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 3

Pages 745 - 1060

THOMAS LUNDY
Attorney at Law
State Bar No. 57656
2500 Vallejo Street, Suite 105
Santa Rosa, CA 95405
Telephone: (707) 524-8112

Attorney for Defendant and Appellant
DAVID ALLEN LUCAS
Under Appointment by the Supreme
Court of California

DEATH PENALTY

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 3

Pages 745 - 1060

THOMAS LUNDY
Attorney at Law
State Bar No. 57656
2500 Vallejo Street, Suite 105
Santa Rosa, CA 95405
Telephone: (707) 524-8112

Attorney for Defendant and Appellant
DAVID ALLEN LUCAS
Under Appointment by the Supreme
Court of California

VOLUME 3 - SANTIAGO CASE
TABLE OF CONTENTS

Page

3.1 SANTIAGO STATEMENT OF CASE 745

3.2 SANTIAGO STATEMENT OF FACTS

A. Prosecution Evidence 757

1. Background 757

2. The Abduction And Assault Of Jodie Santiago . . . 759

3. Discovery Of Santiago After The Assault 765

4. Santiago's Injuries 767

5. Analysis Of The Recovery Scene 770

6. Medication Given To Santiago In The Hospital . . 771

7. Law Enforcement Contact With Santiago In The Hospital 771

8. Santiago's Treatment After Leaving The Hospital 772

9. Composite Drawing With Detective Gillis Of The Seattle Police 773

10. Treatment Of Santiago By Psychiatrist Wendy Freed 774

11. Santiago's Disability Award 774

12. Interview Of Santiago In Seattle By Detectives Henderson, Fullmer And Bove On December 4, 1984 775

13. The Santiago Photo Lineup 777

14. First Car Trip: Santiago Driven By Lucas' House Twice 780

15. Second Car Trip: Santiago Driven By Lucas' House Two More Times 780

16. Execution Of The Search And Arrest Warrants .. 784

17. Extra Judicial Matters Seen By Santiago 784

18. Santiago's Testimony Regarding The Vehicle ... 785

19. Rape Kit Evidence 786

20. In-Court Identification Of Lucas By Santiago 787

21. Vehicle Evidence 787

a. License Plate 787

b. Louvers 788

c. Computerized Voice 789

d. Miscellaneous Evidence Regarding Lucas' 280-Z 789

e. Lucas Traded In His 280-Z For A Toyota Pick-Up Truck 791

B. Defense Evidence 792

1. Santiago's Post Traumatic Stress Disorder And Other Mental Psychological Impairments 792

a. Dr. Zeidman 792

b. Lucy Berliner 793

c. Dr. Wendy Freed 794

d. *Dr. Zigelbaum* 796

2. Vehicle Evidence 798

3. Lucas' House 801

a. *Objects On The Porch* 801

b. *Post-Photo Lineup Drivebys* 802

c. *Presence Of Other People At Lucas' House* 805

4. Alibi Evidence 805

C. Other Offenses Evidence 807

CHART 3.2(C)(1) -- Comparison Of Santiago To Strang 807

CHART 3.2(C)(2) -- Comparison Of Santiago To Swanke 809

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

3.3.1 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL STATEMENT OF FACTS 811

A. The Attack 811

B. Santiago's Hospitalization 813

C. Defensive Wounds 815

D. Pretrial Identification Procedures By Law Enforcement During Santiago's Hospitalization 815

E. Events After Santiago's Release From The Hospital And Return To Seattle 821

F. The Arrest Of Lucas And The Photo Lineup 825

G. In Santiago's View, Lucas' Photo Was The Only One Which Matched Her Description Of The Attacker 829

H. Post-Lineup Interaction Between Santiago And The Detectives 829

I. Whether Santiago Saw The Photo Lineup In The Homicide Office On December 15, 1984 830

J. Identification Of Lucas' House And Vehicle Seat Covers 830

K. Expert Testimony Regarding Eyewitness Identification . . 830

1. Judge Hammes' Ruling That Buckhout And Loftus Were Not Experts 830

2. The Excluded Expert Testimony As To The Unfairness Of The Photo Lineup 832

a. The Photo Lineup Should Be Assembled To Reflect The Features Described By The Victim 832

b. The Photos Should Be Similar To Each Other 834

3. Excluded Expert Testimony Concerning Lay Misconceptions Regarding Eyewitness Identification 836

a. Misconception: Eyewitness Confidence Does Not Correlate With Reliability 838

b. Misconception: Stress Increases Reliability 840

c. Misconception: Accuracy As To Particular Details Increases Reliability 841

d. *Misconception: Witness Estimates Of The Durations Of Events Are Accurate* 842

e. *Misconception: Constructing Composite Drawings Increases Reliability* 844

f. *Misconception: The Presence Of A Weapon Increases Reliability* 845

4. Excluded Expert Testimony Concerning Impact Of Post Event Influences 845

a. *Memory Is Not A Video Tape Machine* 845

b. *Post-Event Information Affects Reliability* . 845

c. *The Adverse Impact Of New Information On Reliability Increases With The Passage Of Time* 847

d. *Post Lineup Reinforcement* 847

3.3.2 A SERIES OF PROBLEMS DENIED LUCAS A FULL AND FAIR OPPORTUNITY TO DEMONSTRATE THAT SANTIAGO'S IDENTIFICATIONS OF LUCAS AND OF LUCAS' HOUSE WERE UNRELIABLE AND WERE THE INADMISSIBLE PRODUCT OF SUGGESTIVE PRETRIAL PROCEDURES 848

A. Introduction 848

B. The Defense Was Denied A Fair Eyewitness Identification Hearing 848

1. Inadequate Record Of The Pretrial Procedures 848

a. *Santiago Was Suffering From Amnesia And Other Psychological And Physical Impairments Which Limited Her Recall Of The Identification Procedures* 848

b. Failure Of Law Enforcement To Make And Preserve Adequate Records Of Pretrial Identification Procedures . . 849

c. Record Deficiencies As To Specific Contacts 850

i. Hospital Contact June 11, 1984 850

ii. Hospital Contact June 15, 1984 851

iii Hospital Contact June 26, 1984 851

iv Identi-Kit Composite With Agent Gillis 852

v December 4, 1984 Composite Drawing And Interview In Seattle 852

vi Construction Of The Photo Array 852

vii The Photo Lineup 852

viii Identification Of Lucas' Residence 854

2. Exclusion Of District Attorney Testimony . 855

3. Refusal To Consider Eyewitness Expert Testimony 856

C. Lucas Was Denied A Meaningful Opportunity To Challenge The Reliability Of Santiago's Identifications 856

D. The Denial Of A Full And Fair Hearing Violated Lucas' Federal Constitutional Rights 857

E. The Error Was Prejudicial 859

1. The Santiago Judgment Should Be Reversed 859

2. The Swanke And Jacobs Convictions Should Also Be Reversed 860

3. The Error Was Prejudicial As To Penalty . . 861

F. If The Judgement Is Not Reversed, The Matter Should Be Remanded For A New Hearing Before A Different Judge 861

1. The Matter Should Be Remanded 861

2. On Remand A Different Judge Should Be Assigned 862

3.3.3 SANTIAGO'S IDENTIFICATION OF LUCAS WAS THE PRODUCT OF UNNECESSARILY SUGGESTIVE PRETRIAL PROCEDURES CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION, AND SHOULD HAVE BEEN SUPPRESSED 863

A. Introduction: Suggestive Identification Procedures 863

B. Procedural Background 863

C. Treatment Of Identification In Arguments To Jury 865

D. Jury Instructions On Eyewitness Identification . . . 865

E. Standard Of Review: Suggestive Identification Procedures 866

F. Legal Principles: Suggestive Identification Procedures 867

1. Due Process 867

2. Eighth Amendment Reliability 868

3. Two-Pronged Constitutional Test 869

G. The Pretrial Identification Procedures In The Present Case Were Unnecessarily Suggestive 870

1. The Events Prior To The Photo Lineup Were Suggestive And Conducive To An Irreparable Mistaken Identification 870

2. The Photo Lineup Was Unnecessarily Suggestive And Conducive To An Irreparable Mistaken Identification 871

a. Photo Lineup Principles 871

b. The Photo Lineup In The Present Case Was Suggestive 873

i. No Photo Other Than Lucas' Had Bulging Eyes 873

ii No Photo Other Than Lucas' Had Feathered Hair 874

iii Not All The Photos Had Facial Hair That Matched Santiago's Description 874

iv No Photo Other Than Lucas' Had Clothing That Matched Santiago's Description 874

v Other Discrepancies Between The Photo Spread And Santiago's Description 875

vi Lucas' Photo Was Larger Than The Others 875

vii In Light Of All The Circumstances The Photo Spread Was Unnecessarily Suggestive And Conducive To An Irreparable Mistaken Identification 876

c. The Events After The Photo Lineup Improperly Reinforced And Tainted The Lineup And In-Court Identifications Of Lucas 876

H. The Judge Erroneously Found That Santiago's In-Court Identification Of Lucas Was Reliable And Free From The Taint Of The Pretrial Identification Procedures And Circumstances 876

1. The Judge's Ruling Was Based On A Mischaracterization Of The Evidence 876

2. The Prosecution Did Not Prove That The Identification Was Reliable And Free From The Taint Of The Pretrial Suggestiveness 878

I. The Failure To Exclude Santiago's Identification Of Lucas Violated The Federal Constitution 878

J. Failure To Exclude The Identification Was Prejudicial 880

1. The Santiago Judgment Should Be Reversed 880

2. The Swanke And Jacobs Convictions Should Also Be Reversed 881

3. The Error Was Prejudicial As To Penalty . . 881

3.3.4 THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION REQUIRE THAT THE WITNESS BE GIVEN FULL AND FAIR INSTRUCTIONS PRIOR TO VIEWING THE PHOTO SPREAD 883

A. Introduction 883

B. Reliability Is Required By The Federal Constitution 883

C. To Be Reliable, A Witness Should Be Instructed Prior To Viewing The Lineup 884

1. The Pre-Lineup Admonition Given In This Case 884

2. Proper Pre-Lineup Instruction 887

D. Santiago Was Not Fully And Fairly Instructed Prior To Being Shown The Lineup 888

E. The Error Violated The Federal Constitution 889

F. The In-Court Identification Was Tainted By The Photo Lineup 890

G. The Error Was Prejudicial 890

3.3.5 THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION REQUIRE DOUBLE-BLIND SEQUENTIAL PHOTO LINEUPS 891

A. Introduction 891

B. Reliability Is Required By The Federal Constitution 891

C. To Be Reliable A Photo Lineup Should Be "Double-Blind" And Sequential 892

1. Double-Blind Lineups Increase Reliability . 892

2. Sequential Lineups Are More Reliable 892

D. The Lineup In The Present Case Was Unreliable . 894

E. The Error Violated The Federal Constitution 894

F. The In-Court Identification Was Tainted By The Photo Lineup 895

G. The Error Was Prejudicial 895

3.4 IDENTIFICATION OF LUCAS' HOUSE AND SEAT COVERS: PRETRIAL ISSUES

3.4.1 IDENTIFICATION OF LUCAS' HOUSE AND SEAT COVERS: PRETRIAL STATEMENT OF FACTS 896

A. Identification Of Lucas' Residence 896

1. The First Drive-By Session 896

2. Meeting In The Homicide Office 897

3. The Second Drive-By Session 898

B. Santiago's "Identification" Of The Sheepskin Seat Covers On Lucas' Truck 901

3.4.2 THE JUDGE ERRONEOUSLY REFUSED TO DETERMINE WHETHER SANTIAGO'S IDENTIFICATIONS OF LUCAS' HOUSE AND SEAT COVERS SHOULD BE SUPPRESSED AS THE UNRELIABLE PRODUCT OF SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES 902

A. Introduction 902

B. Procedural Background 902

C. The Exclusionary Principles Mandated By The Federal Constitution Should Apply To Identification Of Inanimate Objects 903

D. In The Present Case The Identification Of Lucas' House And Seat Covers Should Have Been Excluded . . . 905

E. Relief Is Warranted Due To The Trial Judge's Failure To Consider The Motion To Exclude The Identifications 906

1. The Santiago Evidence Was Closely Balanced 906

a. Santiago Was The Only Identifying Witness 906

b. The Photo Spread Was Suggestive . . 907

c. Santiago Knew The Detectives Had A Suspect Who Was In The Photo Spread 907

d. Post-Lineup Events Reinforced Santiago's Choice Of Lucas' Photo 908

e. Santiago Was Cognitively Impaired By Severe Closed Head Trauma And Post Traumatic Stress Disorder 909

f. Santiago Had An Emotional Need To Identify Someone As Her Attacker . . 909

g. Santiago's Recollection Of The Abductor's License Plate Excluded Lucas As The Attacker 910

h. Other Inconsistencies In The Description Of The Vehicle 910

i. *Santiago's Alcohol Use Before The Abduction* 911

j. *Impact Of Stress And Weapon Focus* 911

k. *Suggestiveness Of The House Identification* 911

l. *The Jury Deliberated For Ten Days And Requested Readback Of The Testimony* 912

2. The Error Was Independently Substantial And Prejudicial 912

F. The In-Court Identification Of Lucas Should Also Have Been Excluded Because It Was Intertwined With And Reinforced By The Suggestive Identification Of His House And Seat Covers 913

G. Alternatively The Matter Should Be Remanded For A New Hearing Before A Different Judge 914

1. The Matter Should Be Remanded 914

2. On Remand A Different Judge Should Be Assigned 914

3.5 EYEWITNESS IDENTIFICATION: TRIAL ISSUES

3.5.1 EXCLUSION OF THE TESTIMONY OF EYEWITNESS IDENTIFICATION EXPERTS WAS ERROR 916

A. Introduction 916

B. Procedural Background 917

1. In Limine Motion 917

2. Renewed Motion 918

3. Voir Dire 918

4. Treatment Of Eyewitness Testimony In Defense Counsel's Opening Statements To The Jury 919

5. Discussion Of Eyewitness Identification In Summations To The Jury 919

6. Jury Instructions On Eyewitness Identification 919

C. Expert Testimony On Eyewitness Identification Should Be Admitted Whenever Such Testimony May Be Helpful To The Jury In Fairly And Accurately Appraising The Reliability Of Eyewitness Identification Testimony, And Especially Where, As Here, There Is A Danger That The Jury May Give The Eyewitness Testimony A False Aura Of Credibility Based On Misconceptions About Eyewitness Identification And/Or A Failure to Fully Appreciate The Effects Of Suggestive Pretrial Identification Procedures 920

1. Expert Testimony Should Be Admitted In A Given Case If There Is A Danger That The Jury May Reach Its Verdict Based On Misconceptions As To The Reliability Of The Identification 920

2. The Judge Erroneously Ruled That Drs. Buckhout And Loftus Were Not Experts . . 921

3. The Judge Erroneously Assumed That Lack Of Corroboration Is A Threshold Prerequisite To The Admission Of Eyewitness Expert Testimony 921

4. Even If Corroboration Is A Threshold Issue, Judge Hammes Improperly Relied On The Other Charges As Corroboration 922

a. *The Defense Was Denied A Fair Opportunity To Contest The Other Offenses Before Trial* 923

b. *Reliance On The Other Charges As Corroboration Was Unreliable Due To The Danger Of Improper Bootstrapping* 924

5. In the Present Case, Eyewitness Expert Testimony Was Needed To Dispel Or Counter Common Misconceptions About Eyewitness Identification That Jurors Were Likely To Apply To Santiago's Identification Testimony . . . 924

a. *Juror Misconceptions About Eyewitness Identification Applicable To The Present Case* 924

i. Misconception: Eyewitness Confidence Does Not Correlate With Reliability 924

ii. Misconception: Stress Increases Reliability 925

iii. Misconception: Accuracy As To Particular Details Increases Reliability 925

iv. Misconception: Witness Estimates Of The Durations Of Events Are Accurate 925

v. Misconception: Constructing Composite Drawings Increases Reliability 925

vi. Misconception: The Presence Of A Weapon Increases Reliability 926

6. In the Present Case, Eyewitness Expert Testimony Was Needed To Fully Explain The Flawed Nature Of The Photo Lineup And Its Potential Impact On The Reliability Of Santiago's Identification Testimony 926

a. The Photo Lineup Should Be Assembled To Reflect The Features Described By The Victim 926

b. The Photos Should Be Similar To Each Other 926

c. Prior To The Photo Lineup The Witness Should Be Expressly Told That The Suspect May Not Be Among The Photos 926

d. Other Instructions Regarding The Suspect Should Be Given 927

e. Impact Of Not Performing A Double-Blind Sequential Lineup 927

f. Impact Of Post-Lineup Reinforcement 927

7. In the Present Case, Eyewitness Expert Testimony Was Needed To Explain The Potential Impact Of Post Event Factors, In Addition To The Photo Lineup, On The Reliability Of Santiago's Identification Testimony 927

a. Memory Is Not A Video Tape Machine 927

b. Post-Event Information Affects Reliability 927

c. *The Adverse Impact Of New Information On Reliability Increases With The Passage Of Time* 927

d. *Composite Drawings* 927

e. *Suggestive Photo Lineup* 927

8. In the Present Case, There Were A Number Of Factors Casting Doubt On Any Conclusion That Santiago's Identification Testimony Was Reliable And Thus Making The Need For Eyewitness Expert Testimony All The More Compelling 928

a. *Deficiencies In The Record Of The Present Case* 928

b. *Contradictions In The Record* 928

c. *The Photo Lineup Procedures Were Suggestive* 928

9. The Judge Misstated The Evidence In Ruling On The Motion 928

10. Conclusion: The Expert Testimony Was Erroneously Excluded 929

D. The Santiago Evidence Was Closely Balanced . . . 929

E. The Error Was Federal Constitutional Error 929

F. The Error Was Prejudicial 931

3.5.2 EXCLUSION OF SANTIAGO'S SUBJECTIVE IMPRESSION OF THE PHOTOS IN THE LINEUP WAS ERROR 934

A. Exclusion Of Santiago's Observations About The Lineup Was Error 934

B. The Error Violated The Federal Constitution 935

C. The Error Was Prejudicial 936

3.6 SANTIAGO CREDIBILITY/RELIABILITY ISSUES

3.6.1 FAILURE TO PERMIT NEUROPSYCHOLOGICAL AND PSYCHOLOGICAL TESTING AGREED TO BY SANTIAGO WAS ERROR 938

A. Introduction 938

B. Proceedings Below 938

C. A Privilege May Be Waived By The Beneficiary Of The Privilege 944

D. Denial Of The Right To Obtain And Present Exculpatory Evidence On A Material Issue Is Fundamental Constitutional Error 945

E. Precluding An Accused From Contacting A Consenting Material Witness Violates The Federal Constitution 947

F. In The Present Case Santiago's Testimony Reasonably Indicated That She Would Consent To The Testing Requested By The Defense 948

G. The Error Was Prejudicial 949

3.6.2 EXCLUSION OF EXPERT TESTIMONY AS TO SANTIAGO'S ABILITY TO REMEMBER THE MATTERS TO WHICH SHE TESTIFIED WAS ERROR 951

A. Proceedings Below 951

B. Constitutional Right To Present Defense Evidence 951

C. Domestic Rules Of Exclusion Must Be Balanced Against The Federal Constitutional Rights Of The Accused: Due Process And Right To Present A Defense 952

D. Domestic Rules Of Evidence Must Be Balanced Against The Federal Constitutional Rights Of The Accused: The Presumption Of Innocence And Trial By Jury 954

E. In The Present Case The Balance Favored Admission Of The Evidence 955

F. The Error Violated Lucas' Federal Constitutional Right To Present A Defense 955

G. The Error Was Prejudicial 956

3.6.3 IT WAS ERROR TO EXCLUDE EVIDENCE AS TO THE IMPORTANCE OF TESTING IN EVALUATING SANTIAGO'S ABILITY TO REMEMBER 957

A. Proceedings Below 957

B. A Criminal Defendant Has A Constitutional Right To Present Defense Evidence 958

C. Domestic Rule Of Exclusion Must Be Balanced Against Federal Constitutional Right To Present Defense Evidence 958

D. Domestic Rule Of Evidence Must Be Balanced Against The Right To Proof Beyond A Reasonable Doubt And Trial By Jury 958

E. In The Present Case The Balance Favored Admission Of The Evidence 958

3.6.4 THE JUDGE ERRED IN EXCLUDING EVIDENCE THAT SANTIAGO LEFT A BAR WITH A STRANGER THE NIGHT BEFORE THE ATTACK 960

A. Introduction 960

B. Procedural Background 960

C. Statement Of Facts 961

D. The Evidence Was Admissible 961

E. Exclusion Of The Defense Theory Evidence Violated The State And Federal Constitutions 962

F. The Error Was Prejudicial 964

3.7 ISSUES RELATING TO THE CREDIBILITY OF THE INVESTIGATING DETECTIVES

3.7.1 THE JUDGE ERRONEOUSLY EXCLUDED EVIDENCE THAT THE SANTIAGO HOMICIDE DETECTIVES GAVE FALSE AND/OR MISLEADING TESTIMONY AND BLATANTLY VIOLATED THE SUSPECT'S *MIRANDA* RIGHTS IN ANOTHER INVESTIGATION 967

A. Introduction 967

B. The *Cavanaugh* Case 968

C. Statement Of Facts 970

1. Perjury And Misconduct Of Detectives Henderson And Fullmer In The *Cavanaugh* Case 970

a. Overview: The Detectives Committed Serious Misconduct 970

b. Detective Henderson's Miranda Violations In Cavanaugh 970

i. Overview 970

ii. *Miranda* Violation During The Seven Minutes After Cavanaugh Asked For An Attorney 971

iii. Miranda Violation By Direct Questioning After Cavanaugh's Statement 974

c. Detective Henderson's Misleading Testimony About The Miranda Violation 975

i. Seven Minute Hiatus Violation 975

ii. Direct Questioning *Miranda* Violation 976

d. Detective Fullmer's False Testimony Concerning Discovery Of The Tape Recorder 976

i. Background 976

ii. Entry Of Mrs. Cavanaugh's House At 12:30 p.m. 977

iii. Fullmer's False Statement That He Could See The Tape Recorder In The Purse When He First Entered 978

iv. Fullmer's False Statement That He Moved The Purse And Then Saw The Red Light 978

v. Fullmer's Assertion Of The Fifth Amendment At The Internal Affairs Investigation 979

e. Failure Of The Detectives To Take Adequate Notes In Cavanaugh 979

2. Miranda Violations In The Lucas Case . . . 980

3. *Miranda* Violations In Cases Besides the Lucas And *Cavanaugh* Cases 980

D. Rulings Below 981

E. Specific Acts Of Misconduct By The Homicide Detectives Were Relevant 982

F. To Be Admissible, Prior Acts Of Giving Untruthful Or Misleading Testimony Need Not Be Conclusively Proven So Long As Substantial Evidence Of The Prior Act Is Presented 983

G. Exclusion Of Evidence Of The Perjury And Misconduct Was An Abuse Of Discretion 983

1. Introduction 983

2. The Credibility Of The Detectives Was A Crucial Factual Issue In Santiago 984

3. Santiago Was Crucial To The Other Counts 987

4. The Prior Acts Of Untruthfulness Were Highly Probative 987

5. Judge Hammes Finding Of Corroboration As To Santiago Improperly Assumed That The Detectives Were Telling The Truth 988

6. The Judge Erroneously Assumed That The Evidence Would Take "Weeks" To Present 989

H. The Error Violated Lucas' Federal Constitutional Rights 990

I. The Error Was Prejudicial 991

J. Alternatively, The Matter Should Be Remanded For A New In Limine Hearing Regarding The Admissibility Of Santiago's Identification 993

3.7.2 THE JUDGE ERRONEOUSLY PRECLUDED THE DEFENSE THEORY THAT THE DETECTIVES INTENTIONALLY ASSEMBLED A SUGGESTIVE PHOTO LINEUP 994

A. Introduction 994

B. Procedural Background 995

C. The Defendant's Constitutional Rights To Present Evidence Supporting The Defense Theory Of The Case 995

D. Exclusion Of The Defense Theory Evidence Was Prejudicial Error 996

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.1 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 998

A. Jacobs Should Not Have Been Cross-Admissible With Santiago 998

B. The Error Was Prejudicial As To Santiago 998

C. The Error Was Prejudicial As To Jacobs And Swanke 999

D. The Error Was Prejudicial As To Penalty 1000

3.8.2 THE SWANKE CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND THUS THE JUDGE 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 SANTIAGO INCIDENT 1001

3.8.3 THE STRANG/FISHER 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 STRANG/FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT 1003

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL 1005

A. Overview 1005

3.8.4.1 THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE 1006

3.8.4.2 THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT 1008

3.8.4.3 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 1010

3.8.4.4 THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE 1012

3.8.4.5 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 1014

3.8.4.6 THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT 1016

3.8.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION... 1018

3.8.5.1 IN DECIDING THE CROSS-ADMISSIBILITY/ CONSOLIDATION MOTION THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE 1018

3.8.5.2 THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES 1020

3.8.5.3 THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY .. 1021

3.8.5.4 BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES ... 1022

3.8.5.5 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 1024

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

3.9.1 THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION 1025

A. Introduction 1025

B. Failure To Properly State The Jurors' Duty 1026

C. Failure To Instruct On The Prosecution's Burden To Prove Guilt Beyond A Reasonable Doubt 1026

D. Improper Admonition That Jury Must "Determine The Question Of "Guilt Or Innocence" 1026

E. Improper Emphasis Of Cross-Admissibility Of Other Crimes In The Preliminary Instructions 1026

F. The Prosecution-Oriented Preliminary Instructions Were Likely To Have Influenced The Jurors In Favor Of The Prosecution 1026

G. The Preliminary Instructions Were Prejudicial .. 1026

3.9.2 BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF "THE PEOPLE" THE TRIAL JUDGE VIOLATED LUCAS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL 1028

3.9.3 THE JUDGE'S CONSISTENT AND ARBITRARY DENIAL OF REQUESTED PRELIMINARY FINDING INSTRUCTIONS, WHICH WERE MANDATORY UNDER EVIDENCE CODE § 403(c), VIOLATED LUCAS' DUE PROCESS RIGHTS 1029

3.9.4 THE TERM "EXPERT WITNESS" SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS 1030

3.9.5 THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM "INFERENCE" IN THE JURY INSTRUCTIONS 1031

3.9.6 THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO NOT CONSIDER ALL THE EVIDENCE .. 1032

3.9.7 THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES 1034

3.9.8 THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT 1036

3.9.9 THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT 1038

A. Introduction 1038

B. The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence 1038

C. The Willfully False Instruction Improperly Failed To Define "Material" 1038

D. The "Probability Of Truth" Language In CALJIC 2.21.2 Lessened The Prosecution's Burden 1039

E. The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath . 1039

F. Numerous Instructions Were Improperly Limited To The Testimony Of "Witnesses" 1039

G. The Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record 1039

H. The Instructional Errors Were Cumulatively Prejudicial 1039

3.9.10 THE INSTRUCTIONS GIVEN IN THE LUCAS TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE 8TH AND 14TH AMENDMENT RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION 1040

3.10 JURY INSTRUCTIONS: BURDEN OF PROOF .....

A. Introduction 1042

B. The Instructions Were Constitutionally Deficient Because They Failed To Adequately Explain And Define The Burden Of Proof 1044

C. The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence 1044

D. The Burden Of Proof Instruction Failed To Adequately Define The Standard Of Proof 1044

E. The Judge Erroneously Refused The Defense Request For Instructions Comparing The Burden Of Proof Beyond A Reasonable Doubt With Other Burden 1045

F. The Reasonable Doubt Instruction Erroneously Implied That Reasonable Doubt Requires The Jurors To Articulate Reason And Logic For Their Doubt 1045

G. The Reasonable Doubt Instruction Unconstitutionally Admonished The Jury That A Possible Doubt Is Not A Reasonable Doubt 1045

H. The Judge Erroneously Instructed The Jurors To Take Into Account Moral Considerations In Deciding Guilt 1046

I. The Circumstantial Evidence Instructions (CALJIC 2.01 And 2.02) Unconstitutionally Lightened The Prosecution's Burden Of Proof, And Also Created A Mandatory Conclusive Presumption Of Guilt, Under The Circumstances Of This Particular Case 1046

J. The Burden Of Proof Principles Of CALJIC 2.01 Were Unconstitutionally Limited To Circumstantial Evidence 1047

3.11 DELIBERATION ISSUES

3.11.1 THE JUDGE VIOLATED STATE LAW AND THE FEDERAL CONSTITUTION BY ALLOWING THE JURORS TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM 1048

3.11.2 ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS' PUBLIC TRIAL RIGHTS 1050

3.11.3 THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS 1052

3.11.4 THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON 1054

3.12 CUMULATIVE ERROR: SANTIAGO

A. Introduction 1056

B. The Errors Cumulatively Violated The Federal Constitution 1056

C. The Errors Were Cumulatively Prejudicial 1057

D. The Santiago Errors Were Prejudicial As To The Jacobs And Swanke Convictions 1058

E. The Swanke, Jacobs And Strang/Fisher Errors Were Prejudicial As To Santiago 1058

F. The Santiago Errors Were Prejudicial As To The Penalty Determinations 1059

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

VOLUME 3

3.1 SANTIAGO CASE: STATEMENT OF CASE (CR 73093)[501]

On March 18, 1985, an information was filed in case number 73093 (hereinafter "CR 73093") in San Diego Superior Court alleging in Count One, that on or about June 8, 1984, David Allen Lucas had forcibly taken Jodie Santiago[502] in violation of Penal Code § 207(a).[503] It was further alleged that during the commission of the offense, Lucas personally used a knife within the meaning of Penal Code § 12022(b) and personally inflicted great bodily injury upon the victim within the meaning of Penal Code § 120022.7. Count

---

[501] All references in this statement are to CR 73093 unless otherwise indicated.

[502] During trial Jodie Santiago changed her last name to Robertson due to marriage. (RTT 7314.) However, she will be referred to as Santiago throughout this brief.

[503] All statutory references are to the Penal Code unless otherwise noted.

Two alleged that on or about June 9, 1984, David Allen Lucas attempted to murder Santiago in violation of Penal Code Sections 187/664 and had personally used a knife within the meaning of Penal Code 12022(b) in the commission of the crime. It was further alleged that Lucas personally inflicted great bodily injury on the victim within the meaning of Penal Code 12022.7. (CT 70-72.)[504]

On March 22, 1985 Lucas was arraigned and entered a plea of not guilty to the charges. (CT 4598.)

On March 11, 1986, in CR 75195,[505] the defense filed a motion to obtain documents from the San Diego Sheriff's Department personnel department concerning Detectives Robert Fullmer, Craig Henderson, Gary Fisher and Dennis Hartman. (*Pitchess* motion.) (CT 6387-6405.) The motion was made on the grounds, inter alia, that the records contained evidence material and relevant to the issue of whether the deputies improperly influenced Santiago's identification of the defendant. (*Ibid.*)

On April 1 and 2, 1986, in CR 75195 and 73093, Judge Orfield heard testimony regarding the *Pitchess* motion. (CT 4660-64; 15081-83.)

On April 7, 1986, Judge Orfield ruled that, with regard to the *Pitchess* motion in CR 75195, the defense was entitled to have the court review the subpoenaed documents *in camera* to determine their relevance to the case. Judge Orfield found no relevant records and ordered them sealed. (CT 15089.)

On July 8, 1986, in CR 73093, the prosecution's motion to file an amended "Notice Of Evidence In Aggravation" pursuant to Penal Code 190.3

---

[504] The information in CR 73093 also included counts alleging offenses arising from the Strang/Fisher and Swanke incidents.

[505] CR 75195 involved the offenses alleged to have been committed against Suzanne and Colin Jacobs and Gayle Garcia.

was granted over objection from the defense. (CT 1697-700; 1709-12; 4721.)

A ("*Ballard*") Motion for Psychiatric and Neurological Examination of Jodie Santiago was filed in CR 73093 on July 14, 1986 and in CR 75195 on July 15, 1986. (CT 1725-56; 6858-61; Exhibits CT 1757-2012; 4725.)

On July 29, 1986, counsel stipulated to the joinder of the *Ballard* motions. (CT 4739.)

On August 4, 1986, in CR 73093, Lucas waived time for trial and further waived time for proceeding to trial from August 25 to November 3, 1986. (CT 15160.) The court proceeded with the defense motion for suppression in CR 73093. (CT 4742; 15161-62.)

On August 20, 1986, the *Ballard* motion was argued by counsel and denied by Judge Orfield. (CT 4749.)

On August 21, 1986, the prosecution filed a waiver of privilege regarding confidential communications and medical records from Jodie Santiago. (CT 2038-39.)

On August 25, 1986, in CR 75195, Lucas requested compliance with his right to a speedy trial. The defense requested that the trial in CR 75195 be scheduled before the November 3 trial date in CR 73093. Judge Orfield heard argument on the issue and decided that the trial date in CR 75195 would be scheduled after the trial in CR 73093, which was set for February 2, 1987. The defense objected and filed a writ petition in the Court of Appeals. (CT 15165.)

On September 17, 1986, the Court of Appeal issued a writ directing the superior court 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. (D005078.) (CT 2048-52; 6887-92.)

On September 23, 1986, in CR 75195, in response to the order of the

Court of Appeal, Judge Orfield set the trial date for October 23, 1986. The prosecution then requested that the trial date in CR 73093 be advanced to October 20, 1986, but the court declined to do so and the date of trial in that case remained November 3, 1986. (CT 4758-59; 15170.)

On September 23, 1986 witness Jodie Santiago waived her privilege regarding confidential communications and medical records. (CT 2053-60; 6893-6902.)

On October 1, 1986, the defense motion to re-open the *Ballard* motion was granted. (CT 4760; 15172.)

On November 3, 1986, in response to the Court of Appeal's order to comply with Lucas' speedy trial request in CR 75195, Judge Orfield ordered that CR 73093 be continued to follow the trial in CR 75195. (CT 4778.) Lucas waived his right to be tried within 60 days in CR 73093. (CT 4778.)

On November 4, 1986, Judge Orfield heard argument on the defense's renewed *Ballard* motion for psychiatric and neurological examinations of Jodie Santiago. (CT 4781.) Judge Orfield determined that it would be inappropriate to order the testing of the witness and denied the motion. (CT 4781.) Judge Orfield also overruled the demurrer and denied the request for dismissal of the prior felony conviction. (CT 4781-82.)

On November 12, 1986, in CR 73093, Judge Orfield denied the defense request to withdraw a previous stipulation that stated that the court could review the preliminary hearing transcripts of the case when considering the 1538.5 and traversal motions. (CT 4791-92.)

On November 18, 1986, the *Ballard* motion as to Jodie Santiago in CR 75195 was withdrawn with the caveat that it could be refiled as an in limine motion before the trial court. (CT 4794.)

On November 19, 1986, in both cases, the defense filed a trial brief

challenging, inter alia, Jodie Santiago's competence as a witness. (CT 8279-8333.)

On December 4, 1986, in CR 75195, the prosecution stated its intent to use Santiago's testimony in the 75195 trial, and moved for a summary denial of the defense's motion for severance. The prosecution also stated its intent to use evidence from CR 73093 in both the guilt and penalty phase of 75195. Judge Kennedy denied the motion for severance of the Jacobs and Garcia homicides. (CT 15197.)

On December 8, 1986, in CR 73093, Judge Orfield denied the motion to suppress based on the warrantless search and the search warrant. (CT 4800.)

On December 12, 1986, the prosecution filed a motion to consolidate CR 73093 and CR 75195 for trial. (CT 9350-9406.)

On December 22, 1986, in CR 73093, Judge Orfield granted a motion to continue the trial date. Lucas was to be tried thirty days after the conclusion of trial in CR 75195 pending resolution of the consolidation motion. Lucas waived his right to be tried within 60 days in CR 73093. (CT 4802.)

On January 8, 1987, the defense filed an opposition to the prosecution's consolidation motion. (CT 9543-75.)

On January 15, 1987, in CR 73093, the defense filed an opposition to the prosecution request for assignment of its consolidation motion to Judge Kennedy. (CT 2471-81; Exhibits CT 2482-2589.)

On January 20, 1987, in CR 73093, Judge J. Richard Haden assigned the case for all purposes to Judge Kennedy due to the fact that Judge Orfield

was no longer available.[506] (CT 4804; 4805.)

On January 23, 1987, Judge Kennedy granted a defense motion per Code of Civil Procedure § 170.1 to disqualify him in CR 73093. (CT 2644-55; Exhibits CT 2656-2719; 15232.) Judge Kennedy was also disqualified in CR 75195 by the prosecution. (CT 9661-62; CT 9663.)[507]

On February 9, 1987, in both cases, Judge Peterson assigned the case to Judge Hammes. (CT 4808; 4811.) Lucas was advised of his rights and waived time to February 17, 1987. (CT 4812.)

On February 17, 1987, Judge Hammes reviewed the transcript of the proceedings held before Judge Kennedy on January 22, 1987, and concluded that Kennedy did not rule upon the merits of the consolidation motion and that Kennedy's remarks were made in the context of the disqualification motion. (CT 4814; 15237.)

On February 18, 1987, in both cases, Judge Hammes overruled the defense objection to consolidation without prejudice. (CT 4815; 15238.)

On March 2, 1987, in CR 75195, the defense filed a *Pitchess* motion for files pertaining to Detectives Robert Fullmer, Craig Henderson, Gary Fisher and Dennis Hartman. (CT 9784-9800; 9801-04.) On March 6 and 9, 1987, the prosecution and Sheriff's Department filed oppositions to the *Pitchess* motion. (CT 2788-96; 9819-31; 9875-83.)

On March 12, 1987, in case number 75195, Judge Hammes reviewed the materials *in camera* and found that the investigation conducted in *People v. Cavanaugh* concerning detectives Fullmer and Henderson was

---

[506] Judge Haden did not rule on the merits of consolidation or whether that motion may be untimely. (CT 4804.)

[507] Judge Kennedy originally denied the prosecution motion but it was granted by the Court of Appeal. (D005741.) (CT 15232; 10300-304.)

discoverable. (CT 4841; 15265.) Judge Hammes ruled that a list of the witnesses pertinent to the Cavanaugh investigation be made available to both sides. (CT 4842; 15266.) The court then issued a protective order with regard to the released materials. (CT 4842; 15266.)

On April 30, 1987, Judge Hammes issued a tentative ruling on the proposed neurological/psychological examination of Jodie Santiago. (CT 4887-88; 15311-12.)

On May 13, 1987, the prosecution filed a second amended information in CR 73093. (CT 3452-57.) With regard to CR 73093, Lucas requested either a continuance of the arraignment or, in the alternative, that the case trail until sixty days following the resolution of trial in CR 75195. The court denied the defendant's requests. Thereafter, Lucas waived the reading of the amended information in CR 73093, entered a plea of not guilty to all counts contained therein, and denied the related allegations. (CT 4895-96; 15320-21.)

On June 15, 1987, the defense filed a motion to sever the Santiago, Strang/Fisher and Swanke counts. (CT 3236-42.)

On November 12, 1987, the judge denied the defense request to conduct psychological/neurological examinations of Jodie Santiago. (CT 5058-59; 15484-85.)

On December 9, 1987, eyewitness identification expert Robert Buckhout was called by the defense. Judge Hammes ruled that, pursuant to Evidence Code 801, the witness was a qualified expert. (CT 5076-77; 15497-98.) The prosecution filed points and authorities in support of its in limine motion to exclude eyewitness identification expert testimony. (CT 3365-69; 11575-79; Appendix A CT 3370-71; 11580-81.)

On January 21, 1988, the prosecution filed a second amended "Notice

Of Evidence In Aggravation" pursuant to Penal Code § 190.3. (CT 5104; CT 11844-45.)

On May 3, 1988, Judge Hammes ruled that the photo lineup was essentially fair and denied the defense request to exclude Santiago's identification of Lucas. The judge also ruled that Santiago had not willingly volunteered to undergo psychological/neurological testing. The judge also denied the defense request to call prosecutor Williams to testify regarding Santiago's identification. (CT 5187-5191.)

On May 9, 1988, Judge Hammes denied the defense motion for discovery of the conclusions of the investigating officers and/or the discipline imposed on Detective Fullmer and Henderson in the *Cavanaugh* investigation. (CT 5205.) The defense filed a trial brief and motion on the defendant's right to call Judge Herbert B. Hoffman as a character witness concerning the veracity of Detectives Fullmer and Henderson in the *Cavanaugh* case. (CT 12387-89.) Judge Hammes ruled that Judge Hoffman's opinion of the character of Detectives Henderson and Fullmer for truth and veracity was not relevant if based solely on one incident in the *Cavanaugh* case. (CT 5194.) The defense also filed a trial brief on the right of the defendant to obtain conclusions of investigating officers and /or discipline imposed on Detectives Henderson and Fullmer concerning the *Cavanaugh* case. (CT 12390-94.)

On May 11, 1988, proceedings were held regarding the *McDonald* eyewitness identification expert issue. The judge granted the prosecution's motion to exclude the defense eyewitness identification experts. The judge ruled that Santiago could be cross-examined as to whether she had previously been attacked and whether she was able to identify an assailant from that

incident. (CT 5197-200.)[508]

On May 24, 1988, the defense filed a motion to disqualify the prosecuting attorney, a supplemental response to the prosecution's consolidation motion and motion to preclude consolidation based on vindictive prosecution. (CT 3702-3824; 23474-87; 12593-96; Exhibits CT 12589-90.)

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's motion to disqualify 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's motion to recuse the San Diego County District Attorney's office. (CT 3899-3907; 12695-703.) The Court of Appeal held that there was no showing that any discipline, if imposed, was relevant to credibility and denied the petition. (D008106.) (CT 12694.)

On June 6, 1988, Judge Hammes denied the defense motion for an evidentiary hearing as to prosecutorial vindictiveness and denied the motion for recusal. (CT 12707-84.) The judge found that the motion for consolidation was timely. The defense motion for severance of the charges within both cases was denied and all charges were joined for trial. (CT 5211-12.)

On June 13, 1988, Judge Hammes finalized her prior in limine rulings.

---

[508] However, the defense was not permitted to inform the jury that the previous "attack" was a rape. (RTH 24930-31; RTT 79; 88-90.)

The judge incorporated the ruling regarding consolidation into the ruling denying the right to call the defense eyewitness identification expert as to Santiago. (CT 5215-16; 15512-13.)

On June 22, 1988, the defense filed a petition for a writ of mandate regarding the recusal/consolidation issues. (D008270.)

On July 7, 1988, the Court of Appeal, Fourth Appellate District, denied Lucas' petition for a writ of mandate in D008270, finding no abuse of discretion. However, the court held that the district attorney's office should have been required to divulge, in advance of trial, whether one or more of its attorneys would be called as a witness so that Lucas could, if appropriate, seek recusal of such individual attorneys. (D008270.) (CT 4106;12874.)

On July 11, 1988, the prosecution filed the consolidated information. (CT 4107-4116; 15516; 12970-73.)

On July 13, 1988, Lucas objected to the consolidated information filed on July 11, 1988 and declined to enter pleas to the charges in that information. The court formally entered a plea of "not guilty" on the defendant's behalf for each of the charges listed in the consolidated information. The defense requested a new preliminary hearing or convening of the grand jury on the consolidated charges. The court denied both requests. (CT 5222-23; 15518-19.)

On August 23, 1988, jury selection commenced. (CT 5237-38; 15535-36.)

On December 8, 1988, jury selection was completed. (CT 5359-61; 15647-49.)

On January 3, 1989, the trial commenced. (CT 5378-81.)

On April 12, 1989, the prosecution rested their case. (CT 5485.) The defense renewed its motion for severance, incorporating all previous

pleadings. The defense also moved for a judgment of acquittal for insufficient evidence pursuant to Penal Code § 1118.1. The court denied both motions. (CT 5486.)

On April 17, 1989, the defense began its case. (CT 5490.)

On May 1, 1989, the defense renewed its motion for a neuro-psychological examination of witness Jodie Santiago. The motion was denied. (CT 5508.)

On May 4, 1989, the court heard argument on the defense in limine motion regarding eyewitness identification. (CT 5513.) On May 8, 1989 Judge Hammes ruled that the testimony of cognitive psychologists in the area of eyewitness identification was inadmissible. (CT 5514.) The defense again renewed its request for a neuro-psychological examination of Jodie Santiago. The motion was denied. (CT 5514.)

On May 23, 1989, the defense renewed its motion for acquittal pursuant to Penal Code §1118.1. The motion was denied. The defense rested its case and the prosecution commenced rebuttal testimony. (CT 5531-32.)

On May 30, 1989, a renewed motion for acquittal pursuant to Penal Code §1118.1 was denied. (CT 5540.) Both the prosecution and defense rested their case. (CT 5541.)

On June 7, 1989, the defense reopened briefly, then both the prosecution and defense rested again. The prosecution made its opening argument to the jury and the defense moved for a mistrial based on improper prosecution argument. The judge denied the motion. (CT 5550-51.) The defense commenced closing argument. (CT 5551.)

On June 9, 1989, the prosecution presented rebuttal argument. The defense objected to the prosecution's closing argument, citing prosecution error and improper argument, and again moved for a mistrial. The judge

denied the motion, finding no error by the prosecution. (CT 5553-54.)

On June 12, 1989, the court instructed the jurors and they began deliberation. (CT 5555.)

On June 21, 1989, after eight days of deliberation, 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,[509] 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 found Lucas not guilty of the murder of Gayle Garcia. (CT 5567; 14234.) The jury was deadlocked as to the Strang/Fisher murders and Judge Hammes declared a mistrial as to those counts. (CT 5563.)

The proceedings were then recessed pending commencement of the penalty trial. (RTT 12320-22.)

---

[509] 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.

3.2 SANTIAGO CASE: STATEMENT OF FACTS[510]

A. Prosecution Evidence

1. Background

In March 1982, Frank Clark and David Lucas opened a carpet cleaning business called Carpet Maintenance Company ("CMC"). (RTT 3734; 3735-76.) At first, Lucas handled the management end of the business: payroll, marketing, and advertising, while Clark was one of the cleaners. (RTT 3737-38.) Later, after the business picked up, Clark moved into the office with Lucas. (RTT 3738.) The business was financially successful and grew progressively. (RTT 3738.) By late 1983 or early 1984 Lucas and Clark had a number of cleaners working for them. (RTT 3771.)[511] Lucas had a green Datsun pickup when CMC was started.[512] (RTT 4181-82.) In 1983, Lucas owned a black Datsun 280-Z with the license plate "CMC INC 2," which stood for "Carpet Maintenance Company, Incorporated, 2." (RTT 3773-74.)[513]

In early 1983, Lucas moved to Spring Valley and eventually bought a

---

[510] 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."

[511] However, by October 1984 business was going downhill. (RTT 3778-79.)

[512] The business bought the vehicle after it opened in 1982. (RTT 4333-34.) Clark also drove the truck. (RTT 4334.)

[513] Clark testified that no one in the company had "CMC INC 1." (RTT 3774.)

house on Casa de Oro Boulevard. (RTT 3770.)[514]

Richard ("Rick") Adler[515] met Lucas in late 1981. (RTT 3424.)[516] In 1982, Adler went to work for Lucas at the carpet company as a carpet and upholstery cleaner. (RTT 3424; 3455-57.) Sometime around the beginning of June, 1984, Adler moved into Lucas' home on Casa de Oro Boulevard and lived there a month to six weeks. (RTT 3424; 3426; 3466.)[517] Adler lived in the smallest bedroom, which was roughly 10 feet by 12 feet. (RTT 3439-40; 3472.)[518/519] There was a sofa bed in the room and it was sparsely furnished. (RTT 3472.) Adler pretty much lived out of boxes then, and used some

---

[514] In November 1983, Lucas was the best man at Clark's wedding. (RTT 3771-72.) Clark met Lucas' wife, Shannon, at the reception. (RTT 3771-72.) Clark socialized with David and Shannon and described their marriage as "stormy." (RTT 3772.) Shannon lived at the house on Casa de Oro. (RTT 3772.)

[515] Adler was granted immunity for testimony that might implicate him in the crimes of possession of cocaine and methamphetamine, furnishing marijuana, transportation of marijuana, cocaine or amphetamines. (RTT 3458-59.) Judge Hammes took judicial notice of the court order granting immunity. (RTT 3458-60.)

[516] On cross examination Adler testified that he knew Lucas since 1982. (RTT 3454.)

[517] During June 1984, Adler went fishing with Lucas several times. (RTT 3497.)

[518] Lucas' wife, Shannon, had a child named Wesley, and in June or July 1984, Adler was asked to move out as they needed Adler's room for Wesley. (RTT 3476-77.)

[519] Adler identified Exhibit 193 Photo I and Photo J as photographs of the bedroom in which he lived. He also identified the room as being the small bedroom in the center of the diagram marked Exhibit 194. (RTT 3439; 3440; 3473.)

shelves in the room to store his clothes and other items. (RTT 3472; 3474.)[520] Lucas occupied the easternmost bedroom in the house. (RTT 3441.)[521] Greg Esry was also living in Lucas' house at the time. (RTT 3441; 3468-69.)[522]

Adler owned Buck knives while he lived at Lucas' house; one was a Buck fillet knife for filleting fish and the other was a Model 110 folding Hunter with a black sheath. (RTT 3495-96.) Adler never saw Lucas carry a knife. (RTT 3530.)

2. The Abduction And Assault Of Jodie Santiago

Jodie Santiago[523] lived in Seattle, Washington. (RTT 7315.) In June of 1984, Santiago visited her brother, Terry Hopperstad, who lived in San Diego. Santiago arrived in San Diego on June 4, 1984. (RTT 7315-16; 7393-94; 7398.)

Hopperstad lived in "The Timbers" apartment complex, which bordered Marshall and Petree Streets. (RTT 7317; 7394-95; 7398.) Across the street from the apartments was a cocktail lounge and restaurant called Baxter's. (RTT 7317.) On the evening of Friday, June 8, 1984, Santiago decided to visit Baxter's. (RTT 7316-17.) She had been there with her brother earlier in the week. (RTT 7399.) She asked her brother to go with her, but he declined. (RTT 7320.) She left her brother's apartment, walked

---

[520] Adler didn't recall if the boxes were in his room. (RTT 3473.) The shelves were depicted in Exhibit 193 photo J. (RTT 3474.)

[521] Adler couldn't recall whether Shannon Lucas was living there at the time because "she came and went so much." (RTT 3441; 3449.)

[522] Esry was already living there when Adler moved in. (RTT 3469.)

[523] By the time of the trial Santiago had married and was known as Jodie Robertson. (RTT 7314.) For purposes of clarity she will be referred to as Santiago rather than Robertson throughout this brief.

through the parking lot to the street, then up an alley to Baxter's. (RTT 7319-20; 7398-99) It was about 7:30 p.m. (RTT 7321; 7399.)

Santiago was wearing a pair of brownish-green khaki pants with big pockets on the legs, pantyhose underneath the pants, and a blue shirt printed with a map of the world. (RTT 7320-21; 7411.) She was also wearing a gold chain with a jade "lifesaver" or "donut," a watch, and a "pinkie" ring with diamonds and rubies in it. She had her purse with her which contained some money and a credit card. (RTT 7345; 7534-35.)[524]

When she got to Baxter's, Santiago bought a drink and some nachos. (RTT 7323.) Some people began talking with her and she conversed with them. (RTT 7323.) According to Santiago, she had two or three Margaritas. (RTT 7323; 7399-7400; 7402-03.)[525] There was a band playing and she stayed long enough to have a few dances, but she was tired and it was loud, so she started back for her brother's apartment. (RTT 7323-24; 7403.) Prior to leaving Baxter's Santiago went into the restroom and removed her panty hose. (RTT 7411.) She left Baxter's sometime between 10:30 and 11:00 p.m. (RTT 7324; 7399.)

She took the same route back to the apartments that she used to get to Baxter's. (RTT 7324; 7411.) While she was waiting at the light to cross Marshall, she saw a "nice looking sports car" slow down and turn the corner. (RTT 7324-25; 7360; 7412-15.) After the car made it's turn, the light

---

[524] Santiago never saw the purse or necklace again after her abduction. (RTT 7345; 7444-45.) She identified Trial Exhibit 161 as being her watch (RTT 7345.)

[525] Santiago didn't have any breakfast that day but did have lunch. She didn't recall what she had for lunch. She did not have any dinner. (RTT 7400; 7402.)

changed and Santiago crossed Marshall and walked up Petree towards her brother's apartment. (RTT 7326; 7414-16.)[526]

As she was walking along the sidewalk, a man came out of the apartment complex parking lot, and walked in the opposite direction. (RTT 7326-27; 7416.) As the man approached her, she glanced at him and looked at his face. (RTT 7328.)[527] He appeared to be looking at her. (RTT 7328.) He walked past her and then, about 30 or 40 seconds later, turned around and came up behind her and put a knife to her throat; he told her that she was going to go with him, and if she screamed or tried to run, he'd cut her throat. (RTT 7326-29.) The man was behind her; he had his hand on her left shoulder while he was holding the knife to her throat. (RTT 7330; 7416-17.)[528] Santiago felt the knife blade at her throat. She did what she was told. (RTT 7329-30.)

The man took her to a car in the complex parking lot. (RTT 7331; 7417.) He held her and the knife. (RTT 7332; 7420.) The car was running and the driver's side door was open. (RTT 7332-33; 7421-23.)[529] The car was a dark brown sports car, a 280-Z type, with louvers on the back. (RTT 7359-

---

[526] Santiago "wasn't really paying attention" but she believed the car turned into her brother's apartment complex. (RTT 7360-61; 7414.)

[527] Santiago had never seen the man before. (RTT 7494.)

[528] Santiago assumed that it was his left hand on her shoulder. (RTT 7330.) The knife was on her right side. (RTT 7416-17.) The man was behind her with his front to her back. (RTT 7417.) Santiago assumed that the man had the knife in his right hand. (RTT 7417.)

[529] Santiago didn't know if the car's lights were on. (RTT 7421.)

60; 7432.)[530] It appeared to be the same car she had seen pass by shortly before. (RTT 7361; 7414.) Santiago tried to remember the license plate and believed that it was a California plate with three numbers and three letters. (RTT 7359-60; 7363; 7418-20.)

The man put Santiago into the car through the open driver's side door. (RTT 7332-33; 7417-18; 7422-23.) Santiago didn't hear any computerized voices coming from the car. (RTT 7434.) He pushed her to get her over to the other side and she had to move over the center console to comply. (RTT 7333.)[531] The man got into the car; she was seated partially in the center of the car and partially in the passenger seat. (RTT 7333; 7423.)[532]/[533] The car had sheepskin seat covers. (RTT 7361-62.)[534] Once in the car, the man put the knife on the dash in front of the steering column on the driver's side. (RTT 7332; 7423.)[535] The man had his left hand on the steering wheel; his right

---

[530] Santiago had owned a Datsun and had a friend who owned a 240 or 260-Z. (RTT 7360-61; 7414.)

[531] Santiago testified that she had her purse when she entered the car but that she never saw her purse again. (RTT 7445.)

[532] Santiago was 5'2" and weighed between 110 and 120 pounds on June 8, 1984. (RTT 7443-44; 7548-49.)

[533] The car had two bucket seats with a small space between the seats and a shift knob on the floor. (RTT 7443.) Santiago didn't remember any console compartment between the seats. (RTT 7537.)

[534] The car had a small back seat where children could have sat. (RTT 7433.)

[535] Santiago didn't remember the knife all that well and didn't know if it was a fixed blade or folding knife. It was a big knife, having a blade approximately 3" long and a light brown wooden handle. The knife remained on the dashboard during the entire length of the trip. (RTT 7423-24.)
(continued...)

hand was on her right shoulder, behind her, with part of his hand on her neck. (RTT 7333-34; 7433.)[536] He made a large U-turn through the parking lot and onto Petree. (RTT 7334-35.)[537]

During the ride, Santiago tried to talk to the man. (RTT 7336.) She asked him why he was doing this to her. (RTT 7336.) She didn't remember exactly when he said it, but he told her that he was sent by her boyfriend to scare her. (RTT 7336.) She told him she didn't have a boyfriend in San Diego and that he had the wrong person. (RTT 7337.) He told her he would check it out. (RTT 7337.) Santiago could see the man's face in the rear view mirror; he didn't try to hide his face. (RTT 7337.) In the mirror she could see the man's face from the bridge of the nose to the forehead. (RTT 7337.)[538] The man's eyes stood out to Santiago and she watched his eyes for most of the car ride. (RTT 7551.)

Nothing stood out about the man's forehead, nose, cheeks or other facial features. (RTT 7540-41.) He had light colored eyes. (RTT 7541-42.) She believed the man was wearing light blue jeans and a light blue polo-type shirt. (RTT 7541.) The man had a very matter-of-fact voice. There wasn't anything distinctive about his voice. (RTT 7541.)

---

[535](...continued)
Santiago's prior testimony was that the knife was a "hunting knife," which she described as a knife that does not fold and is in a sheath. (RTT 7431-32.)

[536] Santiago was not sure whether or not it was a "Z-car" because she didn't remember the man shifting and she didn't know if they came with automatic transmissions. (RTT 7362-63; 7434-36.)

[537] Santiago believed they turned right on Petree, but she wasn't sure of it. (RTT 7335; 7531.)

[538] In 1984 Santiago occasionally wore glasses but was not wearing them that night. (RTT 7534.)

Although she had briefly visited San Diego years before, Santiago wasn't familiar with the area. (RTT 7335-36.) During the drive, Santiago tried to notice things that they drove by. (RTT 7531.)

After about 15 minutes, they arrived at a house, but Santiago didn't know where she was. (RTT 7337; 7437; 7449.)[539] The car turned into a semi-circular driveway. (RTT 7338; 7349.) Santiago remembered a bush or tree near the street. (RTT 7338.) The man took her out of the driver's side of the car, back over the center console, and they started towards the house. (RTT 7338-39.) He held her arm but wasn't really yanking her. (RTT 7339.)[540] They walked up some concrete or stepping stones to a porch and the front door. (RTT 7339; 7446.) He opened the door;[541] they entered the living room and then turned right. (RTT 7339-40; 7446.)[542] He took her down a hallway to a room. (RTT 7340; 7351.) There were boxes in the room. He pulled some cord or rope out and tied her hands behind her back. (RTT 7340-41.)[543] He then took her took her to another room, put her on a bed, and told her to stay there. (RTT 7340-42; 7352; 7447.) There were lights on; it wasn't really bright but wasn't so dark that she couldn't see. (RTT 7341.) Santiago had no difficulty looking at the man's face; he didn't tell her not to look at him, and

---

[539] Santiago couldn't really remember but she thought the ride was "more than 15 minutes." (RTT 7336-37.)

[540] Santiago couldn't remember what happened to the knife at this time. (RTT 7339.)

[541] She believed he had to use a key to open the front door. (RTT 7340.)

[542] Santiago believed that the house had carpet. (RTT 7449.)

[543] Santiago didn't remember there being furniture in the room. (RTT 7340; 7446-47.)

never tried to hide his face. (RTT 7341.) His demeanor was very matter of fact; Santiago thought "it was like he had a job to do and he had to get it done." (RTT 7341.) The man left the room for a minute, then came back and asked her if she had any cigarettes. (RTT 7342.) She told him they were in her purse. (RTT 7342.)[544] After that, he put her face down on the bed and told her not to move and then left the room. (RTT 7343; 7448.) She was feeling panicked and was more afraid than she had ever been in her entire life. (RTT 7343; 7584.)

Santiago started coughing. She raised her head to try to get leverage to clear her throat and turned her head. (RTT 7343; 7588-89.) The man came back into the room; she saw his face. (RTT 7343; 7448; 7589.) The last thing she remembered was his hands on her throat, choking her. (RTT 7343; 7448.) She lost consciousness. (RTT 7344.) Santiago had no recollection of anything that happened after she lost consciousness. (RTT 7343-44.) Nor did Santiago provide any testimony as to when or how she received the defensive wounds to her fingers. (RTT 3050; 7054-55; 7367-68.)

3. Discovery Of Santiago After The Assault

On Saturday June 9, 1984, at approximately 6:30 a.m., Santiago was found by Janice Melton and Davene Gibson at the intersection of Lyons and Calavo. She was lying in the brush and weeds off the road. (RTT 3 2996-98; 3001-03; 3012-14; 3019-21.) She had blood all over her face and the front part of her body. (RTT 2999-3000; 3014; 3024.) Melton and Gibson called 911 and then went back to watch over the person until help arrived. (RTT 2999-3000; 3004; 3014-17; 3024-25.) While they were waiting Santiago sat

---

[544] Santiago couldn't recall whether he went to her purse and got a cigarette or not, but she did remember the conversation. (RTT 7342-43.).

up and laid down two or three times. (RTT 3000.) She was making guttural, gurgling, animal sounds. (RTT 3000; 3018.) First, the fire department arrived, then a sheriff, then the paramedics. (RTT 3004-06; 3017-18; 3025.) The ambulance took Santiago away. (RTT 3004; 3018.)

Deputy Sheriff Sheila Anderson[545] helped take the stretcher out of the ambulance at the hospital. (RTT 3034; 3043.)[546] Santiago had a large amount of blood around her head and shoulder area and a severe cut across the front of her neck. (RTT 3034.) There were also some deep cuts on Santiago's fingers. (RTT 3050.) She also had a mark on her neck that looked like a rope burn. (RTT 3050; 3066-67.) Santiago was wearing a sleeveless light blue shirt with a yellow pattern on it. She was not wearing a brassiere and was nude from the waist down. (RTT 3016-17; 3047-48.)

At the hospital Deputy Anderson ordered that a "rape kit" be taken which included pubic combings, head hair samples, saliva swabbings and rectal swabbings. (RTT 3050-51; 3061-62.) Anderson also requested that a lab unit scrape Santiago's fingernails for trace evidence. (RTT 3051; 3061.) There were several hairs on the bottom of Santiago's right foot and one on the bottom of her left foot. (RTT 3053-54; 3062; 3273.) Anderson removed the hairs, placed them in an envelope which she then gave to the lab personnel. (RTT 3053-54; 3062; 3273.)[547]

---

[545] Anderson was known at the time as Sheila Fagundes and had since married. (RTT 3063-65.)

[546] Anderson did not know whether or not Santiago was conscious. (RTT 3044-45.)

[547] Fullmer didn't recall requesting anyone to analyze the hairs found on Santiago's feet. (RTT 3273-74.) He did not know whether anyone else on (continued...)

4. Santiago's Injuries

During the morning hours of June 9, 1984, Dr. Charles Geiberger, a general and vascular surgeon, was on-call as the trauma surgeon at Grossmont Hospital.[548] (RTT 3680-81; 3683.) When Dr. Geiberger first saw Santiago she already had a trachea tube through the cut in her neck and the wound was filled with bandages. (RTT 3684.) Her blood pressure was 70 over 0, which suggested a reduction in the ability of the heart to pump blood and oxygen to the brain. (RTT 3719.)[549] Her blood pressure returned to normal within 15 minutes. (RTT 3720.)[550] Santiago was "quite restless" and "thrashing." She was given muscle relaxants. (RTT 3684; 3725-26.)[551] Shortly after Santiago was stabilized in the emergency room, she was taken to the operating room where Geiberger performed surgery. (RTT 3683-84.) Geiberger did a tracheotomy to permit breathing and anesthesia. (RTT 3684-85.) The wound was cleaned because it had some dirt in it. (RTT 3685.) A head and neck

---

[547](...continued)
the team made a request for a hair comparison. (RTT 3275.)

[548] Geiberger had a year of surgical training in the pathology department of University Hospital and had performed 100 autopsies. (RTT 3682; 3699.) However, he never practiced as a forensic pathologist. (RTT 3699.)

[549] A person's blood pressure would have to remain at 70/0 for at least a couple of hours, before brain damage would occur. (RTT 3722.)

[550] Normal blood pressure is 120/80. (RTT 3719.)

[551] In the discharge summary Geiberger wrote that Santiago was unconscious at the time of admission; but in the history, which was written closer in time to the day of admission, he said that she was "restless and thrashing." Geiberger supposed that she could have been both unconscious as well as restless and thrashing. (RTT 3724-25.)

surgeon, Dr. Splinter, assisted Dr. Geiberger in reconstructing the neck because the wound was so large. (RTT 3685; 3718.)

The cut in Santiago's neck passed right above the Adam's apple and went straight through, almost as far as the neck bone. It had divided the tissues of the larynx just above the vocal cords. (RTT 3685; 3691.) Only the small arteries within the neck structure had been cut; the carotid artery and the internal jugular vein were not injured. (RTT 3685-86.)

On the edges of the laceration there were at least two little skin tags, indicating some movement of the instrument in the wound. (RTT 3692.) Either the instrument had been applied, then released and applied again, or there was a sawing motion; it wasn't a continuous motion. (RTT 3692.)[552]

In Geiberger's opinion the wound to Santiago's neck was caused by a sharp instrument but it wouldn't necessarily have been a firm blade as those structures weren't hard to cut through. (RTT 3687.)

Geiberger also noted an ecchymotic discoloration in a band across the neck below the cut. (RTT 3693-94.) This was a black and blue mark caused by bleeding under the skin. (RTT 3694; 7073.) A ligature could have caused that mark. (RTT 3694.) The ligature would have been rather smooth, as the mark had a fairly uniform consistency. (RTT 3694; 7075.)[553]

---

[552] Geiberger previously testified that the injury may have been caused by one stroke rather than several without reference to a sawing motion. (Testimony from 3/26/86.) (RT 7063-64.)

[553] Dr. Geiberger was referred to Exhibit 220, a piece of cord approximately 1/4" in diameter which was recovered from a closet in the northwest bedroom of Lucas' home. (RTT 5091-92; 7077) The cord was 9 mm while the mark on Santiago's neck was 10 mm. (RTT 7078.) Dr. Geiberger testified that the cord was very close to the same size and consistency of the mark on her neck. (RTT 7078.) It was smooth enough to

(continued...)

Dr. Geiberger also observed two lacerations to Santiago's scalp, one on each side near the back of the head, nearly in the same place above and behind each ear. (RTT 3695; 3713.) These lacerations were both about four inches long and went through the scalp. (RTT 3695; 3712-13.) X-rays showed that Santiago's skull was fractured. (RTT 3695.) The crack in the skull went around the back and over a portion of each side. (RTT 3715.) It would have taken a lot of force to cause such a fracture. (RTT 3695-96.) The skull fracture caused Santiago's eyelids to swell. (RTT 3697.) She also had bilateral hemotympanium, which is the presence of blood behind the ear drum, commonly found with skull fractures of this nature. (RTT 3718.) Later in the day, Santiago had an x-ray brain scan; it revealed that there was air inside the occipital area of her skull, indicating that the fracture went all the way through the bone and wasn't just a superficial crack. (RTT 3696; 3715-16.)[554]

Dr. Geiberger also observed some cuts on the back of Santiago's fingers on her right hand. (RTT 7054.) The most severe damage was to the middle finger and ring finger. (RTT 7054.) The cuts went through the skin and the extensor tendons (the tendons which straighten out the fingers) to the bone. (RTT 7054-55.)

After the surgery Santiago was taken to the Intensive Care Unit ("ICU"). (RTT 3697.) She was given Demerol, a synthetic narcotic, to relieve the pain. (See § 3.2(A)(6), p. 771 below, incorporated herein.)

---

[553](...continued)
have caused such a mark. (RTT 7078.) However, in the absence of an exact measurement, Geiberger couldn't tell whether or not such a cord actually caused the marks on Santiago's neck. (RTT 7078-79.)

[554] Based on those head injuries Dr. Geiberger concluded that Santiago had a concussion. (RTT 3712.)

Dr. Geiberger provided follow-up care and spoke to Santiago at the hospital. He asked her for the details of what had happened to her, but she was not able to remember. (RTT 3709-11.) Dr. Geiberger concluded that Santiago was suffering from amnesia as a result of a concussion. (RTT 3711; 3714.)

On June 10, 1984, Santiago was given a CT scan which revealed a minimal diffuse cerebral edema, or swelling in the brain, a symptom which is sometimes consistent with physiological damage to the brain. (RTT 3717.)

5. Analysis Of The Recovery Scene

On June 9, 1984, Detective Fullmer examined the Santiago recovery site. (RTT 3170; 3172.)[555] When Fullmer arrived Santiago had already been taken to the hospital. (RTT 3266.) There was blood on the paved portion of the roadway and weeds adjacent to some rocks in the overgrowth at the side of the road. (RTT 3173-74; 3302.)[556] Fullmer did not see anything that indicated the injuries had occurred anywhere other than at the recovery site. (RTT 3285.)

A wrist watch was found in the grassy area between the rocks and the roadway near some bloodstains. (RTT 3178-79; 3300-02). It appeared to be damaged; one side of the band had been broken away from the face of the watch. (RTT 3184.) Fullmer identified Exhibit 546A-C as the tire marks on the asphalt, dirt and gravel found along the roadway at the Santiago recovery

---

[555] Fullmer destroyed the notes he took at the scene. (RTT 3250.)

[556] The bloodstain on the road was visible in Exhibit 147, photos C, D, E, and F. (RTT 3174.)

site. (RTT 3277-79.)[557]

6. Medication Given To Santiago In The Hospital

Santiago was given muscle relaxing medication prior to her surgery on June 9, 1984. (RTT 3684; 3725-26.) She was also given Demerol approximately 15 times between June 9 and June 14, 1984. (RTT 3727.)[558] Demerol can affect a person's cognitive abilities. (RTT 3726-27)

7. Law Enforcement Contact With Santiago In The Hospital

On June 10, 1984, Detective Fullmer attempted to talk to Santiago in the Intensive Care Unit at the hospital but she was unable to communicate with him. (RTT 3179-80; 3296.) Santiago was still unable to talk to Fullmer on June 11, but she could, with some difficulty, communicate in writing. (RTT 3180.) Her right hand was bandaged and it was difficult for her to write. (RTT 3180-81.)

Fullmer next saw Santiago on June 15. (RTT 3181; 7636.) She was still in Grossmont Hospital, but no longer in the ICU. (RTT 3296; 7626; 7637.)[559] She was not yet able to speak and communicated by writing. (RTT 3181.) Fullmer asked her to describe her attacker. (RTT 3181; 7626.) Santiago wrote, "Tall, about six foot two. Blond hair. Blue eyes, I think."

---

[557] Exhibit 547A-B were photos of the tire and shoe impressions. (RTT 3281-82.) However, the tire and shoe impressions proved to have no evidentiary value. (RTT 3179.)

[558] She also received another synthetic narcotic on a couple of occasions during that period. (RTT 3729.)

[559] Santiago was released from the ICU around June 12, 1984. (RTT 3697.)

(RTT 7625; 7635-36.)[560] Fullmer asked her to describe the vehicle her attacker had been driving. Santiago wrote, "Brown two door. Possibly a 280-Z." (RTT 7636.)[561]

By June 21, 1984, Santiago was able to speak but it was difficult for her. (RTT 3182.)

Fullmer next saw Santiago on June 26 and 27, 1984. (RTT 3183.) Fullmer returned her ring and tried to return her watch, but she didn't want the watch. (RTT 3183-84; 3294-96; 7345; 7368.)[562]

8. Santiago's Treatment After Leaving The Hospital

On June 28, 1984, Santiago returned to Seattle after being released from the hospital. (RTT 7369; 7449.) She saw her family doctor in Seattle, Douglas Snow, as well as an orthopedic doctor for her fingers. (RTT 7369; 7449-50.) She also saw a neurosurgeon, Dr. Kamm, for her head injury. Dr. Kamm recommended that she see Lucy Berliner at the Rape Crisis Center at Harbor View Hospital. (RTT 7369-70; 7450-51.) During this period, Santiago was given antidepressant medication. (RTT 7450.)[563]

Santiago saw the rape counselor, Lucy Berliner, on a weekly basis

---

[560] The writing was Exhibit 171. (RTT 7625.)

[561] Other descriptions given by Santiago in the hospital between June 10 and June 27, 1984 were excluded. (See RTT 24449-53.)

[562] Neither the ring nor watch were tested for the presence of trace evidence. (RTT 3294-95.)

[563] Santiago was also taking Tylenol Three with Codeine for migraines. She took the antidepressant medication for approximately 5 months, on and off. (RTT 7450.)

starting in July or August 1984. (RTT 7451.)[564] Santiago told Berliner that she wanted to put the incident behind her. It was important for her to find the person who had attacked her. (RTT 7457-58.)[565] Santiago had recurring nightmares about what had happened to her in San Diego. (RTT 7452.) She would wake up in the middle of the night and bolt up in bed. Santiago had dreams about her attacker's hands around her throat choking her. (RTT 7580.) She was afraid during the dream; it was the same fear she felt when the attack occurred. (RTT 7583-84.)[566] Between July and December of 1984, Santiago had headaches more often than usual and also suffered from dizziness. (RTT 7453-54.) She also had problems hearing people, complained of depression and would cry at the drop of a hat. (RTT 7455; 7537.)

9. Composite Drawing With Detective Gillis Of The Seattle Police

Santiago asked Berliner, if she knew of a way for her to create a drawing of her assailant. She asked Berliner to get in touch with the Seattle

---

[564] Santiago denied that one of the reasons she saw Berliner was because she couldn't remember what had happened to her. (RTT 7535.) The only things she had trouble remembering were the license plate number and the direction she had been taken. (RTT 7535-36.)

[565] In the first part of 1973 Santiago lived in Philadelphia and was the victim of a violent assault. (RTT 7542) She reported the assault to the police and was shown mug books. (RTT 7542; 7551.) She didn't pick her attacker out of the mug book because his picture wasn't in there. (RTT 7551.) She told the police that there was a person that her assailant looked like but that she couldn't be sure without seeing him. (RTT 7584.) The person who assaulted her was never apprehended. (RTT 7542.)

[566] Santiago only had trouble sleeping after she woke up from a nightmare. (RTT 7453.) She didn't think she had problems concentrating. (RTT 7453.)

police. (RTT 7364; 7458.) In October 1984, Detective Gillis of the Seattle Police Department helped Santiago use an Identi-Kit to create a composite. (RTT 7364-65; 7458-60.) The session took three to three and a half hours. (RTT 7460-61.) It was as close as Santiago could get to the likeness of her abductor, but she wasn't really satisfied with the result. (RTT 7365; 7461.)[567]

10. Treatment Of Santiago By Psychiatrist Wendy Freed

Berliner told Santiago that she was suffering from post-traumatic stress disorder ("PTSD"). (RTT 7456.) Berliner was concerned with Santiago's well-being and told her to call if she wanted to be hospitalized. (RTT 7482.) Santiago asked Berliner if being hypnotized would help her remember things about her abduction. (RTT 7482.) Berliner suggested that she see Dr. Wendy Freed, a psychiatrist. (RTT 7370; 7457.) Santiago began seeing Freed after Thanksgiving in 1984, and continued seeing her until April 1985. (RTT 7370; 7457.)

11. Santiago's Disability Award

In 1985, Santiago was awarded disability benefits for her injuries. (RTT 7481.) Her request for disability had been supported by Dr. Snow. (RTT 7481.) The fingers on her right hand had been severed and required pins. (RTT 7553.) Due to the injury she couldn't use her right hand. (RTT 7553.) She had two concussions which caused her to have dizzy spells. (RTT 7553.) Due to the wound in her throat her speech wasn't very good for quite a long time, and she had to place her hand on her throat to speak. (RTT 7553.)

---

[567] Santiago identified Exhibit 258 as the Identi-Kit composite she created. (RTT 7365; 7459-60.)

12. Interview Of Santiago In Seattle By Detectives Henderson, Fullmer And Bove On December 4, 1984

On December 4, 1984, Detectives Henderson, Fullmer and Bove went to Seattle to conduct an in-depth interview with Santiago. (RTT 3186; 3297; 7346; 7366; 7388; 7419; 7461; 7466.)[568]/[569] Fullmer had already seen the Identi-Kit composite Santiago constructed with Gillis. (RTT 3299.) Detective Bove, an artist, was there to create a drawing of the assailant at Santiago's direction. (RTT 3186-87; 3297; 7366.) According to Santiago, the drawings were better than Gillis' Identi-Kit rendering, but she still wasn't completely satisfied. (RTT 7367.)[570]

After Santiago did the drawing with Bove, the detectives interviewed her on tape for several hours. They discussed Santiago's abduction and asked her to try to draw a diagram of the house to which she was taken. (RTT 7346-47.)[571] Santiago told them that if she ever saw the house again she would know it on sight. (RTT 7498.) She also told the detectives that the license plate of the car in which she was abducted had three numbers and three letters. (RTT 7419.) She thought it was a California plate but couldn't remember the

---

[568] Santiago testified that she had no contact with any of the San Diego authorities between the time she left San Diego in June, 1984 until December 4, 1984. (RTT 7459; 7461-62.) However, Fullmer testified that he spoke with Santiago between June 27 and December 4, 1984. (RTT 3297.)

[569] Santiago didn't take any medication on December 4, but she did have some drinks at lunch on that day. (RTT 7535.)

[570] Santiago identified Exhibit 259 as the drawing Bove made of her assailant. (RTT 7366.)

[571] Santiago identified the writing on the right side of the last page of Exhibit 174 as the drawing she made. (RTT 7347.)

color. (RTT 7419-20.)[572]

Santiago described her attacker as a blond haired man with a mustache that did not go below the lips. (RTT 7466.) He was a neat, clean looking individual, about 5'10" tall. (RTT 7467; 7480-81.)[573] She told them the man had "bulging eyes." (RTT 7466.) The detectives told her that if she remembered anything else to write it down and let them know. (RTT 7585.)[574]

---

[572] Henderson and Fullmer asked Santiago if she had any dreams or nightmares after she got home. (RTT 7587.) Santiago told them she had had a couple of nightmares. (RTT 7587.) The detectives told her to write down anything she could recall about the dreams. (RTT 7587-88.)

[573] Santiago couldn't remember if she gave the man's height on December 4, 1984, or if it was at another time. (RTT 7467.) After being shown the transcript from the interview of December 4th, it refreshed her memory that she had told them the man was 5'10" tall. (RTT 7480-81.) When shown Exhibit 171 she couldn't recall the circumstances under which she had written "Tall, about six foot two." (RTT 7580.) She didn't remember writing it, but it was in her handwriting. (RTT 7583.) (Exhibit 171 was written by Santiago during an interview with Fullmer in the hospital on June 15, 1984. See § 3.3.2(B)(1)(c)(ii), p. 851 below, incorporated herein.)

[574] Santiago did write something down and sent it to the detectives, but she couldn't recall what it was. (RTT 7585-88.) However, the content of In Limine Exhibit 69 was as follows:

> "When we got to the house – heading for the door I remember there was a car that slowed down and the people in the car had spoken to him[.] What was said I don't know but I do remember a car.
> ---
> Also – re: my clothing When I went over to Baxter's I was dressed as I described[.] However – the other day I remembered that when I left Baxter's[.] I had removed my nylons in the Ladies' room right before I started to walk home. So when he abducted me I was wearing a SHIRT, (new),
> (continued...)

13. The Santiago Photo Lineup

On December 13, 1984, Sheriff Deputy Frank Winter took a photograph of David Lucas for the purpose of constructing a photo lineup to show Santiago. (RTT 10122-23.) Detective Fullmer prepared a photo spread which consisted of six photos. (RTT 3195-96.)[575]

Around December 14, 1984, Henderson asked Santiago to return to San Diego to look at some photographs to see if any of the photos they had were of the man who attacked her. (RTT 7370; 7386; 7464-65.)[576] Arrangements were made for Santiago's visit. It was for the specific purpose of showing her a photo lineup. (RTT 3188; 10932.)

On December 14, 1984, at approximately 10:30 p.m., Henderson and Fullmer met Santiago at the San Diego airport. They first drove to the detectives' office, and then to a Holiday Inn where the detectives had arranged for Santiago to stay. (RTT 3190; 7371; 7465-66; 7482-83; 10932.) Detectives Henderson, Fullmer, Fisher and Hartman were with Santiago at the hotel. (RTT 3195; 7371; 7465-66.)[577] Also present was Deputy Zuniga,

---

[574](...continued)
SLACKS (new) AND BLACK SHOES (also new)."

[575] Fullmer identified Trial Exhibit 179A as the photo lineup he constructed. (RTT 3198.) Lucas' photo was in the upper row in the middle. A portion of Lucas' head was cut off by the folder. However, when it was shown to Santiago Lucas' photo was more centered within the square. (RTT 3199.) Lucas' image appeared larger than any of the other men in the lineup and he was the only man with what could be described as "bulging eyes." (Trial Exhibit 179A.)

[576] Henderson called Santiago the day before she went to San Diego; either December 13th or 14th, 1984. (RTT 7465.)

[577] Fullmer testified that he and Henderson picked up Santiago at the
(continued...)

Santiago's "bodyguard." (RTT 3196-97; 3305; 7483-88.)

Around midnight or 1:00 a.m. on December 15 they went up to Santiago's room and told her they had a folder with some photos. (RTT 7370-71; 7487.)[578] Fullmer read from a form which advised Santiago that he wanted her to view the lineup and see if she could identify anyone in it. (RTT 3198.)[579] Fullmer told her to take her time, look at the photos thoroughly, and if she saw her assailant, to point him out. (RTT 7371; 7487-88; 7547.) The detectives then showed Santiago the photo spread. (RTT 3195-96; 3200; 7371; 7483-7485.)[580] After a couple of minutes,[581] Santiago selected Lucas'

---

[577](...continued)
airport. They drove directly to the hotel where they were met by Fisher, Hartman and Zuniga. (RTT 3196-97; 3305; 9006 [defense].)

[578] Santiago identified Trial Exhibit 179A as the photo spread she saw. (RTT 7371; 7485.) It appeared to be in the same condition as when she first saw it. (RTT 7535.)

[579] Fullmer identified Trial Exhibit 179B as being the form he read from but the form was not admitted into evidence at trial. Fullmer couldn't remember exactly what he read to Santiago from the form but paraphrased it as follows: "We wish to have you look at a group of photographs. That you are not to assume anything – that we have anyone in custody, but merely to look at the photograph and see if you can identify anyone contained within that photographic lineup." (RTT 3198-99.)

[580] Santiago testified that Henderson and Fullmer were present when she viewed the photo spread. She wasn't sure if Fisher, Hartman and Zuniga were there at the time or if they came later. (RTT 7483-84; 7488.) Her prior testimony was that Fisher, Hartman and Zuniga were present. (RTT 7488.)

[581] On the identification form (Trial Exhibit 179B) Fullmer wrote that the identification was made "immediately." However, Trial Exhibit 179B was not admitted into evidence at trial and no other testimony contradicted Santiago's opinion that it took her a couple of minutes. (But see prosecutor's (continued...)

photo, the top photo in the middle. (RTT 7372; 7485.)[582]/[583]

After the identification, Santiago, Fullmer, Henderson, Zuniga, Fisher and Hartman went down to the lounge. Santiago had a glass of wine. (RTT 7495; 7533-34; 7548.)[584]/[585]

---

[581](...continued)
opening statement. (RTT 43-44 [Santiago "immediately identified the photograph of David Lucas as being her attacker"].)

[582] Santiago testified that no one suggested that her assailant was among the group of photos; nor did anyone point out any particular photo to her. (RTT 7372.) She also testified that the detectives didn't use Lucas' name prior to her being shown the photo spread. (RTT 7547-48.) Santiago couldn't recall when she first heard Lucas' name, whether it was the same weekend before she went home or prior to the first preliminary hearing. (RTT 7548; 7582-83.) She didn't know if she had heard his name from one of the detectives or from Deputy District Attorney Dan Williams. (RTT 7494.)

[583] At some point after the photo lineup was shown to Santiago, the photo of Lucas was moved. (RTH 20346-48.) Prosecutor Williams recalled that the lineup was used in court and one of the photographs became loose. He surmised that the clerk taped it back into the folder in the wrong position. (RTH 20351.)

[584] There was a dispute as to whether Santiago was again shown the photo lineup later in the day on December 15, 1984. Deputy Zuniga originally testified on July 8, 1986, that she had a specific recollection that she saw the photo lineup on Saturday and not on another day. (RTT 9259-61.) However, at trial Zuniga denied this. (RTT 9258.) Fullmer did not recall Santiago seeing the lineup again on the morning of December 15th in the homicide office. (RTT 9005.) He did not show it to her and he did not recall Williams showing Santiago the lineup. (RTT 9005.)

[585] Testifying for the defense, Detective Fullmer said that before they left the hotel, they went downstairs and some alcoholic drinks were ordered, but Fullmer didn't know if Santiago had anything to drink. He assumed she had. (RTT 9000.) Hartman, Fisher and Henderson were also present at the hotel that evening. (RTT 9006.)

14. First Car Trip: Santiago Driven By Lucas' House Twice

After the glass of wine in the hotel lounge, Zuniga asked Santiago to take a car ride and try to retrace her route and locate the house she was taken to. (RTT 3188; 7372; 7495.) The ride began in the early morning hours of December 15, 1984. (RTT 7372-73; 3189.) The purpose was to see if Santiago could remember the direction to the house as well as the house itself. (RTT 3188; 7372.) Detectives Henderson, Fisher and Fullmer were with Santiago in the car. (RTT 7496.) They drove from the hotel to Marshall and Petree and "The Timbers" apartment complex where Santiago's brother lived. (RTT 3190; 7373; 7496.)[586] Going back to the complex several times, they went several different directions, but Santiago could not successfully direct them to the house. (RTT 7373; 7496-98.) They drove by Lucas' house twice but Santiago did not recognize it. (RTT 3191-92; 7373; 7498; 10947.)[587] After the drive-by of Lucas' house they returned to the hotel. (RTT 3192.) Deputy Zuniga stayed with Santiago in her hotel room. (RTT 7374-75; 10899.)

15. Second Car Trip: Santiago Driven By Lucas' House Two More Times

Later in the morning of December 15, 1984, Santiago met at the sheriff's station with the detectives and Deputy District Attorney Dan

---

[586] Fisher testified that they were attempting to retrace the route that may have been taken on the night of Santiago's abduction. They started near Baxter's Restaurant. (RTT 10933.) They drove a route that was partially provided by Santiago. (RTT 10933.) Within moments they realized that she was unable to direct them any further. (RTT 10933.) So they then took the most direct route to the area where Santiago had been found. (RTT 10933.)

[587] Lucas' home was approximately 1.1 miles from where Santiago had been found. (RT 4833-34.)

Williams. (RTT 7374; 7498.)[588] Henderson and Fullmer took Santiago to their desk and asked her to sketch the house where she was taken. (RTT 7374.)[589] Around 2:00 or 2:30 p.m., Santiago, Fullmer and Fisher left to take Deputy Zuniga home. (RTT 7374-75; 7498-99; 10899-900 [defense]; 10932-33 [defense].)[590] Fullmer was driving; Santiago was in the right front seat; Zuniga was in the left rear seat and Fisher was sitting behind Santiago. (RTT 7549; 10900-901 [defense]; 10916 [defense]; 10933 [defense].)[591]

On the ride to Zuniga's home, they began slowing down as the car

---

[588] Henderson, Fullmer, Zuniga, Hartman, Fisher and District Attorney Dan Williams were present. (RTT 7499.)

[589] Santiago sat down at a desk with Fullmer and he asked her to make a sketch of the house she had been taken to. (RTT 7374; 7501-02; 7504.) She drew a circular driveway. (RTT 7532.) Her prior testimony from March 31, 1986 (RTT 3312) indicated that she made the sketch of the house after she took the second drive with the detectives. (RTT 7502-04; 7532.) But later she thought it was before the second drive. (RTT 7502.) Santiago identified Exhibit 176 as the drawing she made on December 15, 1984. (RTT 7532.) She wasn't sure if the structure itself was drawn by Fullmer or herself, but all of the writing in the drawing was Santiago's. (RTT 7532-33.)

[590] Zuniga wasn't sure whether this car ride was Saturday or Sunday but believed it occurred prior to the arrest of Lucas. (RTT 10899-900.) She couldn't recall if it was the 15th or not. (RTT 10900.) Gary Fisher testified the ride was on December 15th, 1984. (RTT 10932-33.)

[591] Zuniga testified that they left the hotel and stopped off at the county facility to get gas. From there they drove on the surface streets towards Zuniga's residence. (RTT 10901.) However, at some point Fullmer made a U-turn and drove back, made another U-turn and drove back down the road. (RTT 10913.) During this trip Santiago pointed to a house. (RTT 10913.) Zuniga didn't remember the address of the house Santiago pointed to. (RTT 10913-14.) She never saw Fullmer or Fisher try to point out or demonstrate a particular house to Santiago during that car ride, nor did she hear either of them say anything to Santiago about a house, prior to Santiago mentioning the house. (RTT 10914-18.)

passed by Lucas' house. (RTT 7375; 7501; 7549; 10933-34.)[592] As they slowly drove by Lucas' house, Santiago turned her head and looked at the house and continued to look at it, gave it a hard look, and turned in her seat slightly. (RTT 7375; 7499; 10934.) She asked detective Fullmer to turn around and drive past it again. (RTT 7375; 7499.) They turned around and came back down the street which put the house on the right. (RTT 10934; 10946.) The vehicle slowed from approximately 30 mph to 15 mph as they approached the house, and Santiago turned in her seat, again, looking at the house. (RTT 10935; 10944-45.) Fisher asked her "Do you see something that you recognize?" (RTT 10935.)[593] She continued to look at the residence and started to describe it. (RTT 10935.) Fisher had a notebook and was writing down what Santiago said about the house: the color of the house, that there were concrete steps and the circular driveway that went around a tree. (RTT

---

[592] Fisher testified that Lucas' house would have been to the left side of the vehicle. (RTT 10934.)

[593] Fisher testified that he never made any effort to direct Santiago's attention to any particular house on Casa de Oro that afternoon. (RTT 10936.) Nor did he see Fullmer or Zuniga try to point out or direct Santiago's attention to any particular house. (RTT 10936-37.) He remembered making a statement to the effect of "You see something you recognize?" (RTT 10937; 10940.) He recalled testifying at least four or five times on this issue, and believed his memory was better on March 4, 1986 than it was at present. (RTT 10937-38.) Fisher denied making any statement which directed Santiago's attention to a specific house. (RTT 10940.) He did say, "Do you recognize something?" when she turned her body in the direction of Lucas' house. (RTT 10940; but see § 3.2(B)(3)(b), pp. 802-05 below, incorporated herein.)

Fisher testified that the car was driven by Lucas' house twice. (RTT 10943-44; 10947-48.) After the second trip back the car was slowed; from approximately 30 mph to 15 mph. (RTT 10944.) Santiago didn't physically point to Lucas' house and say "that is the house." (RTT 10949.)

10951.)[594] As she drove past it again, she pointed it out as being the one to which she had been taken. (RTT 7375; 7499; 7549; 10951; but see RTT 10949 [Santiago didn't physically point at Lucas' house and say "this is the house"].)[595]

After they dropped Zuniga off, the detectives took Santiago back to their office where she was shown a small truck, either a Toyota or Datsun, that had sheepskin seat covers in it. (RTT 7375; 7533.)[596]/[597] Thereafter, the detectives took Santiago back to the hotel where she picked up her luggage.

---

[594] Santiago identified Trial Exhibit 178A-I as photos of the house she was taken to. (RTT 7361.) On cross examination, Santiago testified that she couldn't recall if there was anything on the porch. (RTT 7446.)

[595] Santiago identified the house depicted in Trial Exhibit 178 as being the house she pointed out on December 15, 1984. (RTT 7375.) She couldn't remember if the car came to a complete and full stop or if they just slowed down. (RTT 7549.)

[596] Santiago thought it was Fullmer and Fisher who showed her the truck. (RTT 7533.) In a pretrial hearing not before the jury Fullmer denied showing Santiago any vehicle or seat covers belonging to Lucas. (CT 2397; RTO 6977.) Henderson also denied that he had shown the truck to Santiago but later said that he couldn't remember if he had shown the truck to Santiago. (CT 2411; RTH 6103.) Henderson claims that information about Santiago's observing the truck and identification of the seat covers came from either Fullmer or Fisher and thought the viewing had occurred at the crime lab. (CT 2411; RTO 7004.) Hartman denied showing Santiago the truck and Williams denied knowledge of Santiago seeing the truck. (CT 2411; RTO 6622; RTH 24544.)

[597] During trial, Santiago identified Trial Exhibit 226, a sheepskin seat cover from Lucas' truck, as being similar to the ones that were in the car she was abducted in. (RTT 7361-62; 7550.)

They then drove her to the airport. (RTT 7376.)[598]

16. Execution Of The Search And Arrest Warrants

On December 15, 1984, the detectives obtained a search warrant for Lucas' home and an arrest warrant for Lucas. (RTT 6874-75.) The search warrant also authorized the detectives to seize and search Lucas' truck. (RTT 5399; 6877.) On Sunday morning, December 16, 1984, Lucas was arrested and his home searched. (RTT 2793; 3525; 5085; 6875-80.) The next day, December 17, Lucas' truck was searched and evidence taken from it. (RTT 5097-98; 5101; 5350; 5363-68.)

17. Extra Judicial Matters Seen By Santiago

In January, 1985, Santiago received a transcript of her December 4, 1984 interview with the detectives in Seattle. (RTT 7387-88.)

Before her testimony at the first preliminary hearing Santiago had seen Lucas on TV the night before she was to testify in January. (RTT 7388-89.)

After the first preliminary hearing Santiago saw some TV news broadcasts and newspaper articles about the case. (RTT 7539-40.) She also received some press clippings from Zuniga related to the case. (RTT 7386-87.) The clippings contained photos of Lucas. (RTT 7387; 7392.)[599] She also received transcripts of the preliminary hearing and a video tape of the hearing. (RTT 7390-91.)[600] She also had copies of the police reports in the case, her medical reports and photos of herself at the hospital and at the

---

[598] Before Santiago left, Criminalist Randal Robinson drew a sample of Santiago's blood. (RTT 5502-03; 7375; 8765.)

[599] Santiago never viewed a live line-up of suspects. (RTT 7505-06.)

[600] Santiago reviewed the transcripts and viewed the video tape once. (RTT 7391.)

recovery site. (RTT 7392.) She also had copies of the drawing Bove made. (RTT 7392.)

18. Santiago's Testimony Regarding The Vehicle

Santiago testified that the car in which she was abducted had louvers on the back window. Santiago testified that Exhibits 260A-C, photos of a 280-Z vehicle with louvers on the rear window, looked similar to the car in which she was abducted. (RTT 7544-46.)[601] Santiago identified Exhibit 226, a sheepskin seat cover, as being the type of seat cover that was in the vehicle. (RTT 7550.) Although the car didn't have much of a back seat, Santiago supposed that children could be seated back there. (RTT 7433.) Santiago testified that the vehicles depicted in Exhibits 156A-F, and Exhibit 654,[602] all 280Zs, looked like the car except the rear window louvers were missing. (RTT 7361; 7479; 7543-44; 7561; 7581-82.) She described the louvers as being a mass of overlapping blinds or slats that protect the back window from the weather. (RTT 7432; 7433.)

In February 1985, during a recess of the preliminary hearing, Santiago was shown the Z-car which Lucas used to own. (RTT 7479; 7544.)[603] She could not positively identify it as the car in which she was abducted. (RTT 7480.)

---

[601] Exhibit 260 was not Lucas' car and only a demonstration vehicle. (RTT 7545.)

[602] Exhibit 156A-F were photos of Lucas' 280Z. Exhibit 654 had been used at the preliminary hearing. (RTT 7378.)

[603] Judge Peterson, District Attorney Dan Williams, Deputy Zuniga and defense attorneys were present when Santiago viewed the car. (RTT 7480.) Santiago heard that Lucas owned a Z-car but she didn't remember where she heard it from. It may have been one of the detectives. (RTT 7540.)

19. Rape Kit Evidence

Criminalist Randall Robinson[604] conducted an examination of the Santiago rape kit, which included two deep vaginal swabs. (RTT 10862.) He evaluated the vaginal swab material to determine whether or not it contained sperm and acid phosphatase, an enzyme found in seminal fluid. (RTT 8765-67.)[605/606] Robinson found both sperm cells and acid phosphatase in the vaginal slides and swabs. (RTT 8771.)[607]

The ABO blood group type results neither included nor excluded Lucas as the donor of the sperm cells. (RTT 8777-78.) However, electrophoretic testing excluded Lucas.[608]

---

[604] Robinson was called both by the Defense (RTT 8758-78) and the People. (RTT 10862-69.)

[605] There was a stipulation that the vaginal swabs were taken from Santiago at Grossmont Hospital on June 9, 1984, and that slides were made from the swabs and provided to Robinson. (RTT 8768.)

[606] Acid phosphatase is an enzyme that is found in extremely high concentrations in seminal fluid and is a presumptive indication that seminal fluid is present. Independent of the timing, the existence of acid phosphatase can be consistent with sexual intercourse, provided that the presumptive acid phosphatase test is confirmed, usually by the presence of sperm. (RTT 8767-68.)

[607] The judge excluded evidence that, on the night before she was abducted, Santiago met Neil Reynolds and spent the night with him. (RTT 89-90; 7171.)

[608] Marilyn Fink of the San Diego County Sheriff's Department performed electrophoretic testing on the deep vaginal swab and concluded that it was a PGM 1 in the Group I and II systems. (RTT 6757; 6764-65; 6769.) The results in GLO and ESD were not readable. (RTT 6768.) David Lucas was either a PGM 2-1 (RTT 6817) or a PGM 2. (See RTT 9721 [defense witness Hermann Schmitter would have called David Lucas a PGM

(continued...)

The fingernail scrapings from Santiago were presumptively positive for blood. (RTT 8771-74.) However, the quantity was too small to even determine if it was human blood. (RTT 8774.)

20. In-Court Identification Of Lucas By Santiago

Santiago returned to San Diego six times for court appearances. On each of those six occasions she pointed to Lucas when asked to identify her attacker. (RTT 7344; 7376.)[609] At the first preliminary hearing Lucas was hidden behind a screen until she had identified him by photo lineup and description. (RTT 7593.) After that, Lucas was always within her view in court, sitting next to his attorney. (RTT 7594.) Santiago testified that she had no doubt in her mind that the man pictured in Exhibit 179A, the photo lineup, was the man who attacked her. (RTT 7344; 7376-77.)[610]

21. Vehicle Evidence

a. License Plate

Santiago consciously tried to remember the license plate of the vehicle in which she was abducted. At trial she testified that it was a California plate with three numbers and three letters. (RTT 7359-60; 7363; 7418-20.) Lucas

---

[608](...continued)
2, not a 2-1].) (For additional testimony on the electrophoretic testing see Volume 4, § 4.3, pp. 1124-45, incorporated herein.)

[609] At trial, Santiago stood in front of the jury and showed them the scar on her neck. (RTT 7377.)

[610] At trial Santiago denied talking to anyone about being eligible for a reward in the case. (RTT 7592-93.) She believed that she overheard that there was some victim/witness assistance available, but no one discussed it with her. (RTT 7594-95.) Santiago's prior testimony was read (RTT 3088) indicating her impression that the reward was between $10,000 and $15,000. (RTT 7597.)

owned a Datsun 280-Z with a license plate that read "CMC INC 2." (RTT 3100-03; 3432.)

b. Louvers

Santiago testified that she was abducted in a 280-Z type car which had louvers on the back. (RTT 7359-60; 7432.)

In the summer of 1984, Laura Stewart lived at 10096 Casa de Oro Boulevard. (RTT 7618.) Lucas was her neighbor to the north. (RTT 7618.) Stewart liked nice-looking cars, and when Lucas first moved in, his 280-Z caught her attention. (RTT 7620.) Stewart thought it was a pretty car; it was black with a "T-top" and had louvers in the back. (RTT 7620.) The car had pinstriping, nice wheels and a personalized license plate. (RTT 7620-22.)[611] Lucas usually parked the car near Stewart's property. (RTT 7623-24.)

Rozetta Jacobus, one of Lucas' neighbors in 1984, recalled seeing a low black sports car with louvers on the back window parked at the Lucas property. (RTT 7684; 7688-89.)[612] Ordinarily it was parked on the south side of Lucas' circular driveway. (RTT 7684; 7688.)

When Michael George purchased the 280-Z after Lucas traded it in, there were no louvers on it. (RTT 3132.) After he bought the car, George washed and waxed it. He noticed some gummy material on the chrome strip covering the weather stripping holding the back window in place. (RTT

---

[611] Stewart identified the louvers on Exhibit 260, photos of a vehicle, as the same kind that Lucas had on his car in 1984. (RTT 7620-21.)

[612] Jacobus had originally referred to the louvers as Venetian blinds but was later informed by her husband that they were called louvers. (RTT 7689.) Jacobus read something in the paper about a court proceeding against Lucas. (RTT 7686; 7689) As a result, she called the sheriff's department and told them that the car she had seen at Lucas' house had louvers on it. (RTT 7685; 7686; 7689.)

3128-29.) The substance was a gluey, rubbery substance and was in the four corners of the window. (RTT 3129-30.) He used tar and glue remover to get it off. (RTT 3129.)

Christopher Patterson, an assistant parts manager at a Nissan dealership, testified that both factory and nonfactory louvers could be installed on Z-cars such as Lucas'. (RTT 7639.) Factory louvers were generally installed with screws which would leave screw holes if the louvers were removed. (RTT 7639-43.) The nonfactory louvers were often installed with a clip and an adhesive that slid under the weather strip and stuck to the glass. (RTT 7640-41.) However, some of the nonfactory louver units were installed with screws like the factory units and left screw holes. (RTT 7642-46.)

c. Computerized Voice

Santiago testified that she didn't hear any computerized voices come from the vehicle in which she was abducted. (RTT 7434.)

Rick Adler was familiar with Lucas' black and gold Datsun 280-Z. (RTT 3430; 3478.)[613] The car "talked." Once while Adler was in the car it verbally warned that the "fuel level was low" in a computerized female voice. (RTT 3478-79.) It would also verbally warn with a computerized voice if a door was open. (RTT 3480-81; see also 3138; 9901 [defense witness Mitchell Hoehn].)

d. Miscellaneous Evidence Regarding Lucas' 280-Z

Michael George, who purchased Lucas' car,[614] testified that it had a

---

[613] Frank Clark identified the vehicle depicted in Exhibit 156A-F as Lucas' 280-Z. (RTT 3773.)

[614] George identified Exhibit 155 which was a sales contract for purchase of a 1983 280-Z by Michael George dated 7/8/84. (RTT 3121-22; (continued...)

computerized voice system which "talked" as the vehicle was operated. (RTT 3138.) When Michael George purchased Lucas' 280-Z, it did not have sheepskin seat covers and the lid to the center console/glove box lid was broken. (RTT 3122-23; 3135.)[615]/[616] The car was a stick shift. (RTT 3132-33.) It had a see-through "T-top." (RTT 3133.) The car did not have a back seat. (RTT 3132.)

William Green, who was assisting the prosecution in the Lucas case, asked to borrow Michael George's vehicle for the purpose of a test ride along the route from Santiago's abduction site to Lucas' house. (RTT 7647; 7657; 7672.) The test ride took approximately 17 minutes. (RTT 7652.)[617] Green followed the posted speed limits within a few miles an hour on either side, and stopped at all traffic signals and stop signs. (RTT 7652-53; 7669.)[618] Green

---

[614](...continued)
3135-36.) He also identified the vehicle depicted in Exhibit 156A-F as the one he purchased. (RTT 3122.) There were no back seats in the vehicle he purchased. (RTT 3127.) George drove the car to the location depicted in Exhibit 156 to allow law enforcement to photograph it. (RTT 3122.)

[615] George identified Exhibit 157 as the repair form provided by Terry Allen Autos for repair of the console lid. (RTT 3123.)

[616] George later turned the lid over to a lawyer, Anthony Gilham, who was representing Lucas in 1985. (RTT 3124-3125; 3136.) George identified Exhibit 158A as the plastic lid from the center console of the 280-Z. (RTT 3125.) The console was positioned behind the gear shift and opened away from the driver so the driver would have access to the inside. (RTT 3126-3128.)

[617] The maximum speed Green reached was 46 miles per hour while he drove three-tenths of a mile on the freeway. (RTT 7653.)

[618] Green testified that he thought the "red-line" on a 1983 280-Z car was 5,500 RPM and he had probably driven the car at 2,000 or 1,800 RPMs
(continued...)

drove the entire way in second gear with his right hand in his pocket. (RTT 7653-54.)[619]

e. Lucas Traded In His 280-Z For A Toyota Pick-Up Truck

Rick Adler testified that Lucas loved his 280-Z. (RTT 3432-34; 3493.) However, in June, 1984, Lucas told Adler that he wanted to trade-in the 280-Z due to his financial and insurance problems. (RTT 3481; 3493; see also 9973-77 [defense witness Loren Linker recommended to Lucas that he trade in the 280-Z to reduce his payment].)[620]

Lucas also told Frank Clark that he was having trouble with the payments and wanted to reduce them by trading the 280-Z for a Toyota truck. (RTT 3773-3774; see also RTT 9897-98 [defense witness Mitchell Hoehn].)[621]

On June 13, 1984 David Lucas went to Rose Toyota in San Diego and traded the Datsun 280-Z for a new Toyota pick-up truck. (RTT 3080-81.) Lucas' monthly payments for the new Toyota were substantially lower than

---

[618](...continued)
below the red-line. (RTT 7673.)

[619] Green testified that the 280-Z had a standard transmission car with five forward speeds. (RTT 7653.)

[620] Adler wasn't sure of the exact date, but the 280-Z was sold sometime between June 11th and June 15th, 1984. (RTT 3432.) Adler identified Exhibit 156A-F as Lucas' 280-Z and Exhibit 156G-J as Lucas' Toyota truck. (RTT 3431.)

[621] Clark testified the trade occurred sometime during the summer of 1984. He identified the vehicle depicted in Exhibit 156G-J as Lucas' Toyota truck. (RTT 3773.)

those he had been paying for the 280-Z. (RTT 3093.)[622]

Adler helped Lucas remove the sheepskin seat covers, floor mats and other items from the Z car when he traded it in. (RTT 3433.) The CMC license plate was also taken off the car by a boy at the car lot. (RTT 3433.) Adler put the sheepskin seat covers in the Toyota truck. (RTT 3084; 3434.)[623]

B. Defense Evidence

1. Santiago's Post Traumatic Stress Disorder And Other Mental Psychological Impairments

a. Dr. Zeidman

In 1984, psychiatrist Heywood Zeidman was associated with Grossmont Hospital and was on their staff as an outside psychiatrist. (RTT 8963; 8965-66.)[624] On June 14, 1984, Dr. Raymond Splinter, an ear, nose, and throat specialist, referred Santiago to Zeidman because Splinter thought Santiago might have post-traumatic stress disorder ("PTSD"). (RTT 8966-67; 8969.)[625] Zeidman saw Santiago at her hospital bed. (RTT 8967; 8969.) However, he was only able to superficially evaluate her because it was

---

[622] The payments were $412.23 per month for the 280-Z, while the new payments for the Toyota were only $287.11 per month. (RTT 3092; 10080-83 [defense].)

[623] Frank Clark also testified that Lucas had sheepskin seat covers in both of the vehicles. (RTT 3774-75.)

[624] Zeidman had a private practice of psychiatry and had privileges at Grossmont. (RTT 8966.)

[625] PTSD is a condition where a person suffers after-effects following a trauma or serious event. (RTT 8969.)

difficult for her to speak. (RTT 8967.)[626]

Zeidman had contact with Santiago on June 14th and June 16th. (RTT 8968.) She was clutching a teddy bear and appeared to be depressed. (RTT 8968-69.) She also showed marked psychomotor retardation, meaning that she spoke and moved slowly. (RTT 8968.) Ziedman recommended that specific mental functioning tests be performed at a later date. (RTT 8970.)[627] Santiago was discharged from the hospital before Zeidman could follow-up with psychiatric testing and treatment. (RTT 8969-70.)

b. Lucy Berliner

In 1984, Lucy Berliner was a social worker on the staff of the Sexual Assault Center at Harbor View Medical Center in Seattle, Washington. (RTT 10107-08.) She first saw Santiago on August 14, 1984. (RTT 10109-10.) They had a total of about six or seven counseling sessions. (RTT 10110.) Santiago provided Berliner with a history of what had happened to her. (RTT 10120.)

During the course of the counseling Berliner was able to evaluate Santiago using a diagnosis listed in the Diagnostic and Statistical Manual or

---

[626] Zeidman didn't remember knowing at the time that Santiago had two skull fractures. It may have been in the chart, and he may have reviewed it, but he didn't remember it. He didn't review the entire medical records; he simply reviewed those records relevant to him. It was clear she had multiple physical injuries, but he wasn't evaluating those injuries. (RTT 8967-68.) Zeidman wanted to evaluate Santiago and continue a relationship afterwards so that she would have somebody to follow-up with. (RTT 8969.)

[627] Zeidman testified that a good psychiatric evaluation would include testing of memory, concentration, orientation, judgment, insight; a whole battery of testing to evaluate mental functioning. (RTT 8970.) Because of Santiago's condition he didn't feel that it was appropriate to do that kind of testing at that time. (RTT 8970-71.)

DSM-IIIR.[628] She diagnosed Santiago with Post Traumatic Stress Disorder ("PTSD"). (RTT 10108; 10110.)[629] Santiago met each of the criteria listed in the DSM required to make the diagnosis of PTSD. (RTT 10114.) Berliner also found that Santiago was depressed and needed psychotherapy. (RTT 10114-15.) She referred Santiago to Wendy Freed, a psychiatrist in Seattle. (RTT 10114-15.) She also told Santiago to consider hospitalization if she felt increased distress. (RTT 10115.)

In January 1985, Berliner wrote a letter supporting a disability claim for Santiago. At that point Berliner felt that Santiago was still suffering from PTSD. (RTT 10115-16.)

c. Dr. Wendy Freed

Karen Wendy Freed, a physician and a psychiatrist, saw Jodie Santiago in November of 1984. (RTT 9027-29.) Santiago was feeling depressed and suicidal. (RTT 9028.) Santiago told Dr. Freed about the attack in San Diego. (RTT 9029.) However, Santiago couldn't remember what happened after she was choked unconscious. Dr. Freed thought that such memory loss was consistent with Santiago's physical injuries. (RTT 9066.) At the time she was seeing Dr. Freed, Santiago was taking an antidepressant medication called Ascendin. (RTT 9029.)

On December 19, 1984, Santiago told Dr. Freed that the person whom she believed to be her attacker had been found and put in jail. (RTT 9031.)

---

[628] As a "mental health practitioner," Berliner was familiar with the Diagnostic and Statistical Manual (DSM-IIIR.) (RTT 10108; see also p. 632, fn. 793, below.)

[629] Berliner didn't personally do any psychological testing. Her contact with Santiago was to provide counseling for the effects of her experience. (RTT 10115.)

Santiago indicated relief and told Dr. Freed that she was happy. (RTT 9031; see also RTT 7542 [in 1973 Santiago had been victim of a violent assault; suspect in the assault never apprehended]; RTT 7457-58 [Santiago told Berliner that she wanted to put the incident behind her; it was important for her to find the person who had attacked her].)

In March 1985, Santiago reported that she was suffering from headaches and dizziness. (RTT 9035.) With respect to her life situation, Santiago indicated that she was isolating herself. (RTT 9032.) All together, from the end of November 1984 through April 1985, Santiago had 22 scheduled appointments with Freed. Of the 22, Santiago kept 11 of them. (RTT 9040.)[630]

Dr. Freed's contact with Santiago was primarily for therapy. (RTT 9041.)[631] But based on her evaluation of Santiago during the course of her treatment, using criteria in the DSM-IIIR, Dr. Freed diagnosed Santiago as having PTSD and major depression. (RTT 9041-63; 10163-73.)[632]/[633]

---

[630] In Dr. Freed's experience, patients being treated for PTSD and depression would on occasion cancel their appointments. When someone has experienced the type of physical and emotional trauma that Santiago experienced, it was often difficult for them to come in and discuss it. (RTT 9059-60.)

[631] Dr. Freed never requested psychological testing of Santiago because she thought such testing was unnecessary. (RTT 9085-86; 9089.) Nor did Freed test Santiago for brain damage. (RTT 9091.)

[632] Dr. Freed testified the Diagnostic and Statistical Manual ("DSM") is used by psychiatrists and psychologists for purposes of assisting them in arriving at diagnoses. (RTT 9042.) There have been a number of editions of the DSM. (RTT 9042.) There had been some relatively minor changes with respect to the diagnosis of PTSD between the DSM-III, which was in effect in November 1984, and the DSM-IIIR which was in effect at the time of the

(continued...)

In a case of PTSD, the traumatic event initially may consume the person's life. (RTT 9063.) Dr. Freed would not have been surprised to find a victim of PTSD on disability. (RTT 9063.)[634]

When Dr. Freed saw Santiago in February and March 1985, she showed some positive signs of a shift towards recovery. (RTT 9060; 9081.) Santiago began talking about the future and expressing a sense of herself. (RTT 9060-61.) But in addition to the positive signs, she still exhibited symptoms of PTSD. (RTT 9081.) Santiago still reported having headaches and dizziness during that period of time. (RTT 9082.) The last time Freed saw Santiago in therapy was March 18, 1985. She was still exhibiting symptoms of PTSD at that time. (RTT 9082-83.)

d. Dr. Zigelbaum

Dr. Sheldon Zigelbaum, a psychiatrist specializing in PTSD (RTT 10137-39), testified that many of the people diagnosed with PTSD also have suffered a closed head injury. (RTT 10137-38; 10143.) A closed head injury could range from something as simple as a blow on the head to something as complex as multiple skull fractures. (RTT 10143-44.) The effect of a closed head injury on the brain can vary enormously. (RTT 10145.) Closed head injuries can impair people's ability to perceive events and the world around them, to think about what they have seen, to remember, and later, to be able to utilize the information in an effective way. (RTT 10147; 10156.) Memory,

---

[632](...continued)
trial. (RTT 9044.)

[633] PTSD is worse in patients whose experience came at the hands of another human being as opposed to a natural disaster. (RTT 10164.)

[634] Dr. Freed's records dated 3/1/85 reflected that Santiago had received disability. (RTT 9082.)

perception, and thought are all affected by closed head injuries. (RTT 10157.)[635]

When a closed head injury has occurred there are a number of factors to consider including: loss of blood supply to the brain, or hypoxia; the level of coma (unconsciousness); how long it takes the coma to resolve and whether there was brain swelling or edema. (RTT 10159-61.)

There are two kinds of organic amnesia which may result from closed head injuries: retrograde amnesia, which is amnesia as to events prior to the incident, and anterograde amnesia or post-traumatic amnesia which occurs day-to-day after the person is beginning to recover. These amnesias occur in every instance of closed head injury. Whenever there is a loss of consciousness due to a head injury, there is a loss of memory. (RTT 10179-80; 10211.) The more serious the head injury, the more opportunity there is for memory impairment. (RTT 10211.) Memory lags behind all other recovery, so that if someone had memory impairment, it would be the last thing to recover. (RTT 10212.) On average, it takes a full year for memory to be recovered. (RTT 10180.)

For a psychiatrist, it's very important to understand the organic background of a patient to be able to take into account the impact of an organic event like a closed head injury. (RTT 10158.) Closed head injuries not only affect the cognitive process, they also have an emotional component

---

[635] In Santiago's case there also was a concern about brain damage. A laceration of the scalp and a skull fracture with an intracranial air leak would certainly indicate to him that there was the possibility of brain damage. (RTT 10214-15.) It was difficult to determine how much damage was done to Santiago's brain. (RTT 10146-47.)

to them.[636] For example, people who have had closed head injuries frequently appear be depressed. (RTT 10159.)

A closed head injury can also affect a person who has PTSD. (RTT 10161-62.) The symptoms of PTSD get worse with closed head injuries. (RTT 10214.) The DSM-IIIR cautions to beware of patients who show organic symptoms because they may be suffering from an organic disorder. (RTT 10162.) It also cautions to look carefully at patients with depression, because that may be a secondary diagnosis in addition to PTSD. (RTT 10162.)

There is also a relationship between the cognitive problems of closed head injury and PTSD vis-à-vis memory loss. (RTT 10176.) Both the closed head injury and the PTSD may cause memory loss. (RTT 10176-77.) Psychogenic amnesia occurs in PTSD with reasonable frequency. (RTT 10169; 10177.)

Memory can also be impaired by a severe drop in blood pressure like that experienced by Santiago. A 70 over 0 blood pressure can deprive the brain of oxygen. If the brain is deprived of oxygen for long enough, the brain cells get damaged, the brain begins to react poorly and the condition is likely to result in memory impairment. (RTT 10181-83.)

2. Vehicle Evidence

William ("Bill") Johnson came to San Diego in 1983. (RTT 9241.) He found employment at CMC as a carpet cleaner and worked for Lucas and Clark. (RTT 9241-42.) While he worked at CMC Johnson remembered Lucas driving a black Datsun 280-Z. (RTT 9242.) Lucas would park the car

---

[636] A closed head injury can cause an emotional disorder. (RTT 10158.)

in front of the business and Johnson would see it on a regular basis. (RTT 9242.) Between the time he came to work at CMC in 1983 and the middle part of June, 1984, Johnson never saw louvers on Lucas' car. (RTT 9243.)

In 1984 Mitchell Hoehn was employed at CMC. (RTT 9896.) Hoehn was familiar with Lucas' car, a black five speed 280-Z. (RTT 9897; 9901.)[637] Hoehn knew Lucas when Lucas bought the car. (RTT 9897.) During the entire time that Lucas owned the car Hoehn, who saw the 280-Z many times, never saw louvers on the back window of the car. (RTT 9897-98.)[638]

When Hoehn rode in the passenger seat of the 280-Z he noted that the car had a digital speedometer with a lighted number that increased or decreased with the speed. (RTT 9899.) Hoehn also recalled that the car spoke if the door was open or the fuel was low. (RTT 9901.) The car did not have a back seat. (RTT 9901.) Hoehn was aware that Lucas traded in the 280-Z because the payments on it were too high. (RTT 9897-98.)

In 1984, Dennis Adair worked at CMC as a carpet cleaner for Lucas and Clark. (RTT 9911-12; 9915.) Adair was familiar with Lucas' black 280-Z car. (RTT 9912.)[639] Adair saw the 280-Z at CMC until Lucas traded it in. (RTT 9913-14.) He washed Lucas' car at the shop on a number of occasions. (RTT 9912; 9915.) There was never anything on the back window that

---

[637] Hoehn identified Trial Exhibit 654 as Lucas' car. (RTT 9897.)

[638] Before she could have known about Santiago's statements concerning the louvers, Lucas' wife, Shannon, told the police in a taped interview that the 280-Z did not have louvers. (Court's Exhibit 6, p. 10.) In May 1987, Shannon Lucas died unexpectedly. (RTT 4832-33.) Her statement regarding the dog chain was admitted as a spontaneous statement. (See Volume 4, § 4.6.2, pp. 1167-80, incorporated herein.) However, the defense did not offer her statement about the louvers.

[639] Adair identified Trial Exhibit 654 as Lucas' car. (RTT 9912.)

interfered with his ability to wash the back window; there were no slats or louvers on the back window. (RTT 9912-13; 9914; 9915.)

In 1984, Loren Linker worked at CMC for Lucas and Clark. (RTT 9973.) In May and early June, 1984, Lucas was driving a 280-Z. (RTT 9974.) The car was black with gold striping on its sides. (RTT 9973-74.)[640] In May 1984, Linker had a discussion with Lucas about trading in the car. (RTT 9975.) Lucas was having problems with the payments on the 280-Z and Linker recommended that Lucas trade it for a Toyota 4 x 4 by truck. (RTT 9976.) In May and June of 1984, Linker rode in Lucas' 280-Z. (RTT 9977) Linker never saw louvers on Lucas' car. (RTT 9977.)

In January 1985, John Rose, an investigator with the San Diego county Public Defender's Office, contacted the Rose Toyota dealership where Lucas bought his truck and traded in the 280-Z. (RTT 8779-81.) The dealership sold the car to the Terry Allen Datsun car dealership. (RTT 8781.) Rose went to Terry Allen Datsun and obtained the name of the person to whom they sold the car, Michael George. (RTT 8781.) Rose contacted George and made arrangements to photograph the car. (RTT 8781.)

Rose created Exhibit 654, which was a folder with 9 color photos of George's car which Rose took on January 5, 1985. (RTT 8782.) Rose photographed various parts of the car which was black with gold trim. (RTT 8783-84.) Rose examined the back window but saw no indication that anything had been attached to the window. (RTT 8783-84.)[641]

Anthony Gilham was retained to defend Lucas against the Santiago,

---

[640] Linker identified the vehicle depicted in Exhibit 654 as Lucas' car. (RTT 9974-75.)

[641] Rose did not take a close up of the rear window. (RTT 8785.) There wasn't anything to photograph. (RTT 8785.)

Swanke and Strang/Fisher charges in December, 1984. (RTT 8792.) It was Gilham's understanding that the car depicted in Exhibit 654 had belonged to Lucas at one time and that new owner was Michael George. (RTT 8793.) Gilham made arrangements for Santiago to view the car, inside and out. (RTT 8793-96.)[642] However, Santiago could not positively identify George's car as the car in which she was abducted. (RTT 7480; 8794-95.)[643]

3. Lucas' House

a. Objects On The Porch

Santiago didn't remember seeing anything on the porch of the house where she was taken. (RTT 7528; see also RTT 7446 [Santiago couldn't remember if there was anything on the porch].) However, according to a number of defense witnesses there were several large objects on the porch.

Mitchell Hoehn visited Lucas' house on numerous occasions in May and June of 1984. (RTT 9899-9903.)[644] Hoehn recalled seeing a weight bench with weights and a large Weber-type BBQ on the porch which one could see from the driveway. (RTT 9900-01; 9903.)[645] Hoehn used the weights all the time. (RTT 9903.)

In June, July and August of 1984 Dennis Adair visited Lucas' house

---

[642] The car did not have louvers. (RTT 8796.)

[643] No one rushed Santiago while she was viewing the car. (RTT 8795.)

[644] Hoehn identified Exhibit 178 as Lucas' house, and photos F and C as the front porch of the house. (RTT 9900.)

[645] The weight bench was located in the corner below the window. (Exhibit 178F.) (RTT 9903-04.)

a number of times. (RTT 9913-15.)[646] There was a weight set, a Weber grill, and a lot of other objects on the front porch. (RTT 9913.) Loren Linker recalled that there was a weight set, a BBQ on the front porch in May and June in 1984. (RTT 9978.)[647] Lucas even had a lawnmower on the porch at one time. (RTT 9978.)[648]

b. Post-Photo Lineup Drivebys

According to Detective Robert Fullmer, after the photo lineup on December 15, 1984, the detectives wanted to see if Santiago could show them the route she took on the evening that she was abducted. (RTT 8997-99.) When the detectives interviewed Santiago on December 4, 1984, she told them that she would recognize the house if she saw it. (RTT 9002.)

In the early morning, after the photo lineup, Henderson, Fullmer and Fisher went for a car ride with Santiago to see if she could remember where she was taken. (RTT 8997-99.) However, using Santiago's directions the detectives were only able to go a short distance. (RTT 8998-99.) Fullmer then selected a route for the purpose of driving by Lucas' house to see if something jogged Santiago's memory. (RTT 9001; 9007-08.) Fullmer testified that he made no suggestions to Santiago. (RTT 9008.)

Fullmer drove the vehicle past Lucas' house with Santiago in the car twice at approximately 25 miles per hour. (RTT 9001.) Santiago did not make any identification of the house. (RTT 9002.) They returned her to the

---

[646] Adair identified Trial Exhibit 178 as photographs of Lucas' house. (RTT 9913.)

[647] Linker identified Trial Exhibit 178 as photographs Lucas' house. (RTT 9977.)

[648] As far as Linker knew, those items were up on the porch during the entire month of June, 1984. (RTT 9978.)

hotel and made arrangements to pick Santiago up at the hotel around 9:00 a.m. and transport her to the sheriff's homicide unit office. (RTT 9003.)

Fullmer picked up Santiago and Deputy Zuniga, Santiago's "bodyguard," at the hotel around 9:00 a.m., and went to the homicide office. (RTT 9003.) Assistant District Attorney Dan Williams was at the office, as were Hartman, Henderson, Fisher, and Zuniga. (RTT 9005-06.)

At approximately 1:00 p.m. on December 15, 1984, Fullmer again drove Santiago to the general neighborhood of Lucas' house. (RTT 9008-09.) Zuniga and Fisher were with them in the car. (RTT 9009.) Fullmer drove by the house and then made a U-turn and passed by it yet another time. These were the third and fourth passes of Lucas' house since the photo lineup. (RTT 9009.) As they approached Lucas' house Fullmer heard someone in the car say "this house" or "what about this house." (RTT 9009-11.) At trial Fullmer said he thought it was a male voice. (RTT 9009-10.)[649] His prior testimony indicated that it was Fisher who made the statement.[650]

Gary Fisher's testimony of March 4, 1986[651] also discussed the statement:

---

[649] Fullmer couldn't recall the exact statement or who made statement, but it wasn't him. (RTT 9009-10.) He also did not know if it was a male or female who made that statement, but he thought it was a male voice. (RTT 9010.)

[650] Fullmer testified on February 26, 1986 (RTT 1822-1823), that it was either Hartman or Fisher who made the statement, but Hartman wasn't with them so he knew it wasn't him. (RTT 9011-9013.) This testimony was read into the record. (RTT 9012-13.)

[651] This testimony was admitted as a prior inconsistent statement. (RTT 11272.)

Q. Isn't it correct, Detective Fisher, that someone in the car pointed at the house and specifically said, quote, 'does that house look familiar?' end quote.

A. I don't specifically recall those words. And it's my recollection that she was asked 'do you see something you recognize?' because of her having turned in her seat earlier.

Q. Who made that statement?

A. I don't recall who exactly it was, but I know it was not Mrs. Zuniga. It must have been either Detective Fullmer or myself.

Q. And that was the fourth time, then, that Jodie Santiago had been driven by Mr. Lucas' house; is that correct?

A. That would have been -- would have been the fourth time, that's correct. (RTT 11273.)[652]

After the statement was made, Santiago made an identification of Lucas' house. (RTT 9010.) After her identification, the car was slowed. (RTT 9017.)[653]

Fullmer identified Trial Exhibit 176 as a drawing which attempted to portray the interior of the house Santiago had been taken to. (RTT 9013-14; 9017.)[654] Certain words on the drawing ("bath", "window", "bedroom") were written by Fullmer. The rest of the writing was Santiago's, according to Fullmer. (RTT 9013-16.)[655] Fullmer drew the shape of the house, which he

---

[652] The Court advised the jury that the testimony related to the issue of whether it was Fisher or Fullmer who made the statement in the car. (RTT 11273.)

[653] Fullmer didn't remember whether they stopped in front of the house or just slowed. (RTT 9017-18.)

[654] Fullmer couldn't recall if it was prepared after Santiago's identification of Lucas' house, but he thought it possibly had been afterwards. (RTT 9013.)

[655] The drawing (Trial Exhibit 176) was dated 12/15/84 and bore the (continued...)

had seen from the roadway when they drove by. (RTT 9014-17.) What was drawn inside the shape of the house was at Santiago's direction. (RTT 9016.) None of the detectives had been inside of Lucas' house prior to December 15, 1984. (RTT 9015-16.)[656]

c. Presence Of Other People At Lucas' House

Mitchell Hoehn, who visited Lucas' house many times during May and June 1984, testified that there always were a lot of people at Lucas' house. (RTT 9902.) In addition to Lucas, Rick Adler and Greg Esry were living in Lucas' house at the time. (RTT 3441; 3468-69.) Shannon Lucas was also in and out of the house. (RTT 3441; 3476.)

4. Alibi Evidence

Francine Linker testified that in 1984 her husband, Loren, worked for David Lucas. (RTT 9956.) The Linkers would see Lucas socially from time to time. (RTT 9956.) Lucas visited the Linker house on many occasions. (RTT 9964; 9967.)

Sometime either in the late morning or early afternoon of June 8th a chair the Linkers had ordered was delivered. (RTT 9963-65.) When the chair arrived, Mrs. Linker paid for it by check. (RTT 9958-60.)[657] That evening Lucas came by with Loren. (RTT 9960-61; 9964.) Lucas commented on the chair and told Mrs. Linker it looked "nice." (RTT 9965.) Lucas stayed for a short time, no more than an hour at the very most, then left. (RTT 9960;

---

[655](...continued)
initials J.L.S. (RTT 9014.)

[656] Fullmer testified that when they drove by Lucas' house in the afternoon, they did not go inside of it. (RTT 9015.)

[657] Linker identified Exhibits 710A as the check she wrote to Jerome's Furniture on 6/8/84 and Exhibit 710B as the checkstub. (RTT 9957; 9958.)

9965-66.) That particular evening Mrs. Linker wasn't paying any attention to the discussion Lucas and Loren were having; nor was she paying attention to the particular time Lucas left, but she did note that it was dark out when he left. (RTT 9960; 9966-67; 9970-71.)[658]

Loren Linker wasn't home the day the chair was delivered. (RTT 9979; 10005.)[659] Linker remembered that Lucas was with him when he first came home and saw the chair in his house on June 8, 1984. (RTT 9979; 10002.)[660] It was around 9:00 p.m. and was dark outside. (RTT 9979; 10004-05.)[661]

According to Loren Linker, Lucas stayed at Linker's house about 2 or 3 hours, and left sometime between 11:00 and 12:00. (RTT 9979-80; 10002; 10005.)

Santiago was abducted between 10:30 and 11:00 p.m. (RTT 7324; 7399.)

---

[658] Mrs. Linker testified it was neither early evening nor late evening when Lucas left. (RTT 9960; 9966.) She considered 5:00 to 6:00 p.m. early evening and 11:00 p.m. to be late evening. (RTT 9966.) She couldn't remember if either she or Loren had used drugs or alcohol that evening. (RTT 9968-69.)

[659] Linker testified that to the best of his knowledge he worked on June 8, 1984 and later he and Lucas went to his house. (RTT 10001-02.)

[660] Linker testified that that day was the only time they received a chair from Jerome's while they lived at that address. (RTT 9980.)

[661] On June 8, 1984, sunset was at 7:55 p.m. and twilight ended at 8:23 p.m. Pacific Daylight Time. (RTT 10600.) It would have been dark at 8:23 p.m. (RTT 10600.)

C. Other Offenses Evidence

For narrative testimony regarding wound comparison see Volume 2 § 2.2(Q), pp. 122-27, incorporated herein.

For a comparison of Santiago to Jacobs, see Volume 2, Chart 2.2(R)(2), pp. 130-31, incorporated herein. For a comparison of Santiago to Garcia, see Volume 5, Chart 5.1.2(C)(1), pp. 1271-72, incorporated herein.

CHART 3.2(C)(1) – COMPARISON OF SANTIAGO TO STRANG

Factor	Jodie Santiago	Rhonda Strang
Victim Age	34 (RTT 21 [Op. Arg])	24 (RTT 6983)
Single/Multiple Victims	Single	Multiple
Number of Strokes	One stroke (RTT 3703); sawing or carving motion (RTT 3692; 7057; 7062)	5 distinct cutting injuries to cervical vertebrae (RTT 6993)
Location of Throat Wounds	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)	Cut went through upper portion of the thyroid cart., below the hyoid, through top part of body of larynx (RTT 6998; 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?	One (left) external jugular vein severed; internal jugulars and carotids not cut (RTT 3686)	Both carotid arteries; all jugular veins (RTT 6988)
Direction Of Throat Wound	—	Right to left (RTT 6986-88; 7010)
Stabs to Torso	No	No (RTT 6984-85)
Hypoxia/Petechiae	—	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	Yes (RTT 3694; 7073; 7075)	Yes (RTT 6992; 7059)

Lip/Tongue Wounds	---	No (RTT 7018)
Other Injuries To Face/Head	Severe closed head trauma; skull fractures (RTT 3695); concussion (RTT 3714); brain swelling (RTT 3717); amnesia (RTT 3711)	1/4" superficial cut at right border of neck wound [point of origin] (RTT 6986)
Other Nondefensive Injuries	No	Right shoulder 4" right of midline, superficial hemorrhagic area, 1/4" diam. (RTT 6990; 7011-12)
Defensive Wounds	Middle and ring finger of right hand cuts; cut through tendons to bone (RTT 7054-55; 9395-96)	None noted (RTT 7009-10)
Sexual Overtones of Attack	Yes; nude from waist down (RTT 3048); Slides made from vaginal swabs detected sperm cells (RTT 8766-71; 10862-63 [Exhibits 689, 690, 691].)	No (RTT 6985)
Had Advertised In Paper	No	No
Victim Abducted?	Yes; off street (RTT 7325-7334)	No (See place of attack)
Victim Tied Up?	Yes (RTT 7340)	No
Place of Attack	Taken to house and choked (RTT 7338-44); found alongside a public street (RTT 2997-99; 3033-34)	Inside own home (RTT 3201-02)
Time of Attack	Late evening [around 10:30-11:00 p.m.] (RTT 7324)	Morning/Early Afternoon [between 9:00-9:30 a.m. and 1:30 p.m.] (RTT 3395; RTT 3402-03)
Moved After Attack	Yes (see above)	Not noted
Victim's Clothing	No apparent cutting of clothing	Not indicated (but in limine testimony was fully clothed w/o shoes (RTH 4301))
Acquainted w/ Lucas	No	Yes (RTT 3425)

CHART 3.2(C)(2) – COMPARISON OF SANTIAGO TO SWANKE

Factor	Jodie Santiago	Anne Swanke
Victim Age	34 (RTT 21 [Op. Arg])	22 (RTT [Op. Arg] 21)
Single/Multiple Victims	Single	Single
Number of Strokes	One stroke (RTT 3703); sawing or carving motion (RTT 3692; 7057; 7062)	More than one stroke; 7 strokes on left side and 4 on right (RTT 4867-68)
Location of Throat Wounds	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)	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?	One (left) external jugular vein severed; internal jugulars and carotids not cut (RTT 3686)	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	No	No
Hypoxia/Petechiae	---	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	Yes (RTT 3694; 7073; 7075)	Yes (RTT 4854; 4836-64); Dog chain found around neck (RTT 4703; 4864; 4997)
Lip/Tongue Wounds	---	Yes, hemorrhage due to tongue being clenched b/t teeth (RTT 4905; 7194; 4910)
Other Injuries To Face/Head	Severe closed head trauma; skull fractures (RTT 3695); concussion (RTT 3714); brain swelling (RTT 3717); amnesia (RTT 3711)	Minor injury 1" behind lower portion of left ear (RTT 4976)

Other Nondefensive Injuries	No	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	Middle and ring finger of right hand cuts; cut through tendons to bone (RTT 7054-55; 9395-96)	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	Yes; nude from waist down (RTT 3048); Slides made from vaginal swabs detected sperm cells (RTT 8766-71; 10862-63 [Exhibits 689, 690, 691].)	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	No	No
Victim Abducted?	Yes; off street (RTT 7325-7334)	Yes, off street (RTT 4722)
Victim Tied Up?	Yes (RTT 7340)	Possibly [linear mark on right wrist (RTT 4923)]
Place of Attack	Taken to house and choked (RTT 7338-44);found alongside a public street (RTT 2997-99; 3033-34)	Kidnapped off street; place of killing unknown–found outside in remote area (RTT 4549-53; 4701-02; 4722)
Time of Attack	Late evening [around 10:30-11:00 p.m.] (RTT 7324)	Early morning [between 1:15 or 1:30 a.m.] (RTT 4549-53; 4552; 4561; 4599-4600)
Moved After Attack	Yes (see above)	Unknown; kidnapped off street; place of attack unknown–found outside in remote area (RTT 4701-02)
Victim's Clothing	No apparent cutting of clothing	Clothing was cut (RTT 4706)
Acquainted w/ Lucas	No	No

3 SANTIAGO CASE

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

3.3.1 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL STATEMENT OF FACTS[662]

A. The Attack

On June 4, 1984, Jodie Santiago[663] arrived in San Diego to visit her brother. (RTH 4482-83.)[664] On Thursday, June 7, Santiago and her brother went to a Mexican restaurant where she had some Margaritas. Santiago met a man by the name of Neil Reynolds,[665] who took her back to his apartment where they spent the night. (RTH 4567-68; 4609-11; 5636-37.)[666]

On Friday, June 8, Santiago left her brother's apartment on foot around 7:00 p.m. or 7:30 p.m. for Baxter's, a nearby restaurant and bar. Santiago,

---

[662] The facts set forth in this pretrial statement of facts were before Judge Hammes during pretrial hearings on suggestive identification procedures and related issues.

[663] At the time of her testimony, Ms. Santiago had remarried and went by the name Jodie Lee Robertson. (RTH 4482-83.) However, for the sake of clarity, she will be referred to as Jodie Santiago in this brief.

[664] Her brother lived in an apartment complex on Petree Street. (RTH 4483.)

[665] When she testified on March 23, 1987, Santiago could not remember Neil's last name. (RTH 4567.)

[666] The Neil Reynolds evidence was excluded at trial because, in the judge's view, it would have made Santiago look like a "loose lady." (RTH 24941; 24943; 25095.)

who was alone, had a few Margaritas[667] and then started walking back to her brother's apartment some time between 10:00 p.m. and 11:30 p.m. (RTH 4483-84; 5614; 5628.)

When she was about 50 feet from the parking lot of her brother's apartment complex, a man walked past her and then came up from behind and put a knife to her throat. He told her that she was to go with him and if she screamed or tried to get away he would cut her throat. (RTH 4484-85; 4679.) 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. (RTH 5628.) As they approached the attacker's car Santiago had a good view of the license plate which she tried to memorize. (RTH 4604; 5649.) She was forced into the attacker's car from the driver's side. (RTH 4485-86.) She didn't hear any computerized voices coming from the car. (RTH 4583-84; 5615.)

The man placed the knife on the dashboard and drove to a house which took about 15-20 minutes. (RTH 4485-86.) She tried to remember the street signs along the way. She was seated between the bucket seats and saw the man's face through the rear view mirror. (RTH 4486-87.)

The man took Santiago into the house.[668] He took her down a corridor to a back bedroom where he tied her hands behind her back. (RTH 4487.) She was then moved to another bedroom where she was forced to sit on the bed. (RTH 4487.) The man left for a few moments and returned with a beer and asked for cigarettes. (RTH 4487.) He took cigarettes from her purse and lit one up. He forced her face down on the bed. When she began to cough,

---

[667] She testified that she had two Margaritas but told the police that she had three drinks that night. (RTH 4564; 5613 [two or three Margaritas].)

[668] Santiago testified that the lighting was adequate to see his face and he did not attempt to hide his face. (RTH 4488-89.)

he choked her. The next thing she remembered was being in the hospital. (RTH 4488-89.)[669]

B. Santiago's Hospitalization

On the morning of June 9, 1984, Santiago was found alongside the road at the intersection of Lyons Drive and Calavo Drive in San Diego County. (RTH 5306.)[670] She was taken to the hospital where she remained in intensive care for approximately 10 days. (RTH 4527-28; 4588; 4591-93.)

Dr. Charles Geiberger treated Santiago at Grossmont Hospital on June 9, 1984. She had scalp lacerations on each side of her head and an extremely large laceration to the neck, and small lacerations on two of her fingers. X-rays revealed two skull fractures. (RTH 4865-66.) Geiberger believed that the two head wounds were caused by a blunt object. (RTH 4866.) 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.) Santiago's blood pressure was lower than normal and impacted the flow of oxygen to the brain. (RTH 4892.)

A C.A.T. scan of Santiago showed an edema, which is fluid on the brain. Such an edema impairs an individual's cognitive processes and would have discouraged Geiberger from relying on any information given by

---

[669] Santiago's testimony failed to explain the defensive wounds to her hands and fingers. (See § 3.3.1(C), p. 815 below, incorporated herein.) Santiago had also told Detective Henderson that she believed that she spent four or five hours with her attacker. (RTH 6032; In Limine Exhibit 77.)

[670] This was an unincorporated portion of the county, adjacent to El Cajon and La Mesa, commonly referred to as Calavo Gardens. (RTH 5306.) It was approximately one mile from Lucas' house. (RTH 5494.)

Santiago. (RTH 4894.) Also, there was air inside Santiago's skull and there was some general brain swelling. (RTH 4886.) While in the hospital, Santiago was given Demerol, which can have an impact on a person's ability to think clearly. (RTH 4898.) Demerol slows down the thinking process. (RTH 4910.)

Dr. Heywood Zeidman, a psychiatrist, saw Santiago twice while she was hospitalized. (RTH 17656-57.)[671] On at least one occasion, Santiago was able to speak to Dr. Zeidman although she had suffered "severe trauma." (RTH 17662-64; 17669-70.) Dr. Zeidman concluded that Santiago was psychiatrically very troubled. (RTH 17662-64.) He felt that additional testing for memory function should be conducted at a later time. (RTH 17660-61.) Dr. Zeidman noted that Santiago was taking Demerol in the amount of one to two doses per shift. (RTH 17664-65.)

Jodie Santiago later testified that she could not remember anything that happened in the hospital during the first 10 days.[672] Even though she was interviewed on several occasions by detectives during those 10 days, and even though she answered questions during those interviews, she could not remember anything about the interviews. (RTH 4588; 4592.)[673] Nor did she remember being interviewed in the hospital by Dr. Ziedman. (RTH 4592-93 [she remembered neither the first nor second Ziedman interview].)

---

[671] Dr. Zeidman's progress reports were dated June 14, 1984 (Exhibit 591) and June 16, 1984 (Exhibit 592).

[672] Geiberger diagnosed her with amnesia. (RTH 4889.)

[673] However, Santiago testified that her memory of the abduction and assault was just as good at the time of her testimony (on March 23, 1987) as it was between June and December, 1984. (RTH 4669.)

C. Defensive Wounds

Santiago suffered injuries to her hand. (RTH 4615.)[674] She had lacerations on two of her fingers which were described as "defensive wounds." (RTH 4865; 9395; 11798.)

D. Pretrial Identification Procedures By Law Enforcement During Santiago's Hospitalization

Detectives Henderson and Fullmer of the San Diego County Sheriff's Office conducted numerous interviews with Jodie Santiago while she was in the hospital. The first contact took place in the intensive care unit on June 10, 1984, the day after she was attacked. (RTH 5312.) She was highly sedated and in great pain. (RTH 5310.) She could not talk and did not communicate with the detectives that day. (RTH 4529-30; 5310-11.)[675]

The next contact between the detectives and Jodie Santiago was June 11, 1984. According to Fullmer, he asked her questions to which she responded in writing as follows (RTH 5316-20):

Exhibit 66 (RTH 5320-21):

Q. What is your name?
A. Jodie L. Santiago.
Q. Do you have any relatives in San Diego?
A. My brother Terry.
Q. Where are you from?
A. Washington; Seattle, WA.

---

[674] Santiago did not know how her hand was injured. (RTH 4615.)

[675] On June 10, 1984, Henderson and Fullmer obtained two pieces of paper (Exhibit 61 and Exhibit 62) which Santiago had apparently written prior to their arrival. These notes contained the following writing: "Angel Santiago" – "Jodie Santiago, Seattle" – "2025 39th" and a phone number. (RTH 5313-15; 6010-11.)

Exhibit 63 (RTH 5319):

Q. Where does your brother live?
A. El Cajon.
Q. What is your brother's [last] name?
A. Hopperstad.
Q. What is your age?
A. 34.
Q. What is your brother's age?
A. 37.

Exhibit 64 (RTH 5320):

Q. What kind of vehicle does your brother drive?
A. Brown Colt.

However, the above questions do not necessarily reflect the exact wording that was used. (RTH 5582.) Neither Fullmer nor Henderson wrote down the exact wording and neither had any recollection of the precise questions which generated Santiago's responses. (RTH 5581-82; 6017.) The interview was not recorded and any notes taken by the detectives were shredded. (RTH 5573-74; 6014-15.)[676]

Dena Warr,[677] the ICU nurse who treated Jodie Santiago, was present when Santiago made the written responses to the detectives instructions on

---

[676] Fullmer's normal practice would have been to take notes regarding his contacts with Santiago, but to shred those notes after preparing his report. (RTH 5574.) Fullmer's report of the June 10, 1984 contact was prepared on December 18, 1984. (RTH 5586.)

[677] Warr had assisted other detectives in obtaining descriptions and had developed techniques for communicating with persons who cannot speak. (RTK 1780.) She aided the Sheriff's Detectives in obtaining a description of the assailant from Santiago who had a tracheotomy and was intubated. (RTK 1782.)

June 11, 1984.[678]/[679] According to Warr, the "brown Colt" response in Exhibit 64 was written in response to an inquiry regarding the car in which Santiago was abducted. (RTK 1795-96.)[680] Jodie Santiago had "no idea" what question prompted the "Brown Colt" response. (RTH 4601.)[681]

On either the day or day after Jodie Santiago was found, Detective Henderson spoke with John Bludworth, a police agent for the City of El Cajon. (RTO 3392-93.)[682] In response to this conversation, Bludworth dictated a memo for distribution to the patrol units with the following descriptions of the suspect: "White male, 25 to 30, six foot, slender, short blond hair, very blond."

---

[678] Warr remembered the detectives visiting Santiago twice on June 11. (RTK 1785.) However, Fullmer testified he was sure there was only one visit on June 11. (RTH 5582-85.) Henderson did not remember a second visit but wasn't sure. (RTH 6-23-24.)

[679] At the time of this interview, Santiago's vital signs were stable. She was not "on her death bed." (RTK 1783.) Warr was present during both of the interviews that day with the police. (RTK 1785.) The description that Santiago provided was "tall and slender." No age was given but Warr was led to believe the assailant was comparatively young. (RTK 1787.) The communication between Santiago and the police was mostly written but some was by nods and lip reading. Warr was not sure if Santiago had taken pain killers but knew they had been prescribed. (RTK 1793.)

[680] Warr's testimony before Judge Kennedy on January 6, 1987, was admitted at the hearing before Judge Hammes pursuant to stipulation. (See RTH 23167; Court's In Limine Exhibit 13.)

[681] A DMV check revealed that Santiago's brother, Terry Hopperstad, owned a brown Colt. (RTH 5753-54.)

[682] Reporter's Transcript of Pretrial Testimony before Judge Orfield admitted for consideration by Judge Hammes by stipulation. (RTH 23167-68; In Limine Court Exhibit 13.)

Bludworth's memo contained the following description of the vehicle: "Brown two-door compact, fairly new, bucket seats, center gear shift." The memo contained the following description of the offense: "From Baxter's to Timbers about 11:30 p.m. Contacts in parking lot. Drives 10 minutes. Taken into house. Raped. Beaten on head. Multiple skull fracture. Throat cut ear to ear." (RTO 3395; Pretrial Exhibit RR.)

Agent Bludworth's notes also included the following entry: "Brother did it. Refused prosecution. May have been the head injury. Fits description of suspect." Bludworth explained this entry as follows: "If I remember correctly, Detective Henderson advised me that in his initial contact with Jodie Santiago she was delirious, possibly from the head injuries, and he believed that some of the statements that she made indicated that her brother may be a suspect, but he was just guessing at that, and that it possibly would wind up that the end result would be a no prosecution, if it did turn out to be a family situation." (RTO 3396:22-28.)

The next interview was on June 15, 1984. (RTH 5586-88; 6027.)[683] Both Fullmer and Henderson asked Santiago questions. (RTH 6026-27.) However, the detectives had no notes or other record of what questions that were asked. (RTH 6028-30; 6040; In Limine Exhibit 76 [exhibit fully memorialized her answers to the questions put to Santiago on June 15, 1984].) Nor could the detectives remember if they asked follow-up questions. (RTH 6028.) Detective Henderson's testimony regarding the June 15, 1984 interview was the following:

> Q. When you asked her about the hair of the individual, she indicated blond hair; is that

---

[683] Henderson's report of the June 15, 1984 contact was written on January 3, 1985. (RTH 5603.)

correct?

A. Yes.

Q. When you asked her about the height of the individual, she indicated "Tall, about six feet two." Is that correct?

A. Yes.

Q. Did you ask her when she said "About six-two" what her best estimate of the height parameters were or how sure she was? Did you press her at all in obtaining information?

A. No, not that I recall.

Q. Did you try and follow up some of her answers? For instance, when she said "Tall, about six-two," did you ask her: Well, could he have been six feet? Could he have been six-four?

A. I don't remember.

Q. With respect to the eye description, did she tell you anything other than, quote, "Blue eyes, I think," end quote?

A. No.

(RTH 6028:12-28; 6029:1-11 [Testimony of Detective Henderson]; see also RTH 5604: 2-3 [People's Exhibit 76].)

With reference to the house where she was taken, Santiago wrote on June 15, 1984: "Four to five hours, rear bedroom, bed/dresser." (RTH 5604-05; Exhibit 77.) Santiago also wrote down a possible route to the house but it was not possible to follow her route because of a dead end. (RTH 5605; 5634-35; 6031-32; Exhibit 78.) Santiago described the attacker's car as a "brown, two-door, possibly a 280-Z." (RTH 6029.)[684] Santiago did not tell the detectives that the attacker said he had been hired by her boyfriend to scare her. (RTH 6029-30.) Santiago described the attacker's eyes as blue but she

[684] Santiago had no recollection of mentioning a 280-Z as a possible vehicle until December 1984. (RTH 4702.)

didn't mention anything about them being "bugged" or larger than the sockets. (RTH 6029.)

At the next interview of June 21, 1984, Santiago was mobile and could talk. She described her attacker as 6'2" tall, blond, approximately 25-30 years old. (RTH 5625; 6039.) She also described him as neat in appearance. (RTH 5599; 5625; 6039.) She described the vehicle as a small brown sports car type with two doors, bucket seats, and a standard four-speed transmission. (RTH 5600.) She had the impression that it was a 280-Z but could not be certain. (RTH 5625; 6039-40.) She also mentioned, for the first time, that her attacker said he had been hired by her boyfriend to scare her. (RTH 6041.) She didn't mention anything distinctive about his eyes.[685]

At the next interview on June 26, Santiago indicated that the attacker was only six feet tall, not six-two. (RTH 6042.)[686] Also, for the first time she said he had collar length hair and a mustache. (RTH 5639; 6044-46.) She described the car as having a "tan interior, maybe sheepskin." (RTH 5741.) Santiago did not mention anything about the assailant that was unusual or distinctive. (RTH 6041-43.)[687]

On June 26, 1984, Detective Fisher had his first contact with Jodie

---

[685] Santiago did not remember what she told the detectives. (RTH 4527-28; see also § 3.3.2(B)(1)(a), pp. 848-50 above, incorporated herein.)

[686] The report of this interview was written by Detective Henderson. (See RTH 5603; see also Defendant's In Limine Exhibit 6-K.)

[687] Henderson took notes of the June 26 interview (Exhibit 70), but he had no record or recollection of the precise questions that were asked. (RTH 6043.) It was Henderson's custom and practice to ask eyewitnesses whether they remembered anything highly distinctive about the assailant. (RTH 6043.) However, Henderson could not remember whether he did so on June 26, 1984. (RTH 6043.)

Santiago when he met her in the hospital and returned property to her. (RTH 6195; cf., RTH 6049 [Henderson: ring returned].)

On June 27, at another interview session, Santiago mentioned meeting, and spending the night with, Neil Reynolds the night before the attack. (RTH 5636-37.) Santiago also stated that the attacker said: "Stay cool, and you won't be hurt. Period." Santiago said the attacker told her he was "doing it for a friend." (RTH 5637.)

E. Events After Santiago's Release From The Hospital And Return To Seattle

After Santiago left the hospital on June 28, 1984, she returned to Seattle. (RT 4612-13.) Within a week of returning to Seattle she saw her family physician, Dr. Snow. (RTH 4613; 4615-16.) She was experiencing headaches, dizziness and had injuries to her hands. She was also having a major psychological problems. (RTH 4613-14; 4615-16.)[688] Santiago also saw a Seattle neurologist, Dr. Kamn. (RTH 4617.)

Santiago received therapy from a rape crisis counselor, Lucy Berliner, from July through November 1984. (RTH 4619-20.) Berliner diagnosed

---

[688] Dr. Snow saw Santiago on numerous occasions from July, 1984, through July, 1986. (RTO 7956-81.) Santiago was suffering from headaches, dizziness, as well as major psychological disturbance. (RTO 7963-64; 7970-71; 7975.) Dr. Snow attempted to counsel Santiago regarding her psychological problems and prescribed antidepressant pain medication. (RTH 7965; 7973-74; 7979; 7991.) However, the pain medication did not solve the problems. As late as March 5, 1985, she was still complaining of dizziness and headaches. She said her head felt like it was in a vise and the pain medication (Tylenol with codeine) had not given her much relief. (RTO 7975-76.)

Santiago with acute Post Traumatic Stress Disorder ("PTSD"). (RTK[689] 1655; RTH 4619-21.)[690] Berliner testified that Santiago's symptoms got worse as time went on in 1984. (RTK 1658.) They were serious enough to be disabling and on January 8, 1985 Berliner wrote a letter in support of Santiago's claim for disability. (RTK 1656.) At Santiago's request, Berliner arranged for a composite drawing with Detective Gillis of the Seattle Police Department. (RTH 4622; PHRT (CR 75195) 728-48.)[691] Santiago did an Identi-Kit composite with Detective Gillis. (RTH 4623; In Limine Exhibit V.) Berliner and Santiago's friend, Diane Day, were also present. (RTH 4624-25.)[692] One of Berliner's therapeutic goals was to help Santiago get her

---

[689] Berliner's testimony before Judge Kennedy (RTK 1643-1710) was admitted before Judge Hammes by stipulation. (RTH 18640-41.)

[690] Santiago discussed her private and personal feelings and experiences with Berliner including her current depression and past (pre-June 1984) suicide attempt. (RTK 1658; 1686.)

[691] This portion of the preliminary hearing on July 1, 1985 was admitted by stipulation. (See RTH 23167, In Limine Court's Exhibit 13.)

[692] This composite was prepared on October 26, 1984, by Detective Michael Gillis of the King County Sheriff's Department using an "Identi-Kit." (PH (7/1/85) RT 728.) The results of this session are depicted in In Limine Exhibit V. (RTH 4623-24.) Gillis admitted he did not have a very good recollection of this session (PH (7/1/85) RT 730), but he did recall that Santiago expressed dissatisfaction with the hair as depicted stating that the color was too dark and the style was not quite correct. (PH (7/1/85) RT 742.) Due to Santiago's frustration with the hair, Gillis allowed her to look through the Identi-Kit Handbook at all the various hairstyles. (PH 7/1/85) RT 744.)

Santiago was also dissatisfied with the eyes on the composite and Gillis allowed her to look through the Identi-Kit Handbook for eyes as well. (PH (7/1/85) RT 745.) The process used by Gillis was to "focus" on the areas of dissatisfaction. (PH)7/1/85) RT 746-47.) Gillis had no written record of Santiago's dissatisfaction. (PH (7/1/85) RT 747.) The composite session with

(continued...)

assailant off the streets. (RTH 4628.) Santiago wanted Lucas to be incarcerated. (RTH 4542; 4640.) Berliner assisted Santiago in her dealings with law enforcement. She contacted the San Diego authorities on Santiago's behalf. (RTK 1679.) In November 1984, Berliner referred Santiago to Dr. Freed who continued her therapy until April, 1985. (RTH 4621-22.)[693]

On December 4, 1984, the detectives, who had flown from San Diego to Seattle, had an all-day session with Santiago. (RTH 4631; 5648; 6062-63.) By this time, Santiago trusted Detectives Henderson and Fullmer. She believed that they had come to Seattle to help her. She wanted, as best she could, to provide them with assistance. (RTH 4631.)[694]

On December 4, 1984, Santiago worked on the composite with Detective Bove from about 10:00 a.m. until 12:30 p.m. (RTH 4633; 5653-54; 6061-63.) She had lunch and a glass of wine with the detectives and then they

---

[692](...continued)
Gillis was not recorded. (RTH 4624.)

Gillis sent the composite to San Diego a few weeks later but did not include a cover letter detailing Ms. Santiago's reservations. (PH (7/1/85) RT 734.) He had some recollection that he may have told someone in San Diego about these reservations but could not recall who it was or when the conversation took place. (PH (7/1/85) RT 743-744.)

[693] Freed conducted numerous therapy sessions with Santiago starting on November 26, 1984 and continuing through April 22, 1985. (RTO 7843-47.) Santiago talked about her private and personal feelings including feelings of depression (RTO 7857-58; RTK 1748-51); suicidal thoughts (RTO 7860); guilt/survivor syndrome (RTO 7865-66; RTK 1716); low tolerance for frustration (RTO 7871); etc. Freed concluded that Santiago had chronic and acute Post Traumatic Stress Disorder. (RTO 7856; RTK 1718-19.)

[694] Between August and December, 1984, Lucy Berliner was in contact with Detective Hartman of San Diego. (RTH 4627-30.) On December 3, 1984, Fullmer and Henderson visited Berliner in her office and discussed the scheduled interview with Santiago. (RTH 5647-48.)

interviewed her in the afternoon. (RTH 4633; but see RTH 5654 [Fullmer couldn't remember what Santiago drank at lunch]; RTH 6061 [Henderson didn't think Santiago had alcohol at lunch].) During the afternoon session they took a break during which Santiago had a beer. (RTH 4633; 6051-63.)[695] These sessions were recorded except for the composite session, the lunch break and the afternoon break. (RTH 4631-32; 5601; 6061-63.)[696]

During the interview on December 4, 1984, Santiago described her attacker as follows:

- 5'10" tall and 180 pounds. (RTH 5656.)
- "Neat in appearance but not overly well-dressed." (RTH 5656.)
- "He didn't appear scrubby and scroungy." (RTH 5656.)
- The hair was "feathered," "laid back" and "somewhat wind-blown." (RTH 4660; 4647-48.) She also described the hair as "collar-length." (RTH 6044-45.)[697]
- He had a mustache which did not go below his lip. (RTH 5658.) The assailant did not have a beard. (RTH 4648.)
- He was "healthy-looking." (RTH 4648.)
- He was not a "muscle-building" person. (RTH 4648.)

---

[695] Without stipulating to its authenticity, the defense offered a transcript of the December 4, 1984, interview to refresh the recollection of Detective Henderson. (In Limine Exhibit NN; RTH 6064-65; 5650 [Exhibit K before Judge Kennedy].)

[696] Two different transcripts were made of this tape and admitted into evidence as In Limine Exhibit MM. (RTH 5659-61; 6064-65; 6068-70.) The original tape was given to the defense to review and for purposes of identifying unintelligible portions of it. (RTH 5699.)

[697] She did not describe it as "parted" in the middle. Rather, she said it was "falling away from the middle." (RTH 5657.)

- He wore a blue, "polo-type looking shirt that had buttons halfway down." (RTH 4648.)
- "One thing that stands out first and foremost in my mind is his eyes. It was like they were small, but bugged out." (RTH 5660.) [This was the first time Santiago had mentioned anything distinctive about the eyes. (RTH 5611).]

As to the car Santiago testified that:

- The car was an automatic because she didn't see the man shift. (RTH 6067-69.)
- The seat covers were sheepskin. (RTH 4680.)
- She was also "pretty sure" there was a back seat in the car. (RTH 5650.)
- The car had louvers on the back window. (RTH 5649-50; 4680; 4703-04 [what "stands out" about the assailant's vehicle were the "louvered windows on the rear."].)

Santiago also stated that she had specifically tried to memorize the license plate of the abductor's vehicle. (RTH 5648-49.) She saw the plate when she was first being taken to the car. (RTH 4603.) She recalled that it was a California plate with three letters and three numbers. (RTH 5649; see also 4604.)

She also said she was certain she would recognize the house she had been taken to if she saw it again. (RTH 5679.)[698]

F. The Arrest Of Lucas And The Photo Lineup

Detective Henderson denied that Lucas had been discussed prior to

---

[698] Santiago made some notes after the interview on December 4, 1984. (RTH 4696-99; In Limine Exhibit 69.)

December 4, 1984. (RTH 6060.) A routine warrant check revealed that Lucas had been arrested in July of 1984 on a drunk driving charge and a warrant was out for his arrest. (RTH 5328.)

Lucas was arrested on this warrant on December 13, 1984, as he was driving his truck. (RT 549-550.) He was taken to the Lemon Grove substation where the arresting officer, Frank Winter, took several color Polaroid photos of him at Fullmer's request. (RTH 5328; 6080.)

However, Fullmer wanted a closer view of Lucas' face so he asked Winter to take some closer shots. (RTH 5672-73.)[699] Fullmer selected a photo with a closer view for the photo lineup. (See In Limine Exhibit GG6-GG13.)[700]

Fullmer then assembled a six person photo lineup with photos[701] that were "consistent with the photograph of Lucas . . . ." (RTH 5673-74.)[702] Fullmer was not "trying to put together a lineup . . . of men that were

---

[699] Fullmer and Henderson ended up with a number of photos of Lucas from which to choose. (RTH 5668; Exhibit GG [Lucas was GG6-GG13; Bill Johnson – the person riding in the car with Lucas who was not a suspect was GG1-GG5] (RTH 6089.).)

[700] Fullmer could not remember if he selected the closer view of Lucas due to Santiago's description of the attacker's bulging eyes. (RTH 5672-73.)

[701] The other photos were chosen from those available at the Lemon Grove station. (RTH 6090.) Neither Fullmer nor Henderson had "any idea" how many photos were in the selection. (RTH 5668-69.) The source photos were not preserved. (RTH 5669; 6090.)

[702] Detective Henderson, who assisted in putting together the photo lineup, testified that they were "seeking to put together a fair photo lineup, which would include people of similar appearance." (RTH 6086.) Henderson also testified that they were trying to include photos similar in appearance to Santiago's description of the assailant on December 4. (RTH 6087; 6091.)

relatively consistent with the description which Santiago had provided . . . ." (RTH 5673-74.)

On December 14, 1984, Detective Henderson contacted Jodie Santiago in Seattle and asked her to fly down to San Diego to view the photo lineup. (RTH 5475; 6081.) Henderson told Santiago something along the lines of the following: "We have a possible suspect [and] we would like you to go through a lineup to determine whether or not he is in fact the man who accosted you and, if so, to please tell us." (RTH 490; 4647.)

In response to this request, Santiago flew down that day. (RTH 6081.)[703] Upon her arrival in San Diego, Santiago was taken to the Holiday Inn in downtown San Diego. (RTH 5475-76.) Santiago was met in the hotel lobby by the detectives and Deputy Zuniga around 11:30 p.m. on December 14. (RTH 5475-76; 6028; 6297.)

Santiago then went up to a hotel room with Detective Fullmer, Detective Henderson, and possibly Deputy Zuniga (Santiago's "bodyguard" [RTH 6288; 6295]) where she was shown the photo lineup (In Limine Exhibit 59)[704] after being given the "standard" admonition. (RTH 5476-77; 6208; 6302-03.)[705] Santiago testified that she was told something like: "We want

---

[703] A prepaid ticket was waiting for her at the airport. (RTH 6081.)

[704] When Santiago testified at least one of the pictures was slightly out of alignment from its original position. (RTH 5669-70.) In Limine Exhibit I I, a photograph of the original lineup, portrayed the photos in their original positions. (RTH 5670-71; 5671-72.)

[705] According to Fullmer, he read the following to Santiago (RTH 5476-77; Exhibit 63): "I am going to ask you to look at a group of six photographs. You should not infer anything from the fact that the photographs are being shown to you or that we have a suspect in custody at (continued...)

you to take a look at this lineup and to take your time and, if you see the man that accosted you, to point him out." (RTH 4655:15-17.)

There is a contradiction in the record as to how long Santiago viewed the photo spread before responding. According to the form filled out by the detectives, Santiago pointed to Lucas' picture (# 2) "immediately." (See Exhibit 63.)[706]/[707] However, Santiago testified that she carefully scrutinized

---

[705](...continued)
this time. Please look through the photographs and see if you can identify any of the individual pictures."

[706] There is also a contradiction in the record as to when Santiago saw the photo lineup. Deputy Zuniga testified that the lineup was shown to Santiago the day after she arrived. (See § 3.3.1(I), p. 830 below, incorporated herein.)

[707] Although not formally before Judge Hammes when she ruled on the identification motion the following colloquy illustrates the discrepancy between Santiago's testimony and that of the detectives:

> Q. [Williams] With respect to the actual display of Exhibit 18 [photo lineup] to Miss Santiago, is there, in your recollection, a time span that one the photos were within her view, that she – a time span that she took to select a photograph?
>
> A. [Fullmer] She immediately, I would say, within one or two seconds picked photograph number 2.
>
> Q. When she picked photograph number 2, did she actually point to it or verbalize?
>
> A. She touched the photograph with her finger.
>
> Q. Would you please demonstrate by utilizing that plain manila folder, opening it and demonstrating , in terms of time, the amount of time Miss Santiago took to touch her finger on Exhibit 18.
>
> A. After reading the form, I opened the photographic lineup like this (indicating). She immediately said, "That's him" (pointing).

(continued...)

each photo and took "a couple of minutes" before choosing photo # 2. (RTH 4658.) When asked if she was sure Santiago said, "You bet" or "Yes." (RTH 4663; 5478.)

In Santiago's opinion the photograph of Lucas was the only one which had bulging eyes. (See § G, below.)

G. In Santiago's View, Lucas' Photo Was The Only One Which Matched Her Description Of The Attacker

Jodie Santiago testified that only three out of the six photos had mustaches that were similar to the one she described. (RTH 4659-60.) She also testified that Lucas was the only person in the photo spread wearing a blue shirt. (RTH 4658-59.)

It was also her opinion that Lucas' photo was the only one with "bulging eyes." (RTH 4704-05; see also 7595; cf., 17939-41 [Buckhout: Lucas' eyes stand out in the photo].)

H. Post-Lineup Interaction Between Santiago And The Detectives

Both Fullmer and Henderson denied that Santiago was told that she had selected the suspect, David Lucas. (RTH 5685; 5693-94; 5696; 6093.) However, according to Santiago, after she made her choice the detectives said

---

[707](...continued)

Q. And pressing her finger down as hard as you just did?

A. Yes.

[Williams]: May the record show that approximately two seconds passed between opening of the folder and the touching of the photograph.

The Court [Judge Wayne Peterson]: Yes, that's –

[Gilham]: I would say it was less than that, your Honor.

The Court: Well, it was a certainly instantaneous type of response. The record will reflect no more than two seconds. (PHT (73093) Vol. VII (2/20/85) pp. 1133-34.)

she had selected Lucas. (RTH 4673; 4677.) Henderson also denied that Santiago had a drink in the lounge with the detectives after the photo lineup identification. (RTH 6093-94; see also 6209-10 [Fisher: no recollection].) However, Fullmer and Santiago testified that after the photo lineup they all went downstairs to the hotel lounge and had a drink. (RTH 4663-64.) Santiago had a glass of wine, which was purchased by the detectives. (RTH 4663-64.) Detective Hartman, who had not been present during the photo lineup (RTH 6208), and Deputy Zuniga were also present and had a drink with Santiago in the lounge/bar area. (RTH 4664; 5676-78.)

I. Whether Santiago Saw The Photo Lineup In The Homicide Office On December 15, 1984

The detectives arranged to bring Santiago into the homicide office at 9:00 a.m. on December 15, 1984, to prepare warrants, meet with Deputy DA Dan Williams and to have Santiago look at Lucas' truck. (RTH 5683; 6098.)

That morning, Fullmer picked up Santiago and Zuniga at the hotel and brought them into the homicide office. (RTH 5684.)

According to Deputy Zuniga, the photo lineup was laying on a desk and Santiago pointed to one of the photos. (RTH 6298; 6301-02.)[708]

J. Identification Of Lucas' House And Vehicle Seat Covers

See § 3.4.1, pp. 896-901 below, incorporated herein.

K. Expert Testimony Regarding Eyewitness Identification

1. Judge Hammes' Ruling That Buckhout And Loftus Were Not Experts

Judge Hammes originally ruled that expert testimony on eyewitness

---

[708] Bill Green was also present but Zuniga did not recall him being in the room at the time Santiago pointed to one of the photos. (RTH 6302.)

identification was not admissible because Santiago's identification was corroborated. (See § 3.5.1(B)(1), pp. 917-18 below, incorporated herein.) Eventually, however, the judge found that the defense experts, Dr. Robert Buckhout[709] and Elizabeth Loftus were "not experts" because their research

---

[709] Dr. Robert Buckhout was described as a nationally recognized expert by this Court. (See *People v. McDonald* (1984) 37 Cal.3d 351, 365 fn. 10.) His credentials included the following:

- Qualified as an eyewitness expert at least 100 times in 20 different states. (RTH 17902.)
- Ph.D. in psychology. (RTH 17887.)
- Professor of psychology at Brooklyn College in New York and John Jay College in New York. (RTH 17887.)
- Special expertise in cognitive psychology with an emphasis on memory. This is the study of perception, identification and long-term memory. (RTH 17888.)
- Published extensively in the area of eyewitness identification including corporal lineups and photo spreads. (RTH 17888.)
- Consulted with and lectured to law enforcement agencies, courts, defense counsel, universities and international conferences. (RTH 17889; 17893.)
- Fellow of the American Psychological Association. (Only 1% of the members are fellows and it is considered a great honor.) (RTH 17890.)
- On editorial boards of various legal publications. (RTH 17889.)
- Conducted many experiments in eyewitness identification and published the results. (RTH 17894.)
- Published articles on guidelines for photo lineups. (RTH 17895.)
- Aided the military in training personnel in memory techniques. (RTH 17897.)
- Received various research grants. (RTH 17897.)
- Published article on "weapon focus effect." (RTH 17900.)

was not based on actual crimes and victims. (*Ibid.*)

2. The Excluded Expert Testimony As To The Unfairness Of The Photo Lineup

a. The Photo Lineup Should Be Assembled To Reflect The Features Described By The Victim

According to both Dr. Buckhout and Dr. Loftus,[710] not only should

---

[710] Dr. Elizabeth Loftus' credentials included the following (see Dr. Loftus' Curriculum Vitae; In Limine Defendant's Exhibit 698):

- Ph.D. in psychology from Stanford University. (RTT 9281.)
- Professor at University of Washington. (RTT 9282.)
- Fellow at Stanford Center for Advanced Study in Behavioral Sciences. (RTT 9282.)
- Professor Georgetown University Law Center. (RTT 9282.)
- Faculty member, National Judicial College. (RTT 9282.)
- Regular instructor for California Judge's Continuing Education. (RTT 9282.)
- Recognized expert in the field of human perception and memory and the sub-field of eyewitness testimony. (RTT 9284.)
- Published articles and books on eyewitness identification. (RTT 9285.)

Dr. Loftus testified at a special in limine hearing held during trial after the *McDonald* motion as to Santiago had already been denied. Her testimony was offered with respect to the Stapleton identification in the Garcia case. (See Volume 5, § 5.1.2(A)(1)(e), pp. 1253-54, incorporated herein.) However, it was also offered in support of the defense request to reconsider the Santiago *McDonald* issue. (RTT 9299.) It was also offered as to the suggestibility of the photo lineup, an issue that was left open at the Santiago *McDonald* hearing. (RTT 9149; 9152-53; 9161; 9276; 9239.)

Ultimately, the trial judge excluded the testimony of Drs. Buckhout and (continued...)

each of the photos in the lineup be similar to each other but "equally important is the idea that if a witness does recall a particular feature and that . . . is part of the initial recollection of this witness, then that feature ought to, to whatever extent possible, be a feature of each of the people in the lineup." (RTT 9308-09; RTH 17921; 17926.) "When this general rule for selecting distractors is violated in the extreme (i.e., the suspect is the only person in the lineup who matches the eyewitness' description of the culprit), experts will conclude routinely that the lineup is biased against the suspect in a way that leads to a heightened tendency to identify the suspect as the culprit even if the suspect is not the culprit. [Footnote omitted.]" (Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony, supra*, § 15-2.2.3, p. 250.)

A simple test can evaluate the fairness of the photo spread. People who are given only the verbal description of the culprit should not be able to select the suspect based on this description at a greater rate than would be expected by chance. (RTH 17922; see also (Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony, supra*, § 15-2.2.3 [4] p. 250.) "If an outsider without memory of the crime can pick out the individual, then you essentially have a very unreliable test." (RTH 17922; see also (Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony, supra*.) "[P]eople with no memory of the crime should be totally confused by the lineup enough so they would pick any one of them. If not, there is bias." (RTH [Buckhout] 17971-72.)

---

[710](...continued)
Loftus, inter alia, because "the tests conducted by the experts do not form a proper basis upon which they can form their opinions in court. I don't find them to be experts. That's the bottom line." [Emphasis added.] (RTT 9365.)

According to Buckhout, the photo spread in the present case was deficient because only Lucas' photo had all of the physical characteristics described by Santiago, that is: blond hair, mustache stopping at the corner of the mouth, bulging or "bug" eyes and clean appearance. (RTH [Buckhout] 17939-49; 17944; see also RTH 5658-59 [#4 and #6 had mustaches extending below the lips].) "If the feature has also been mentioned by the witness such as the eyes, which are easier to see . . . in a photograph where the face is closer, then [use of such a photograph] is a mistake that violates the general principle of matching up the photographs to each other and to the description provided by the witness." (RTH [Buckhout] 17973-74.) This standard is backed up by both research and police practice throughout most of the country. (*Ibid.*)

b. The Photos Should Be Similar To Each Other

Dr. Buckhout recommends to the law enforcement agencies he counsels that a good photo spread should have a good standard set of photographs taken at the same distance, using the same quality film and with each of the individuals wearing the same type of clothing. (RTH 17922; 17926.)[711]

In the present case, there was also a problem because Lucas' photo was obviously taken at a much closer distance than the others. (RTH [Buckhout]

---

[711] The impact of this problem could have been mitigated in the present case if one of the other available photos of Lucas had been used. (RTH [Buckhout] 17942 [In Limine Exhibits GG-7 through GG-13].) However, Fullmer's testimony suggested that the close-up photo may have been included for the very purpose of responding to Santiago's statements about the eyes. (RTH 5773-74.) The special closer photo was taken because the detectives were not satisfied with the other photos. (RTH 5773; see also § 3.7.2, pp. 996-99 below, incorporated herein.)

17941.) This made Lucas' "eyes more visible and cause[d] them to stand out more as a feature as compared to the other individuals." (RTH [Buckhout] 17941.)[712]

Another problem was "the general hair color, which varies considerably amongst all of the individuals in the photo spread, ranging from brown, what I would call brown, to blond, which is only shown in the hair of the defendant, basically, in the photograph." (RTH [Buckhout] 17941; 17944; but see RTH [Buckhout] 17964.)

Dr. Buckhout also noted that there are problems with the clothing because each person is wearing a different type of clothing. (RTH [Buckhout] 17941; 17944.)

There was also a problem with Lucas' photo because the top portion was cut off which:

1) did not allow the hair above to be observed; and

2) exaggerated the subjective impression that Lucas was taller than the other subjects. (RTH [Buckhout] 17941.)

There was "another problem area with regard to the amount of forehead visible . . . The individuals again vary as to whether the forehead is visible at all. Photograph No. 1 has hair practically into the eyes, and . . . some of the other individuals have the hair clearly showing that there is no tendency toward balding, at least in these individuals, whereas the picture of the defendant and the picture No. 4 contain hair that's slightly receding. This would affect perception of age, as well." (RTH [Buckhout] 17945; see also RTH 4660-61; 6091.)

---

[712] The impact of this problem could have been mitigated if one of the other available photos of Lucas had been used. (RTH [Buckhout] 17942 [In Limine Exhibits GG-7 through GG-13].)

Lucas' photo was also different because his hair was not parted in the middle which made it different from all of the others except No. 5." (RTH [Buckhout] 17958.) Also, photographs 3, 4, 5, and 6 all had different skin colors from Lucas. (RTH [Buckhout] 17959.)

Also, photo No. 5 is the only person besides Lucas who had blue eyes. (RTH [Buckhout] 17960-62.) Furthermore, Lucas' photo was in the top center position which witnesses are more likely to select. (RTH [Buckhout] 17974-76.)

In sum, the photo lineup in the present case was "biased" and "unfair." (RTH [Buckhout] 18002.)

3. Excluded Expert Testimony Concerning Lay Misconceptions Regarding Eyewitness Identification

a. Misconception: Eyewitness Confidence Does Not Correlate With Reliability

Robert Buckhout, a nationally recognized expert, testified that "[t]he layman puts a great deal of value on high confidence with respect to it being a signal of high accuracy on the part of witnesses who are people remembering things." (RTH 17934.)

In 1984 Dr. Loftus first published her well-known text on eyewitness identification. In that publication Dr. Loftus noted that lay jurors hold the "intuitively reasonable" assumption "that a witness is more likely to be correct if he or she projects certainty rather than doubt." (Loftus & Doyle, *Eyewitness Testimony: Civil And Criminal* (Lexis 1997) § 3-12, p. 66.) Dr. Loftus confirmed this in her testimony: "There is a commonly held belief amongst people in general and jurors in particular that there is a strong relationship between confidence and accuracy." (RTT 9303; see also RTO [Penrod] 7140 [stressing need to make sure jurors understand that confidence of eyewitness

is not a reliable gauge of accuracy].)[713]

For this reason, the persuasive force of a confident eyewitness is high: "It is almost impossible to over estimate the persuasive impact of eyewitness confidence. [Footnote omitted.]" (Loftus & Doyle, *supra*, § 9-10, p. 214; see also § 1-3, pp. 2-4 ["studies show that eyewitness testimony offered with confidence is likely to be believed by jurors"].)[714]

Yet juror reliance on witness confidence as a measure of reliability is misplaced. As Dr. Buckhout explained: "The confidence level expressed by a witness does not indicate either high or low accuracy. It turned out to be a nonevent, possibly again because there is a social obligation for people to say that they are confident when they remember – when they are testifying or when they are giving a memory report. And this confidence may be misplaced." (RTH [Buckhout] 17934.) Similarly, Dr. Loftus testified that there is "general agreement that there is not a strong correlation . . . between the level of confidence that a particular [eyewitness] has versus the objective accuracy of their information." (RTT 9286; 9303-04.)

Indeed, this crucial juror misconception has been expressly recognized

---

[713] Penrod did not testify in the proceedings before Judge Hammes. However, he is a noted eyewitness identification expert. (RTH 23951; see generally Cutler and Penrod, *Mistaken Identification: The Eyewitness Psychology And The Law*, 1995.)

[714] The latest research continues to demonstrate that lay persons, eyewitnesses and jurors persist in their misplaced faith that certainty on the part of the eyewitness correlates to accuracy in identification. (See e.g., Cutler, Penrod & Stuve, *Juror Decision-Making in Eyewitness Identification Cases*, 12 Law & Human Behavior 41 (1988); Penrod & Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 Psych. Pub. Pol. & Law 817 (1995); Luus & Wells, *The Malleability Of Eyewitness Confidence: Co-Witness and Perseverance Effects*, 79 J. Applied Psychology 714 (1994).)

by this Court:

> . . .[P]sychological factors have been examined in the literature that appear to contradict the expectations of the average juror. Perhaps the foremost among these is the lack of correlation between the degree of confidence an eyewitness expresses in his identification and the accuracy of that identification. Numerous investigations of this phenomenon have been conducted: the majority of recent studies have found no statistically significant correlation between confidence and accuracy, and in a number of instances the correlation is negative – i.e., the more certain the witness, the more likely he is mistaken. (Wells & Murray, *Eyewitness Confidence*, in Eyewitness Testimony: Psychological Perspectives, pp. 159-162.) Indeed, the closer a study comes to reproducing the circumstances of an actual criminal investigation, the lower is that correlation (*id.* at 162-165), leading the cited authors to conclude that "the eyewitness accuracy-confidence relationship is weak under good laboratory conditions and functionally useless in forensically representative settings. (*Id.* at 165; see also Deffenbacher, *Eyewitness Accuracy And Confidence: Can We Infer Anything About Their Relationship?* (1980) 4 Law & Human Behav. 243.) The average juror, however, remains unaware of these findings: "A number of researchers using a variety of methods have found that people intuitively believe that eyewitness confidence is a valid predictor of eyewitness accuracy." (Weel & Murray, *supra*, at 159, citing five recent studies.)

(*People v. McDonald*, *supra*, 37 Cal.3d at 369.)

b. Misconception: Stress Increases Reliability

As a matter of intuition, most lay jurors believe that increased stress increases the reliability of the identification since it is assumed that stress heightens the witness's attention to the matters being observed. (RTH [Buckhout] 17932-33; see also Loftus & Doyle, *supra*, § 2-9, p. 26 [discussing misstatement about role of stress by the court in *Commonwealth*

v. Gallagher (Pa. 1988) 519 Pa. 291 [547 A.2d 355, 358]].)

In reality, however, the role of stress is a complex matter upon which expert testimony is particularly appropriate.

> The role that stress plays at the time a witness experiences a complex event is captured in the Yerkes-Dodson Law, named for the two psychologists who first discovered it in 1908. We cannot say that a person who experiences more stress will always perceive more poorly. On the contrary, the level of performance will sometimes be improved and sometimes hurt by increases in stress. As a general rule there seems to be an optimal level of stress at which performance is at its best. Stress levels lower or higher than this optimal level will interfere with performance.
>
> Why is this? At very low levels of stress or arousal (for example, when a person is just waking up in the morning), the nervous system may not be functioning fully, and sensory message may not get through. At moderate levels of stress, the situation improves. But when stress gets too high, performance begins to decline. This is the essence of the Yerkes-Dodson Law.

(Loftus & Doyle, *supra*, § 2-9, pp. 27-28.)

The "Yerkes-Dodson Law" is "one of the fundamental laws in the literature. It's the kind of thing that you would find in every introductory psychology book." (RTT 9300 [Loftus].) Most of the scientific literature is consistent with the "Yerkes-Dodson Law" which suggests that the accuracy of eyewitness identification is impaired by high degrees of stress or fright. (RTT [Loftus] 9300; see also RTH [Buckhout] 17985 [stress impairs perception more than anything else].)

While high stress will help witnesses to remember the "general theme of the event . . . they will not remember the detail and information necessary to provide an accurate description of what went on as well as if they had been

through something a little bit less stressful." (RTH [Buckhout] 17931-32; 17935-37; 18010-11.)

This is so because "stress interferes with the efficient taking in or encoding of information that [witnesses] might later try to remember. They quite literally don't get as much information into memory storage as does a person who is under low-stress or no-stress conditions." (RTH [Buckhout] 17937.)

In a related area, Dr. Loftus found that exposure to mentally shocking events can cause "retrograde amnesia" for other events that occur a short period of time before. One "explanation for these memory deficits is that mental shock disrupts the lingering processing necessary for full storage of information in memory. Whatever the exact reason for the reduced performance in the case of the violent incident, the practical significance is clear: testimony about an emotionally loaded incident should be treated with caution." (Loftus & Doyle, *Eyewitness Testimony: Civil & Criminal*, *supra*, § 2-7, p. 22.)

c. Misconception: Accuracy As To Particular Details Increases Reliability

Intuitively it would seem that there should be a positive correlation between the ability of a witness to accurately describe details of the culprit's face and the reliability of his or her identification. In fact, the United States Supreme Court has "endorsed the belief that there is a meaningful and useful relationship between the verbal description given by an eyewitness and the accuracy of a subsequent lineup or photographic identification." (Loftus & Doyle, *supra*, § 4-4, p. 79 [discussing *Neil v. Biggers* (1972) 409 U.S. 188].)

However, scientific research challenges this belief: "There is evidence that people who are superior at describing details of the faces they have seen

from memory are not much better at recognizing those faces later. In a study by Pigott and Brigham, subject-witnesses looked at a 'culprit' and later had to both describe him and try to identify him. The researchers found that subjects who gave relatively accurate descriptions were not more likely to make a correct identification than were subjects who gave a relatively poor description. [Footnote omitted.]" (*Ibid.*)

And, the results of another study "showed that description accuracy was not related to identification accuracy." (*Ibid.*)

As Dr. Buckhout testified, a focus on a particular feature of the culprit's face may actually impair the ability of the witness to make an accurate identification:

> Q. In your study of memory, have you found that people are limited in the number of things that they can focus on at any given time?
> A. Yes.
> Q. And although an individual will say that they saw a person's face, do you find that they – that the tendency is not to be able to focus on all features of that face?
> A. Yes. I'm afraid so. The actual focus area that they may be looking at – unknown to them, by the way – and maybe just one portion of the face, or even the expression of the face – it's not uncommon for people in our studies to report that they remember the expression on the face better than they remember the face itself. Overall impressions like that are a little easier to remember. (RTH 18005-06.)

d. Misconception: Witness Estimates Of The Durations Of Events Are Accurate

"[T]he length of time that an eyewitness observes the person he later identifies is often given significant weight by the jury. But in virtually every

such case the only evidence of that duration is the witness's own estimate. Studies show that witnesses consistently overestimate the length of brief periods of time, especially in the presence of stressful stimuli: "during sudden, action-packed events such as crimes, people almost always overestimate the length of time involved because the flurry of activity leads them to conclude that a significant amount of time has passed. [Citations.]" (*People v. McDonald*, *supra*, 37 Cal.3d at 368, fn. 13.)

Dr. Loftus testified that "there is a general agreement . . . that when somebody attempts to estimate the duration of an event, how long an event lasted, they stretch out those time periods in their mind. They think the event lasted longer than it actually did." (RTT [Loftus] 9286; 9302-02.)

e. Misconception: Constructing Composite Drawings Increases Reliability

As a matter of intuition average jurors would likely conclude that the process of constructing a composite drawing increases witness reliability by helping the witness to recall and identify specific features of the culprit. However, in reality, there is a risk that the composite process will be suggestive and reduce the reliability of the witness:

> At its worst, the person who is assisting the witness in getting a description may essentially join minds. This has led to some criticism of the use of composites, where composite drawing is the product of both the witness and a very skilled person who knows how to draw or to assemble the parts of an Identi-Kit or photo-fit device into a whole face.
>
> Again, if a person as the witness can only remember really a part of a face and part of the overall features, they may be encouraged by the person running the test to add more details in order to come up with a complete face rather than just a partial face. (RTH [Buckhout] 17931.)
>
> [T]he most important problem that we identify is that once the individual begins to interact with a person, such as an

individual who controls a pen in a composite situation or who controls the kit that's used, we no longer are sure whether the memory report is solely their memory, the witness, or a combination of the witness plus the operator. It simply messes up the search for an independent cause or that memory report and can be a place in which suggestion and bias does take place. (RTH [Buckhout] 17937-38.)[715]

---

[715] Buckhout further explained this problem on cross-examination:

> Q. When you indicated to us that the questioner in particular the man or woman creating the composite drawing, joins minds with the victim . . . what do you mean by that?
>
> A. They selectively introduce example or what they call exemplars of faces, of hair styles, of beards, mustaches and the like, all of which are from their experience or possibly from pictures, files that they have on hand . . . It's an interactive procedure. People are assisting the witness in trying to reach a conclusion about what the face looked like. And the risks for the procedure, as I indicated before, are that you may end up having too much input from the person who's helping and then you won't know where the identification came from, as to whether it's primarily the witness's memory or the combined experience of the operator plus the witness.
>
> Q. So you're saying even though the artist is totally void of knowledge of the attacker and learns only what the artist puts on the paper from the victim . . . the artist is yet still a contributor?
>
> A. Of course, yeah. The artist knows a great deal about how human faces are constructed and . . . they have examples, perhaps successful cases that they have worked on in the past. They have access to picture files and they quite frequently, in my jurisdiction, will simply turn the witness loose with the tray full of pictures and ask them

(continued...)

f. Misconception: The Presence Of A Weapon Increases Reliability

Intuitively a juror may assume that the presence of a weapon during a crime will make the eyewitness more alert and thus increase eyewitness reliability. (See § 3.3.1(K)(3)(b), pp. 838-40 above, incorporated herein.) However, the presence of a weapon during the event may cause the witness to consciously or subconsciously focus on the weapon, making identification of the culprit's face less reliable. (RTH [Buckhout] 17996-97; see also Loftus & Doyle, *Eyewitness Testimony: Civil & Criminal*, *supra*, § 2-10, pp. 30-31; § 2-11, p. 31; Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, (West 2002) § 15-2.2.2[3] [weapon focus is an area of general agreement].)

People are limited in the number of things which they can focus on at

---

[715](...continued)

> to pick out people who have the similar head at first, "Look for heads. Look for mustaches," et cetera, to look for parts first so that they can then reach into their experience to draw on the board a certain type of face, beard, or hair style or whatever.
>
> Q. And once they have done that, if the victim says, "No, that's not right. I want this changed or that changed," that's still the product of the artist?
>
> A. He is selectively narrowing down their focus a little bit. Again, you know, there is nothing wrong with this, were it not to be considered a photographic reproduction of what the witness saw. It may be very useful for some investigative purposes, but it also raises the risk that it can be the product of both, two minds working; possibly one harder than the other." (RTH 17982-84.)

once. (RTH [Buckhout] 18005.) Thus, people have difficulty focusing on all features of a face. (*Ibid.*) The actual focus area of the witness – often unknown to the witness – may be just one portion of the face, or even the expression of the face. (RTH [Buckhout] 18005-06.)

The presence of a weapon reduces eyewitness reliability for two reasons: 1) the weapon diverts the witness's attention from the culprit's face; and 2) the weapon increases the stress level of the victim. (RTH [Buckhout] 18008-09.)

4. Excluded Expert Testimony Concerning Impact Of Post Event Influences

a. Memory Is Not A Video Tape Machine

Many people view memory as similar to a video machine that can be played back accurately. (RTH 17918.) However, this is inconsistent with current scientific research. (RTH 17918.) Memory is "anything but a faithful duplication of what was seen or experienced." (RTH 17918-19.) Under ideal conditions face recognition is pretty good "but it falls off quite dramatically as we approach the situation that most victims find themselves in." (RTH 17920.)

b. Post-Event Information Affects Reliability

Dr. Loftus testified that when an eyewitness is exposed to post-event information, that new information may "actually alter or change or transform a recollection." (RTT 9293; see also 9286; 9294 ["new information . . . can actually contaminate or transform memory."].)

One specific way in which memory can be manipulated is exposure to media accounts. (RTT 9294.) "[T]here is a consensus that post-event information can cause memory to change . . . from that which may have been

objectively true to that which is later suggested via . . . press information." (RTT 9296.)[716]

"Further . . . once [the witnesses] adopt . . . this new information . . . as their own recollection, they do so with a high degree of confidence. They can describe objects that they are now claiming to see that, in fact, they never saw. And they will give sometimes fairly detailed descriptions of them." (RTT 9297.) Thus, the research suggests that multiple questioning sessions over a period of time can cause the witness to "fill in" details based on logic rather than actual observation. (RTH [Buckhout] 17928-29; 17967-69.) Such "filling in" may occur even when the witness has seen the entire face for an extended period of time. (RTH [Buckhout] 17968.) In most situations the "filling in" is not a deliberate lie but rather is a product of logic or analysis. (RTH [Buckhout] 17968; 18006.) In fact, the witness may not even be conscious of the "filling in." (*Ibid.*)

In counseling law enforcement officers, Dr. Buckhout warns them to not get too involved with the witness to avoid "join[ing] minds with the witness." (RTH [Buckhout] 17930-31; 17937-38.) During the questioning of a witness "it is possible for a number of mistakes to be made by an officer that can have serious consequences for the ability of the eyewitness to accurately describe and later identify the culprit." (Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony, supra*, § 15-2.2.3 [1] p. 248.) "Interruption of the natural process of recall not only confuses the issue of which bits of information came from free recall and

---

[716] In "the interests of full disclosure" Dr. Loftus noted that "I can find one or two who have some contrary positions, in the same way that you can find one or two people who claim that the Holocaust never happened." (RTT 9296:25-27.)

which were solicited, but also disrupts natural recall and can confuse the eyewitness as to what he knew and what was a guess. Hence, the initial questioning of a eyewitness is one of the first junctures at which the system itself is contributing to error in eyewitness accounts." (*Ibid.*)

c. The Adverse Impact Of New Information On Reliability Increases With The Passage Of Time

Dr. Loftus testified that: "The memory becomes more and more vulnerable to . . . the influence of new [post-event] information. . . ." (RTH 9304-05; see also ; RTH [Buckhout] 17945 [there is general agreement that ability to recall declines over time].) "The bigger drops do occur within the first couple of days, and it [the drop] continues steadily over time." (RTH [Buckhout] 17945-46); Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, *supra*, § 15-2.2.2 [4] p. 245.)

d. Post-Lineup Reinforcement

See § 3.4.2(F), pp. 913-14 below, incorporated herein.

3 SANTIAGO CASE

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

ARGUMENT 3.3.2

A SERIES OF PROBLEMS DENIED LUCAS A FULL AND FAIR OPPORTUNITY TO DEMONSTRATE THAT SANTIAGO'S IDENTIFICATIONS OF LUCAS AND OF LUCAS' HOUSE WERE UNRELIABLE AND WERE THE INADMISSIBLE PRODUCT OF SUGGESTIVE PRETRIAL PROCEDURES

A. Introduction

Elsewhere in this brief it is contended that Santiago's identifications should have been excluded due to improperly suggestive pretrial identification procedures. (See § 3.3.3, pp. 863-82 below, incorporated herein.) However, apart from the substantive inadmissibility of the identification testimony, relief should also be granted because Lucas was denied a fair opportunity to make the required showing that the identification testimony was constitutionally tainted, and further, after denial of the motion to suppress, was also denied a fair opportunity to demonstrate the unreliability of the identifications to the jury adjudicating appellant's guilt and sentence.

B. The Defense Was Denied A Fair Eyewitness Identification Hearing

1. Inadequate Record Of The Pretrial Procedures

a. Santiago Was Suffering From Amnesia And Other Psychological And Physical Impairments Which Limited Her Recall Of The Identification Procedures

The physical and psychological impairments Jodie Santiago continued to endure in the months following the attack severely undermined her ability to accurately recount what happened during her contacts with the authorities. (See § 3.2(B)(1)(a-d), pp. 792-98 above, incorporated herein [Geiberger;

Zeidman; Freed; Berliner; Snow].) In fact, she had no recollection whatsoever of her first ten days in the hospital. (RTH 4588; 4592-93.)[717] Hence, the record of these early, yet important,[718] contacts was limited because it was based entirely on the testimony of the investigating detectives whose credibility was contested by the defense.[719]

b. Failure Of Law Enforcement To Make And Preserve Adequate Records Of Pretrial Identification Procedures

Law enforcement agencies also have a duty, under the Due Process Clause of the 14th Amendment, to preserve evidence "that might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488; accord *People v. Beeler* (1995) 9 Cal.4th 953, 976.) However, regardless of whether this failure violates due process, the importance of properly preserving the material circumstances surrounding an eyewitness identification of the alleged culprit is beyond dispute. "Complete and accurate documentation of the witness' statement is essential to the integrity and success of the investigation . . . ." (United States Department of Justice "Eyewitness Evidence: A Guide for Law Enforcement" (1999) §

---

[717] Not only did Santiago's amnesia impair her memory of the events that occurred in the hospital, it impaired her memory of the attack. As observed by Dr. Loftus, "shocking events can cause 'retrograde amnesia' for other events that occur a short period of time before . . . [therefore] testimony about an emotionally loaded incident should be viewed with caution." (Loftus & Doyle, *supra*, § 2-7, p. 22; see also § 3.3.1(C), p. 815 above, incorporated herein.)

[718] See § 3.3.1(K)(4), pp. 845-47 above, incorporated herein.

[719] Eventually the judge ruled that neither party could offer Santiago's hearsay statements (written and oral) made in the hospital. (RTH 24449-53.) Subsequently she ruled that if the defense offered portions of the hospital statements the prosecution could offer other portions. (*Ibid.*)

III(D), p. 24.) Hence, it should be the obligation of the law enforcement personnel who conduct pretrial identification procedures to adequately record all relevant aspects of those procedures. (Cf. *People v. Rosario* (N.Y. 1961) 9 N.Y.2d 286 [173 N.E.2d 881].)

However, in the present case, the record of the pretrial identification procedures was woefully inadequate. There was no clear record of what was said to the witness during numerous crucial encounters between Santiago and the authorities. Any notes of the contacts were either destroyed or inadequate. (See § 3.3.1(H), pp. 829-30 above, incorporated herein.) And, the reports of the contacts were written months after the fact and after Santiago had identified Lucas in the photo lineup. Detective Fullmer's report of the June 10, 1984 contact was not prepared until December 18, 1984. (RTH 5586.) Detective Henderson's report of the June 15, 1984 contact was not written until January 3, 1985. (RTH 5603.)[720]

It is true that a good portion of the December 4, 1984 interview in Seattle was recorded.[721] However, no other contact or interview was recorded.

c. Record Deficiencies As To Specific Contacts

i. Hospital Contact June 11, 1984

A specific example of how the deficient record contributed to the unreliability of the process is Santiago's reference to a "brown Colt" in her

---

[720] The Department of Justice certainly would not consider such delay to be a "sound protocol." Their policy is to require written documentation of an eyewitness interview "as soon as reasonably possible after the interview. . . ." (United States Department of Justice, *supra*, § III(D), p. 24.)

[721] Some portions were not recorded and other portions of the tape were not intelligible. (RTH 5659-61; 6064-65; 5699.) The composite drawing session with Detective Bove was not recorded. (RTH 4631-32; 5601; 6061-63.)

first communication with law enforcement. (RTH 5320; In Limine Exhibit 64.) This reference was crucial because this was Santiago's first reference to any vehicle (see Loftus & Doyle, *supra*, § 3.3 through § 3.11 [the witness's initial statements are especially important because they haven't been tainted by post-event input]; see also § 3.3.1(K)(4)(b), pp. 845-47 above, incorporated herein), and because Lucas did not drive a "brown Colt."

Fullmer testified that he was asking about the vehicle driven by Santiago's brother when Santiago responded with "brown Colt." (RTH 5320.)[722] However, Dena Warr, the nurse who was present at the time, testified that the "brown Colt" notation was in "reference to the vehicle in which Santiago was abducted." (RTH 1795-96.) And, due to Santiago's amnesia, she had "no idea" which question prompted the "brown Colt" response. (RTH 4601.)

Hence, there was a crucial conflict in the evidence which, without any reliable record of what actually happened, added to the unreliability of the process and denied Lucas a fair opportunity to defend.[723]

ii. Hospital Contact June 15, 1984

Detectives Fullmer and Henderson both asked Santiago questions but neither had any notes or other record of the questions asked. (RTH 5573-74; 6014-15.)

iii. Hospital Contact June 26, 1984

Detective Henderson took notes of the interview but had no record or

---

[722] However, he did not offer any notes or his report to corroborate this.

[723] There were further contradictions regarding this first interview between the detectives' testimony and that of John Bludworth, who received a bulletin based on the initial information received from Santiago. (See § 3.3.1(D), pp. 8112-13 above, incorporated herein.)

recollection of the precise question asked. (RTH 6043.)

iv. Identi-Kit Composite With Agent Gillis

The process by which a composite drawing is made is fraught with the potential for suggestiveness even if there is no intent to influence the witness. (See § 3.3.1(K)(3)(e), pp. 842-43 above, incorporated herein [Buckhout].) Hence, it is especially distressing that no record whatsoever was made of the 2½ to 3 hour interaction between Gillis and Santiago during which an Identi-Kit composite was constructed. (RTH 4623-28: In Limine Exhibit V.) Certainly the sketchy recollections of Gillis and Santiago in their testimony, given months after the session, are inadequate to reliably determine the impact of that session on the accuracy of Santiago's subsequent statements and identifications.

v. December 4, 1984 Composite Drawing And Interview In Seattle

See § 3.3.1(E), pp. 821-25 above, incorporated herein.

vi. Construction Of The Photo Array

A major shortcoming in the record as to the photo array was the absence of the original pool of photos from which the photos other than Lucas were selected. (See § 3.3.1(F), pp. 826, n. 701 above, incorporated herein].)

vii. The Photo Lineup

Anything that was said or done before, during or after the lineup could have affected both the reliability of the lineup and any subsequent identifications by the witness. (See Loftus & Doyle, *supra*, § 3.4; see also § 3.3.1(F), pp. 825-29 above, incorporated herein.)[724] In the present case,

[724] This is so critical that the Department of Justice instituted the (continued...)

however, there are crucial contradictions in the record concerning the circumstances surrounding the photo lineup.

First, there is the critical issue as to how long it took Santiago to pick Lucas' photo. She testified that it took around 2 minutes (RTH 4658) while the detectives' notation says "immediately." (In Limine Exhibit 63.)

Second, there is an inadequate record as to what was said and done afterwards. While the detectives testified that nothing was said, Santiago

---

[724](...continued)
following policy: "Prior to presenting a lineup, the investigator shall provide instructions to the witness to ensure the witness understands that the purpose of the identification procedure is to exculpate the innocent as well as to identify the actual perpetrator." (Department of Justice, *supra*, §V(B), p. 31.) The Department of Justice also requires the following specific procedures to facilitate this policy:

> "Photo Lineup: Prior to presenting a photo lineup, the investigator should:
>
> 1. Instruct the witness that he/she will be asked to view a set of photographs.
>
> 2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
>
> 3. Instruct the witness that individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
>
> 4. Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.
>
> 5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
>
> 6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification." (Department of Justice, *supra*, §V(B), p. 31-32.)

testified that she was told – at some point – that she had identified David Lucas. (RTH 4673; 4677.) Santiago also said that they all had a post-lineup drink in the hotel lounge, yet the detectives did not agree on this. (See § 3.3.1(H), pp. 829-30 above, incorporated herein.) The extent to which such post-event reinforcement occurred is a critical question in evaluating the accuracy of any subsequent identifications and in evaluating how much weight to give Santiago's professed confidence that Lucas was the assailant. (See Loftus & Doyle, *supra*, § 3.4.)[725]

viii. Identification Of Lucas' Residence

The trial judge refused to consider any suggestive procedures related to Santiago's identification of Lucas' house because, in her view, eyewitness identification jurisprudence does not apply to inanimate objects. In another argument Lucas contends that this ruling was erroneous. (See § 3.4, pp. 896-915 below, incorporated herein.) However, even if eyewitness identification of inanimate objects is not subject to suppression, the suggestive procedures related to the identification of Lucas' residence were crucially relevant to the reliability of Santiago's identification of Lucas.

The residence identification occurred less than 24 hours after the photo lineup, so that it served as post-event input that reinforced Santiago's opinion that Lucas was her attacker. (See § 3.3.1(K)(4), pp. 845-47 above,

---

[725] See also Wells & Bradfield, *"Good, You Identified the Suspect:" Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360 (1998); Wells & Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification Feedback Be Moderated?*, 10 PSYCHOL. SCI. 138 (1999); Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relationship Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002).

incorporated herein; see also Loftus & Doyle, *supra*, § 3.4.)[726] Hence, determining the reliability of Santiago's identification of the house was an important factor in determining the reliability of Santiago's in-court identification.

Yet the record of the residence identification process is grossly deficient. It was not recorded and any notes or reports were inadequate. Nor did the testimony illuminate what actually happened. The four people who were in the vehicle prior to and during the identification gave four substantially different stories as to what was said and done. (See § 3.3.1(K)(4), pp. 845-47 above, incorporated herein.)

2. Exclusion Of District Attorney Testimony

The record was further impaired by the judge's ruling that Deputy District Attorney Williams was not required to testify. (RTH 24544.) Williams was present during an important meeting between Santiago and the detectives at the homicide office.[727] This meeting took place on December 15, 1984, after the photo lineup, but before Santiago's identification of Lucas' house. (See § 3.3.1(I), p. 830 above, incorporated herein.) Hence, what was said or done during this meeting was relevant to both reinforcement of the photo identification and suggestiveness as to the residence identification. As to the former, there was evidence that Santiago may have seen the photo spread for a second time at that meeting. (*Ibid.*) As to the latter, any

---

[726] See also n. 725, above.

[727] The defense argued that Williams' presence at the meeting made his testimony relevant to the photo spread, the tainting or alteration of it, the driveby of the Lucas house and the waiver of the psychotherapist-patient privilege. (See § 3.3.1(J), p. 830 above, incorporated herein.) (RTH 24412-13.)

statements made as to Lucas' address would have been highly improper and suggestive. (See § 3.4.1(A)(2), p. 897 below, incorporated herein.)

3. Refusal To Consider Eyewitness Expert Testimony

Apart from the inadequate record, Lucas' opportunity for a fair eyewitness hearing was also impaired by the refusal of the trial judge to consider his proffered eyewitness experts as experts.[728] This expert testimony was necessary to provide important insights for the judge to consider with respect to the suggestiveness of the procedures and the reliability of Santiago's identification. (See § 3.3.1(K), p. 830-47 above, incorporated herein.) In denying the suppression motion the judge opined that the photo lineup was "a good one" and that Santiago's in-court identification was independently reliable. (RTH 24586-87.) Hence, the judge's refusal to consider expert testimony which directly related to both of these findings rendered the hearing fundamentally unfair.

C. Lucas Was Denied A Meaningful Opportunity To Challenge The Reliability Of Santiago's Identifications

In sum, the following factors impaired Lucas' ability to challenge the reliability of Santiago's identifications of appellant:

---

[728] The trial judge originally ruled that the expert testimony was not admissible as to Santiago because her identification was adequately corroborated. The judge interpreted the corroboration discussion in *People v. McDonald* (1984) 37 Cal.3d 351 as a threshold prerequisite to the admission of eyewitness expert testimony.

Subsequently, the court concluded that, apart from the corroboration issue, the testimony was not relevant to any eyewitness issues because the witnesses – Dr. Buckhout and Loftus – "are not experts." The basis for this finding was the judge's view that the scientific research should be ignored because it did not utilize actual crime victims and witnesses. (See § 3.5.1(B)(2), p. 918 below, incorporated herein.)

1. Santiago's amnesia.

2. Santiago's physical, psychological and emotional impairments during the pretrial identification process.

3. Failure of the detectives to accurately memorialize their numerous contacts with Santiago.

4. Failure of Detective Gillis to memorialize the details of the Identi-Kit composite session.

5. Failure to preserve the source photos from which the photo lineup was assembled.

6. Failure to make and preserve an adequate record of the pre-photo lineup procedures.

7. Failure to make and preserve an adequate record of the photo lineup identification.

8. Failure to make and preserve an adequate record of post-lineup events.

9. Failure to accurately memorialize the events relating to the identification of Lucas' residence.

10. Failure of the trial judge to consider eyewitness expert testimony at the identification suppression hearing, and the trial judge's exclusion of such testimony at the guilt phase trial.[729]

D. The Denial Of A Full And Fair Hearing Violated Lucas' Federal Constitutional Rights

The above deficiencies separately and cumulatively deprived Lucas of a meaningful opportunity to challenge the reliability and admissibility of

---

[729] Exclusion at trial of expert testimony concerning eyewitness identification is the subject of a separate claim. (See § 3.5.1, pp. 918-35 below, incorporated herein.)

Santiago's identification in violation of his state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th, 8th and 14th Amendments) constitutional rights to due process, to fair trial by jury, to compulsory process, to present a defense, to effective assistance of counsel and equal protection, and to fair and reliable capital guilt and sentencing determinations. 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]; *Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [the opportunity to be heard is one of the immutable principles of justice which inhere 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 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; *People v. Chavez* (1980) 26 Cal.3d 334, 353.) A litigant's right to be heard in court is guaranteed by the Sixth and Fourteenth Amendments of the federal constitution. (See e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Webb v. Texas* (1972) 409 U.S. 95; *Washington v. Texas* (1967) 388 U.S. 14, 17-19.) The right to call witnesses is also expressly guaranteed under the California Constitution. (Art. I, section 1, 7, 15, 16 and 17.) The right to present evidence is a linchpin of the due process right to a fair hearing. (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].) Due process guarantees the accused the right to access to the courts and the right to a meaningful opportunity to be heard. (See e.g., *Holt v. Virginia* (1965) 381 U.S. 131, 136; *In re William F.* (1974) 11 Cal.3d 249, 255 [due process requires fundamental fairness in the fact finding process]; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 914.) Favoring the prosecution also violated due process by creating an imbalance between the prosecution and defense. (See *Wardius v. Oregon* (1973) 412 U.S. 470.) These fundamental constitutional rights to be heard and to call witnesses apply to motion hearings as well as to the jury trial itself. (See *Holt v. Virginia* (1965) 381 U.S. 131, 136; *Bell v. Burson* (1971) 402 U.S. 535, 541-42.)

E. The Error Was Prejudicial

1. The Santiago Judgment Should Be Reversed

Santiago's identification of Lucas and his residence were obviously prejudicial as to the Santiago kidnapping and attempted murder counts. Santiago's identification of Lucas was clearly the key evidence upon which the prosecution relied to argue that Lucas was the person who kidnapped and assaulted Santiago.[730] Therefore, the judgement should be reversed under the

---

[730] The evidence of the other charges should not be considered because Lucas was denied a full and fair hearing on the cross-admissibility of the other offenses. (See Volume 2, § 2.3.5.1, pp. 277-300, incorporated herein.) However, even if the other offenses are considered they are not sufficiently probative to cure errors committed in the Santiago case. The evidence in Strang/Fisher was clearly insufficient to independently link Lucas to that offense. (See Volume 2, § 2.3.3, pp. 224-29, incorporated herein.) While the evidence of guilt in Jacobs and Swanke was sufficient to convict, there were factual issues in both of these cases which raised potential questions about

(continued...)

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.) Without Santiago's identifications the evidence in that case was not merely close, it was plainly insufficient. Therefore, the judgment should be reversed under both the *Watson* standard as well as the federal standard (*Chapman v. California* (1967) 386 U.S. 18, 24) which requires the prosecution to demonstrate beyond a reasonable doubt that the error was harmless.

2. The Swanke And Jacobs Convictions Should Also Be Reversed

The error was also prejudicial as to the other convictions. The prosecution relied heavily on the cross-admissibility of the offenses. (See Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein.) This is so because Santiago was the only charge supported by an eyewitness identification of Lucas. Therefore, had the Santiago identification been excluded, it is reasonably probable that Lucas would not have been found guilty of the Jacobs and/or Swanke charges. (See generally Volume 2, § 2.3.1(I)(2), pp. 209-11, and Volume 4, § 4.3, pp. 1124-45, incorporated herein.)

Moreover, because the error violated Lucas' federal constitutional rights the judgment should be reversed unless the prosecution demonstrates

---

[730](...continued)
Lucas' guilt. (See § 3.4.2(E)(1), pp. 906-12 below, and Volume 4, § 4.3(L), pp. 1144-45, incorporated herein.)

Additionally, any inferences of guilt in Santiago from Jacobs and Swanke was offset by the contrary inference arising from the acquittal in Garcia. To the extent that the jury credited the defense alibi in Garcia, Garcia was affirmative evidence that Lucas did not commit Santiago.

beyond a reasonable doubt that it was harmless. (*Chapman v. California* (1967) 386 U.S. 18.) Given the importance of the Santiago identification in both Jacobs and Swanke, the prosecution cannot meet its burden under *Chapman*. Therefore, the convictions as to Swanke and Jacobs should be reversed as well as the Santiago convictions.

3. The Error Was Prejudicial As To Penalty

Moreover, even if the error was not sufficiently prejudicial to require reversal of the guilt judgment, it was prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced as demonstrated by the difficulty the jury had in reaching a verdict.[731] Therefore, any substantial error at the guilt trial should be considered prejudicial as to the penalty because a major defense mitigating theory at penalty was lingering doubt.[732]

The error was particularly prejudicial as to the penalty trial since the Santiago count both aggravated under Factor (a) and undermined the mitigating factor of lingering doubt.

F. If The Judgement Is Not Reversed, The Matter Should Be Remanded For A New Hearing Before A Different Judge

1. The Matter Should Be Remanded

The accused's fundamental federal constitutional right to due process

---

[731] 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.].

[732] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing requirement that prosecution prove any error harmless beyond a reasonable doubt under both the state and federal standards of prejudice for penalty phase error].

is implicated when the defense is not given a fair opportunity to litigate evidentiary issues. (See Volume 2, § 2.3.5.1(E), pp. 282-84, incorporated herein.) Accordingly, because the in limine motion to suppress eyewitness identification testimony had a crucial bearing on the reliability and fairness of the trial, the matter should be remanded for a new hearing on the motion. (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.)

3 SANTIAGO CASE

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

ARGUMENT 3.3.3

SANTIAGO'S IDENTIFICATION OF LUCAS WAS THE PRODUCT OF UNNECESSARILY SUGGESTIVE PRETRIAL PROCEDURES CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION, AND SHOULD HAVE BEEN SUPPRESSED

A. Introduction: Suggestive Identification Procedures

At trial, Jodie Santiago identified David Lucas stating that she had no "doubt in her mind" that he was her attacker. (RTT 7344; 7376-77.) However, notwithstanding her confidence, Santiago's testimony was not reliable, and should have been excluded due to numerous suggestive pretrial procedures, including a highly suggestive photo lineup.

B. Procedural Background

The defense filed a motion before Judge Hammes to suppress Jodie Santiago's identification of David Lucas based on suggestive and unreliable identification procedures. (CT 8315-29.)[733] The motion also sought suppression of Santiago's identification of Lucas' house and the seat covers in Lucas' car due to inherently suggestive identification procedures. (CT 8329-31; see § 3.4, pp. 896-915 below, incorporated herein.)

The court denied the motion as to Santiago's identification of Lucas,

---

[733] This issue had been addressed prior to assignment of the case to Judge Hammes. However, Judge Hammes ruled, over objection of the prosecution, that the motion would 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.)

finding that the procedures were not suggestive and that, in any event, Santiago's identification was independent of any such procedures. (RTH 24586-87.)[734]

---

[734] In denying the motion, the court stated:

> "On the issue of the photo lineup, the law does not require a perfect photo lineup, only that it be a lineup that is a fair one, and that it not be impermissibly suggestive. That includes the actions of the persons that are administering the photo lineup.
>
> The lineup here was a good one. All the young men that were in the photos were of the same general type. They were all blondish, they all had mustaches, they were the same type of individual, approximately the same age.
>
> To the extent that the defendant here has focused on certain aspects of differences in treatment between Mr. Lucas' photo and the others, such as the fact that Mr. Lucas' photo was larger, or his face was larger within the photo, that it occupied the top center position, possibly, in the photo lineup, and that it may have been cut off at the top, depending on where it was placed at the time Jodie Robertson saw it, I find that these small factors of difference between them – and they did not constitute impermissibly suggestive factors within the photo lineup.
>
> There was nothing from the testimony that leads me to believe that Mrs. Robertson's identification of Mr. Lucas was tainted any way or suggested in any way by anything that was said or done by the deputies.
>
> In any event, regardless of all that, I think there is clear and convincing evidence that her identification is based in court not upon anything that occurred from the deputies, by news, or by the lineup itself, but in fact is based on her independent recall of the appearance of Mr. Lucas. And in particular one cannot ignore the very, very distinctive eyes that Mr. Lucas has and her early-on description of those eyes, not to mention all the other corroborative factors that have been discussed by the court." (RTH 24586:5-24587:8.)

C. Treatment Of Identification In Arguments To Jury

Both sides extensively discussed Santiago's eyewitness identification testimony in their opening statements and final arguments to the jury. (See RTT 42-44; 103-108; 11792-99; 12084; 12113-14; 12124; 12128-29.)

D. Jury Instructions On Eyewitness Identification

The defense requested numerous instructions on eyewitness identification which were refused. (CT 14570-82.)

The following instructions were given:

> BURDEN OF PROVING IDENTITY BASED SOLELY ON EYE WITNESSES [CALJIC 2.91 (5th Edition, 1988)]
>
> The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crimes with which he is charged.
>
> If, after considering the circumstances of any eyewitness identification and any other evidence in this case, you have a reasonable doubt whether defendant was the person who committed the crime or crimes charged, you must give the defendant the benefit of that doubt and find him not guilty. (CT 14286.)
>
> FACTORS TO CONSIDER IN PROVING IDENTITY BY EYE WITNESS TESTIMONY [Modification of CALJIC 2.92 (5th Edition, 1988)]
>
> Eyewitness testimony has been received in this trial for the purpose of identifying the defendant as the perpetrator of crimes charged. Eyewitness identification, whether of a person or an inanimate object, is an expression of belief or impression by the witness. In determining the weight to be given eye witness identification testimony, you should consider the believability of the eye witness as well as other factors which bear upon the accuracy of the witness' identification of the defendant, including, but not limited to, any of the following:
>
> The opportunity of the witness to observe the alleged criminal act and the perpetrator of the act;

The stress, if any, to which the witness was subjected to at the time of the observation;

The witness' ability, following the observation, to provide a description of the perpetrator of the act;

The extent to which the defendant either fits or does not fit the description of the perpetrator previously given by the witness;

The witness' capacity to make an identification;

Whether the witness was able to identify the alleged perpetrator in a photographic or physical lineup;

The period of time between the alleged criminal act and the witness' identification;

Whether the witness had prior contacts with the alleged perpetrator;

The extent to which the witness is either certain or uncertain of the identification;

Whether the witness' identification is in fact the product of his or her own recollection;

The mental condition of the witness at the time of making the observation, including whether the witness' powers of observations were hampered or impaired;

The quality of the witness' initial description, if any;

The witness' mental condition at the time of giving the initial description, if any;

The period of time between the alleged criminal act and the witness' initial description, if any;

Whether the witness had been subjected to any suggestion of identification;

The consistency or inconsistency of the witness' descriptions of the perpetrator;

Any other evidence relating to the witness' ability to make an identification. (CT 14287-88.)

E. Standard Of Review: Suggestive Identification Procedures

"The Supreme Court has indicated that 'the ultimate question as to the constitutionality of . . . pretrial identification procedures . . . is a mixed question of law and fact. . . .' *Sumner v. Mata* (1982) 455 U.S. 591, 597." (*United States v. Love* (9th Cir. 1984) 746 F.2d 477, 478.) This Court has not

settled on the standard of review applicable to determinations of suggestiveness made by trial courts. (See *People v. Johnson* (1992) 3 Cal.4th 1183, 1216.) As observed in *Johnson*, "[d]ebate over the proper standard of review of claims of impermissibly suggestive identification procedures continues" remains true today. (*Ibid.*) In noting its indecision as to the applicable standard of review, this Court concluded from a review of cases in other jurisdictions that "[i]t is unsettled whether suggestiveness is a question of fact (or a predominantly factual mixed question) and, as such, subject to deferential review on appeal, or a question of law (or a predominantly legal mixed question) and, as such, subject to review de novo." (*Ibid.*, quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1242.)

The better view is that embraced by those jurists that recognize the inherent legal dimension to this determination. (See, e.g., *Cikora v. Dugger* (11th Cir. 1988) 840 F.2d 893, 899-900 (conc. & dis. opn. of Clark, J.).) Accordingly, appellant urges this Court to independently review the trial court's conclusion that the identification procedure at issue in this case was not unduly suggestive and treat the matter as a question of law.

F. Legal Principles: Suggestive Identification Procedures

1. Due Process

A criminal defendant's fundamental right to a fair trial is violated under the Due Process Clause of the Fourteenth Amendment when the jury is allowed to consider evidence of an identification by an eyewitness whose testimony has been tainted by unnecessarily suggestive police procedures. (*Manson v. Brathwaite* (1977) 432 U.S. 98.) Convictions based on tainted eyewitness identification must be set aside even if a course of cross-examination exposes to the jury the method's potential for error. (*United States v. Wade* (1967) 388 U.S. 218; *Simmons v. United States* (1968) 390

U.S. 377; *People v. Caruso* (1968) 68 Cal.2d 183.) In determining the reliability of an identification, the court must weigh the corruptive influence of the procedure against independent evidence of reliability. (*Manson v. Brathwaite*, *supra*, 432 U.S. at 114; *People v. Johnson*, *supra*, 3 Cal.4th at 1216, fn.5.)

Exclusionary principles are applicable to identification testimony because of its inherent power as a tool of conviction, because of the vulnerability of eyewitnesses to mistaken identification once exposed to suggestive police procedures, and in order to discourage government officials from engaging in coercive techniques which undermine the reliability of criminal convictions. (*People v. Caruso, supra,* 68 Cal.2d at 187-89.)

2. Eighth Amendment Reliability

Suggestive identification procedures undermine the reliability of the trial process. (See *Neil v. Biggers* (1972) 409 U.S. 188, 199.) This Court long ago recognized that "unfairly constituted lineups have in the past too often brought about the conviction of the innocent. . . ." (*People v. Caruso, supra,* 68 Cal.2d. at 188.) Recent studies have shown that misidentification in the eyewitness identification process still too often contributes to wrongful convictions; most shocking is the fact that those wrongful convictions often concern death judgments. For example, one analysis of wrongful convictions since restoration of the death penalty in 1976 determined that misidentification put 46 innocent persons on America's death rows. (See Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* [http://www.law.nwu.edu/wrongful convictions /eyewitnessstudy.htm].) That study concerned death penalty cases where innocence was subsequently established and concluded that "[e]rroneous eyewitness testimony — whether offered in good faith or perjured — no doubt

is the single greatest cause of wrongful convictions in the U.S. criminal justice system." (*Ibid.*) Both this Court and the United States Supreme Court have concluded that suggestiveness in the identification process is largely responsible for this fallibility in the criminal justice system.

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."

(*People v. Caruso, supra,* 68 Cal.2d at 188, quoting *United States v. Wade* (1967) 388 U.S. 218, 228-229.)

Accordingly, due to the risk of unreliable conviction in eyewitness identification cases, a death sentence which is substantially based on a suggestive identification procedure violates the Eighth and Fourteenth Amendments of the federal constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 627-46.)

3. Two-Pronged Constitutional Test

This Court and the United States Supreme Court have adopted a two-pronged due process test for determining whether an identification procedure violates due process where the procedure was "unnecessarily suggestive and conducive to irreparable mistaken identification." (*Stovall v. Denno* (1967) 388 U.S. 293, 302; *Neil v. Biggers, supra*, 409 U.S. at 196-197; *Manson v. Brathwaite, supra*, 432 U.S. at 109; *People v. Cunningham* (2001) 25 Cal.4th 926, 989.) The first prong evaluates "whether the identification

procedure was unduly suggestive and unnecessary. . . ." (*People v. Cunningham*, *supra*, 25 Cal.4th at 929.) If the methods employed were suggestive, it is incumbent on the prosecution to prove they were justified by the circumstances. (*In re Hall* (1981) 30 Cal.3d 408, 433.) The second prong comes into play once a suggestive process has been shown. If the extrajudicial identification was "unnecessarily suggestive and conducive to irreparable mistaken identification," the prosecution must prove by "clear and convincing proof" that the in-court identifications were based solely upon the observations of the witness. (*People v. Floyd* (1970) 1 Cal.3d 694, 712.)

G. The Pretrial Identification Procedures In The Present Case Were Unnecessarily Suggestive

1. The Events Prior To The Photo Lineup Were Suggestive And Conducive To An Irreparable Mistaken Identification

The totality of the circumstances prior to the photo lineup were suggestive and fraught with indicia of unreliability and the danger of an irreparable mistaken identification.

First, Jodie Santiago's ability to accurately remember and identify her attacker's face was compromised by her amnesia, severe closed head trauma and acute Post Traumatic Stress Disorder. (See § 3.2(B)(1)(a-d), pp. 792-98 above, incorporated herein.)

Second, Santiago's emotional need to have her attacker arrested and convicted made her more prone to suggestion. (RTH 4542; 4628; 4640.)

Third, Santiago's participation in the making of composite drawings on two separate occasions raised the danger that her subsequent identification was tainted. (See § 3.3.1(K)(3)(e), pp. 842-43 above, incorporated herein.)

Fourth, the questioning process was suggestive because the questions may have implanted specific facts in Santiago's mind. (See § 3.3.1(K)(4)(b),

pp. 845-47 above, incorporated herein.)

Fifth, by informing Santiago that they had a suspect (RTH 4490; 4647) and by flying Santiago down to see a single photo lineup the investigating detectives strongly suggested that the suspect would be in the lineup.[735] There was an air of emergency about the call because Santiago was told the ticket was already at the airport and that they had a suspect for her to view. Santiago was met by two or three detectives who immediately drove her to her hotel. As soon as they arrived at the hotel, the detectives showed Santiago the photographic display. At least three detectives hovered around Santiago while she made the identification. (See § 3.3.1(F), pp. 825-29 above, incorporated herein.)

Sixth, the lack of an adequate record as to what really occurred during the pretrial identification process further undermines the reliability of the identification. (See § 3.3.2(B)(1), pp. 846-53 above, incorporated herein.)

2. The Photo Lineup Was Unnecessarily Suggestive And Conducive To An Irreparable Mistaken Identification

a. Photo Lineup Principles

Although each case must be based on its own circumstances, certain fundamental principles have been established in applying the due process test for suggestiveness of photo lineups. A photo spread is suggestive when the defendant's photograph depicts a subject who alone has the identifying characteristic as described by the witness. (See e.g., *People v. Slutts* (1968)

---

[735] Nor did the admonition given to Santiago contradict the obvious inference that the suspect was in the lineup. For example, the pre-lineup admonition which Fullmer read to Santiago told her not to assume that "we have anyone in custody." (RTT 3198-99.) Nothing in this admonition prevented her from assuming that they had a suspect whose photo was included in the photo spread.

259 Cal.App.2d 886, 891; see also *People v. Shea* (N.Y. App. 1976) 54 A.D.2d 722 [387 N.Y.S.2d 477, 478]; *State v. Haynes* (Wis. Ct. App. 1984) 118 Wis.2d 21 [345 N.W.2d 892, 897]). In short, "[a] procedure is unfair which suggests, in advance of identification by the witness, the identify of the person suspected by the police." (*People v. Hunt* (1977) 19 Cal.3d 888, 893.) When the other subjects for the identification procedure have been so hastily chosen so that only one other person could possibly fit the description given to the police, the identification procedure is unduly suggestive. (*People v. Tatum* (N.Y. Sup. Ct. 1985) 129 Misc.2d 196 [492 N.Y.S.2d 999, 1004]; *People v. Lebron* (N.Y. App. 1974) 46 A.D.2d 776 [360 N.Y.S.2d 468, 471]). Thus, in *People v. Floyd, supra*, 1 Cal.3d at 713, this Court recognized that a suspect might be dressed in such a striking outfit that to place him in a lineup with others not similarly garbed would be unfairly suggestive.

In *State v. McBain* (Ore. App.1976) 24 Or.App. 737 [547 P.2d 188, 189], the Oregon Court of Appeal concluded there was an impermissibly suggestive identification procedure when only one photograph out of nine depicted a darkly bearded heavy set man (although other men in the photos were bearded) and the assailant had been described to the police as having these characteristics. (See also, *Judd v. State* (Fla. App. 1981) 402 So.2d 1279, 1280-81 [pretrial photographic array was impermissibly suggestive in its singular depiction of the defendant as the only person who was both bare-chested and had braided hair when the general suspect description was black male, about 5 feet 10 inches tall, weighing approximately 180 pounds, bare-chested, with braided hair and a very wide and flat nose]; *United States ex rel Cannon v. Montage* (1973 2nd Cir.) 486 F.2d 263, 267 [identification lineup would be impermissibly suggestive if the defendant was the only man in the lineup wearing a green shirt]; *United States ex rel. Cannon v. Smith*

(W.D.N.Y. 1975) 388 F.Supp. 1201, 1204 [lineup was held to be impermissibly suggestive because the defendant was directed to wear a distinctive green shirt because that was an important lead in the investigation]; *State v. Iron Thunder* (S.D. 1978) 272 N.W.2d 299, 301 ["Since the victim had particularly commented on the rapist's big belly in her initial interview, there can be no question that the inclusion of the single torso shot was an attempt to suggest identification"]; *United States v. Sanders* (D.C. Cir. 1973) 479 F.2d 1193, 1197-98 [defendant was "the only one whose facial hair was in any way comparable to the initial uncertain descriptions given by the witnesses].)

People v. Tatum (N.Y. Sup. Ct. 1985) 129 Misc.2d 196, 204 [492 N.Y.S.2d 999, 1004] is also illustrative. In *Tatum* the court was "convinced that the lineup viewed by both witnesses was unduly suggestive since the defendant was the only one with such a 'grossly dissimilar . . . appearance.'" (*Id.*, at 1005). The witness testified she recalled the man having a "funny" eye. The defendant was the only person in the lineup with a noticeable facial disfigurement, a glass eye (*Id.*, at 1002.) Relying on *United States v. Sanders*, *supra*, 479 F.2d 1193, the court found that the defendant "fairly leaps out" as the one person who is different. (*Id.* at 1004.)

b. The Photo Lineup In The Present Case Was Suggestive

i. No Photo Other Than Lucas' Had Bulging Eyes

In the present case, the thing that stood out "first and foremost" in Santiago's mind were the assailant's "bulging" eyes. (RTH 5660; see also 5611.) Yet, according to Santiago, there was only one picture in the photo spread which depicted eyes similar to her description, and that was the photograph of Lucas. (See § 3.3.1(G), p. 829 above, incorporated herein.) Based on this alone, the lineup was suggestive.

ii. No Photo Other Than Lucas' Had Feathered Hair

Santiago told the detectives that her attacker had a "feathered" hair style. The hair was "feathered," "laid back" and "somewhat wind-blown." (RTH 4660; 4647-48.) She also described the hair as "collar-length." (RTH 6044-45.) She did not describe it as "parted" in the middle. Rather, she said it was "falling away from the middle." (RTH 5657.) The photo of Lucas is the only one that meets this description.

iii. Not All The Photos Had Facial Hair That Matched Santiago's Description

The photo lineup also failed to include individuals with mustaches which matched Santiago's description. Santiago described the suspect's mustache as not meticulously groomed, but neat in appearance; not extending past the lip. (RTH 4648; 5658.) The photographs in positions 4 and 5 were automatically excluded on the basis of the mustache description because each had a mustache which extended well beyond the lips, in a "fu-man-chu" style. In essence, from the viewpoint of Santiago, or anyone else who had knowledge of her previous description, these two photographs would have been automatically eliminated from consideration. (RTH 4659-60.) Similarly, photos in positions 3 and 6 would have been excluded because they did not show any mustache at all. (See In Limine Exhibit 179-A.)

iv. No Photo Other Than Lucas' Had Clothing That Matched Santiago's Description

Santiago described her assailant as "neat" and "neat in his dress." (RTH 5656.) He was not scrubby and scroungy looking and he was not overly well dressed, for example, like a businessman. (RTH 5656.) The assailant wore a blue, "polo-type . . . shirt that had buttons halfway down." (RTH 4648.) David Lucas (position 2) was depicted wearing a light colored

shirt with a collar and buttons. (In Limine Exhibit 59.) The person depicted in position 3 wore a flowery or design shirt while the two individuals depicted in positions 4 and 6 wore T-shirts. The person depicted in position 5 wore an unbuttoned checkered long-sleeve shirt over a T-shirt. (*Ibid.*) In sum, based on dress, photos 3, 4, 5 and 6 did not comport with Santiago's description.

v. Other Discrepancies Between The Photo Spread And Santiago's Description

The photograph in position 6 portrayed a filthy, dirty man in a T-shirt. This photograph would have been automatically excluded based on Santiago's previous description of her assailant as being "neat in appearance." (RTH 5656.)

The person depicted in position 3 had an obviously oversized neck and looked like a body builder. Also, his hair was parted down the middle, and he was wearing a button shirt which was opened at the collar to expose has large neck. Inasmuch as Santiago told detectives that her assailant was "not a muscle type man" the man in position 3 would easily be discounted, particularly since his hair was parted down the middle. [Santiago had previously told the detectives that her attacker did not have a part down the middle of his hair but it had a feathered look. (RTH 4660; 4647-48.)] Santiago also said that the attacker "didn't look like he laid out in the sun all the time to the point of laying around the pool or laying on the beach." (In Limine Exhibit NN, p. 011748 [Interview of Jodie Santiago, December 4, 1984.) The man in position 3 was obviously suntanned.

vi. Lucas' Photo Was Larger Than The Others

See § 3.3.1(K)(2)(b), pp. 834-36 above, incorporated herein.

vii. In Light Of All The Circumstances The Photo Spread Was Unnecessarily Suggestive And Conducive To An Irreparable Mistaken Identification

In sum, the picture of Lucas in position 2 was obviously the only person Santiago would have considered based on her description of the attacker. Lucas' face is larger than the others and is the only one depicting eyes which were similar to those described by Santiago. Also, matching Santiago's description was his mustache, his hair and his shirt. Lucas was also clean in appearance, and he appeared to be taller than the other individuals. (See also RTH 17941.) There was no question that based on her description, Santiago would gravitate to photograph 2 as her assailant, and that anyone familiar with Santiago's pre-photo lineup descriptions would have picked that photo as the most likely suspect. (See also § 3.3.1(K)(2), pp. 832-35 above, incorporated herein.)

c. The Events After The Photo Lineup Improperly Reinforced And Tainted The Lineup And In-Court Identifications Of Lucas

See § 3.3.1(K)(4), pp. 845-47 above, incorporated herein.

H. The Judge Erroneously Found That Santiago's In-Court Identification Of Lucas Was Reliable And Free From The Taint Of The Pretrial Identification Procedures And Circumstances

1. The Judge's Ruling Was Based On A Mischaracterization Of The Evidence

Judge Hammes found by clear and convincing evidence that Santiago's in-court identification of Lucas was independent of the pretrial procedures and circumstances. (RTH 24586-87.) However, because the judge based that finding on a hearing at which the defense was denied due process, the finding was unreliable and insufficient to vitiate the constitutional violations which

occurred.

Moreover, the judge's finding that the pretrial circumstances did not taint the in-court identifications was predicated on two false assumptions about the evidence.

First, the judge's conclusion that the photo lineup was a "good one" (RTH 24586-87) is contrary to the record. An objective evaluation of the photo lineup demonstrates that, as Dr. Buckhout testified , it was "unfair" and "biased." (See RTH 18002; see also § 3.3.1(K)(2)(b), pp. 834-36 above, incorporated herein.) Moreover, the lineup was also inadequate because it was neither blind nor sequential. (See § 3.3.5, pp. 891-95 below, incorporated herein.) And, the instructions given to Santiago before the lineup were woefully inadequate. (See § 3.3.4, pp. 883-90 below, incorporated herein.)

Second, the judge grossly mischaracterized the record by finding that Santiago had mentioned her attacker's "bulging" eyes "early on." (RTH 24586-87) The bulging eyes were first brought up at the December 4, 1984 interview. This was over four months and five interviews (including the Identi-Kit composite) after the incident. Despite specific requests in the prior interviews for any distinguishing characteristics of the assailant, Santiago did not mention anything unusual about the eyes until six month later after numerous discussions with the police and after doing two separate composite drawings. (RTH 5611; 5660.) Hence, the eye description could have been the product of either conscious or subconscious suggestion.

In sum, because Judge Hammes' finding that the in-court identifications were independent was founded on crucial mischaracterizations of the evidence, the finding was an abuse of discretion. A sound exercise of judicial 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, pp. 406-408.) Hence, Judge Hammes did not exercise "informed discretion." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8.)

2. The Prosecution Did Not Prove That The Identification Was Reliable And Free From The Taint Of The Pretrial Suggestiveness

In light of Santiago's multiple impairments, the suggestiveness of the procedures before and after the lineup, and the prosecution's failure to maintain an adequate record of law enforcement contacts with Santiago, prosecution did not meet its burden of proving that the in-court identification was reliable and independent of the pretrial circumstances.

I. The Failure To Exclude Santiago's Identification Of Lucas Violated The Federal Constitution

Under well established precedent admission of Santiago's identification testimony violated the due process and reliability requirements established by the federal constitution for all cases whether capital or noncapital.

A criminal defendant's fundamental right to a fair trial is violated under the due process clause of the Fourteenth Amendment when the jury is allowed to consider evidence of an identification by an eyewitness whose testimony has been tainted by unnecessarily suggestive police procedures. (*Foster v. California* (1969) 394 U.S. 440, 443; *Manson v. Brathwaite* (1977) 432 U.S. 98; *People v. Bisogni* (1971) 4 Cal.3d 582, 586.) Convictions based on tainted

eyewitness identification must be set aside even if a course of cross-examination exposes to the jury the method's potential for error. (*United States v. Wade* (1967) 388 U.S. 218; *Simmons v. United States* (1968) 390 U.S. 377; *People v. Caruso* (1968) 68 Cal.2d 183.)

Furthermore, because suggestive identification procedures undermine the reliability of the trial process (see *Neil v. Biggers* (1972) 409 U.S. 188, 199; *Foster v. California* (1969) 394 U.S. 440, 443), in a capital case the 8th and 14th Amendments of the federal constitution are violated by such procedures. (See *Beck v. Alabama*, *supra*, 447 U.S. 625.) 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; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

Moreover, both this Court and the United States Supreme Court have concluded that suggestiveness in the identification process is largely responsible for this fallibility in the criminal justice system.

> A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. A commentator has observed that "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined."

(*People v. Caruso*, *supra*, 68 Cal.2d at 188, quoting *United States v. Wade*, *supra*, 388 U.S. at 228-229.) As observed by a recent study, "[e]rroneous

eyewitness testimony — whether offered in good faith or perjured — no doubt is the single greatest cause of wrongful convictions in the U.S. criminal justice system." (See Warden, *How Mistaken and Perjured Eyewitness Identification Testimony Put 46 Innocent Americans on Death Row* [http://www.law.nwu.edu/wrongfulconvictions/eyewitnessstudy.htm].) According to another study, "In sixty of the first eighty-two DNA exonerations, mistaken eyewitness identification played a major part in the wrongful conviction." (See Scheck, Neufeld and Dwyer, *Factors Leading To Wrongful Convictions*, http://www.innocenceproject.org/causes/mistakenid.php.)

Accordingly, due to the increased risk of unreliable conviction in eyewitness identification cases, a death sentence which is substantially based on a suggestive identification procedure implicates the 8th Amendment of the federal constitution.

J. Failure To Exclude The Identification Was Prejudicial

1. The Santiago Judgment Should Be Reversed

Santiago's identification of Lucas and his residence were obviously prejudicial as to the Santiago kidnapping and attempted murder counts. Santiago's identification of Lucas was clearly the key evidence upon which the prosecution relied to argue that Lucas was the person who kidnapped and assaulted Santiago.[736] Therefore, the judgement should be reversed under the

---

[736] The evidence of the other charges should not be considered because Lucas was denied a full and fair hearing on the cross-admissibility of the other offenses. (See Volume 2, § 2.3.5.1, pp. 277-300, incorporated herein.) However, even if the other offenses are considered they are not sufficiently probative to cure errors committed in the Santiago case. The evidence in Strang/Fisher was clearly insufficient to independently link Lucas to that offense. (See Volume 2, § 2.3.3, pp. 224-29, incorporated herein.) While the evidence of guilt in Jacobs and Swanke was sufficient to convict, there were

(continued...)

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.) Without Santiago's identifications the evidence in that case was not merely close, it was plainly insufficient. Therefore, the judgment should be reversed under both the *Watson* standard as well as the federal standard (*Chapman v. California* (1967) 386 U.S. 18, 24) which requires the prosecution to demonstrate beyond a reasonable doubt that the error was harmless.

2. The Swanke And Jacobs Convictions Should Also Be Reversed

The error was also prejudicial as to the other convictions because Santiago was the only charge supported by an eyewitness identification of Lucas and the prosecution relied heavily on the cross-admissibility of the offenses. (See Volume 2, § 2.3.5.1(H), pp.293-99, incorporated herein.) Therefore, given the importance of the Santiago identification in both Jacobs and Swanke, the prosecution cannot meet its burden of proving that the error was harmless as to Swanke and Jacobs. (*Chapman v. California, supra,* 386 U.S. 18; see also § 3.3.2(E)(2), pp. 860-61 above, incorporated herein.)

3. The Error Was Prejudicial As To Penalty

Moreover, even if the error was not sufficiently prejudicial to require

---

[736](...continued)
factual issues in both of these cases which raised potential questions about Lucas' guilt. (See Volume 2, § 2.3.1(I)(2), pp. 209-11, incorporated herein; Volume 4, § 4.3(L), pp. 1144-45, incorporated herein.)

Additionally, any inferences of guilt in Santiago from Jacobs and Swanke was offset by the contrary inference arising from the acquittal in Garcia. To the extent that the jury credited the defense alibi in Garcia, Garcia was affirmative evidence that Lucas did not commit Santiago.

reversal of the guilt judgment, it was prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced.[737] Therefore, any substantial error at the guilt trial should be considered prejudicial as to penalty because lingering doubt was a major defense mitigating theory at penalty.[738]

The error was particularly prejudicial as to the penalty trial since the Santiago count both aggravated under factor (a) and undermined the mitigating factor of lingering doubt.

---

[737] 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.].

[738] See also Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [under *Chapman* standard substantial penalty trial errors should be reversible].

3 SANTIAGO CASE

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

ARGUMENT 3.3.4

THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION REQUIRE THAT THE WITNESS BE GIVEN FULL AND FAIR INSTRUCTIONS PRIOR TO VIEWING THE PHOTO SPREAD

A. Introduction

The Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) preclude the imposition of criminal liability and the penalty of death if the eyewitnesses whose testimony contributed to the verdicts was not given full and fair instructions prior to viewing the photo spread. Accordingly, in the present case the failure to properly admonish the witness prior to viewing the photo lineup was prejudicial federal constitutional error.[739]

B. Reliability Is Required By The Federal Constitution

The Due Process and Cruel and Unusual Punishment Clauses of the federal constitution require heightened reliability in the determination of guilt and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also § 3.3.3(F) and (I), pp. 867-70; 878-80 above, incorporated herein.)

---

[739] Trial counsel's failure to raise this issue did not waive the issue because it is a pure question of law. (See *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

C. To Be Reliable, A Witness Should Be Instructed Prior To Viewing The Lineup

1. The Pre-Lineup Admonition Given In This Case

On December 14, 1984, Detective Henderson contacted Jodie Santiago in Seattle and asked her to fly down to San Diego to view the photo lineup. (RTH 5475; 6081.) Henderson told Santiago something along the lines of the following: "We have a possible suspect [and] we would like you to go through a lineup to determine whether or not he is in fact the man who accosted you and, if so, to please tell us." (RTH 490; 4647.)[740]

In response to this request, Santiago flew down that day. (RTH 6081.) [741] Upon her arrival in San Diego, Santiago was taken to the Holiday Inn in downtown San Diego. (RTH 5475-76.) Santiago was met in the hotel lobby by the detectives and Deputy Zuniga around 11:30 p.m. on December 14. (RTH 5475-76; 6028; 6297.)

Santiago then went up to a hotel room with Detective Fullmer, Detective Henderson, and possibly Deputy Zuniga (Santiago's "bodyguard" [RTH 6288; 6295]) where she was shown the photo lineup (Exhibit 59)[742]

---

[740] At the preliminary hearing, Santiago testified that she was told she would have the opportunity to see the suspect in a photo lineup: "The reason they asked me to come down was because they had a suspect they felt was the one who attacked me . . . They said they had a suspect, and they wanted me to come down and identify him." (PHT (CR 73093, 2/11/85) p. 462-464.) However, this testimony was not before Judge Hammes for purposes of the suppression motion.

[741] A prepaid ticket was waiting for her at the airport. (RTH 6081.)

[742] When Santiago testified at least one of the pictures was slightly out of alignment from its original position. (RTH 5669-70.) In Limine Exhibit

(continued...)

after being given the "standard" admonition. (RTH 5476-77; 6208; 6302-03; RTT 3198.)[743] Santiago testified that she was told something like: "We want you to take a look at this lineup and to take your time and, if you see the man that accosted you, to point him out." (RTH 4655:15-17.)[744]/[745] The detectives then showed Santiago the photo spread. (RTT 3195-96; 3200; 7371; 7483-7485.)[746] After a couple of minutes,[747] Santiago selected Lucas' photo, the top

---

[742](...continued)
I I, a photograph of the original lineup, portrayed the photos in their original positions. (RTH 5670-71; 5671-72.)

[743] According to Fullmer, he read the following to Santiago (RTH 5476-77; Exhibit 63): "I am going to ask you to look at a group of six photographs. You should not infer anything from the fact that the photographs are being shown to you or that we have a suspect in custody at this time. Please look through the photographs and see if you can identify any of the individual pictures."

[744] Fullmer identified Trial Exhibit 179B as being the form he read from but the form was not admitted into evidence at trial. Fullmer couldn't remember exactly what he read to Santiago from the form but paraphrased it as follows: "We wish to have you look at a group of photographs. That you are not to assume anything – that we have anyone in custody, but merely to look at the photograph and see if you can identify anyone contained within that photographic lineup." (RTT 3198-99.)

[745] Fullmer testified he read from a form which advised Santiago that he wanted her to view the lineup and see if she could identify anyone in it. (RTT 3198.) Santiago testified that Fullmer told her to take her time, look at the photos thoroughly, and if she saw her assailant, to point him out. (RTT 7371; 7487-88; 7547.)

[746] Santiago identified Trial Exhibit 179A as the photo spread she saw. (RTT 7371; 7485.) It appeared to be in the same condition as when she first saw it. (RTT 7535.)

[747] On the identification form (Trial Exhibit 179B) Fullmer wrote that
(continued...)

photo in the middle. (RTT 7372; 7485.)[748]

The preprinted form which Fullmer said he read to Santiago was entitled "Photo Lineup." The form provided as follows (the bracketed items were filled in by hand):

> The victim/witness [Jodie Santiago] was read the following statement, and then allowed to view the photo lineup:
>
> I am going to ask you to look at a group of [6] photographs. You should not infer anything from the fact that photographs are being shown to you, or that we have any suspect in custody at this time. Please look through the photographs and see if you can identify any of the individual pictures.
>
> The victim/witness was then allowed to view the photographic lineup. (In Limine Exhibit 63.)[749]

---

[747](...continued)
the identification was made "immediately." However, Trial Exhibit 179B was not admitted into evidence at trial and no other testimony contradicted Santiago's opinion that it too her a couple of minutes. (But see prosecutor's opening statement. (RTT 43-44 [Santiago "immediately identified the photograph of David Lucas as being her attacker"].)

[748] Santiago testified that no one suggested that her assailant was among the group of photos; nor did anyone point out any particular photo to her. (RTT 7372.) She also testified that the detectives didn't use Lucas' name prior to her being shown the photo spread. (RTT 7547-48.) Santiago couldn't recall when she first heard Lucas' name, whether it was the same weekend before she went home or prior to the first preliminary hearing. (RTT 7548; 7582-83.) She didn't know if she had heard his name from one of the detectives or from Deputy District Attorney Dan Williams. (RTT 7494.)

[749] The form also had two "fill-in" boxes at the bottom: "Identified photo # _____ as the suspect" and "Could not identify." For some reason these boxes were left blank. Under "Remarks" Fullmer wrote: "Pick photo # 2 immediately." (In Limine Exhibit 63.)

2. Proper Pre-Lineup Instruction

"Instructions given to the witness prior to viewing a lineup can facilitate an identification or nonidentification based on his/her own memory." (United States Department of Justice "Eyewitness Evidence: A Guide for Law Enforcement," (1999) § V(B).) This concern has been echoed by commentators:

> Eyewitness researchers agree that some instructions (e.g., "Try to identify the person who robbed you") lead to an increased likelihood of false identification owing to the already strong tendency for eyewitnesses to select the person who most looks like the culprit and to not consider carefully the possibility that the actual culprit might not be in the lineup at all. In general, those instructing an eyewitness must make salient to the eyewitness that the culprit might not be among the people in the lineup and thereby legitimize the selection of no one as an acceptable response for the eyewitness to make. The dangers of failing to explicitly state that the culprit might not be in the lineup are compounded when other certain characteristics of the lineup are present [], but the presence of an error of this sort during prelineup instructions is sufficient to lead most experts to conclude that any resultant identification has been made much less trustworthy by the instructions.

(Faigman, et. al., *Modern Scientific Evidence: The Law and Science of Expert Testimony*, *supra*, § 15-2.2.3[3] p. 249.)[750]

---

[750] This concern was echoed by Dr. Buckhout who testified:

> The wording, which has been picked up by several states, is that 'the person who committed the crime may or may not be in this array of photographs,' or 'this lineup,' and that they should look them over carefully; and if they do recognize somebody to say – make a note of it; and if they fail to recognize anybody, then to just write a zero on the form. All of this is to give them essentially the right to remain silent, if you will, when their memory is not up to identifying anybody there. (RTH [Buckhout] 18004.)

Accordingly, the Department of Justice recommends the following procedure be followed prior to the presentation of a photo lineup to a witness:

> Prior to presenting a photo lineup, the investigator should:
>
> 1. Instruct the witness that he/she will be asked to view a set of photographs.
>
> 2. Instruct the witness that it is just as important to clear innocent persons from suspicion as to identify guilty parties.
>
> 3. Instruct the witness that individuals depicted in lineup photos may not appear exactly as they did on the date of the incident because features such as head and facial hair are subject to change.
>
> 4. Instruct the witness that the person who committed the crime may or may not be in the set of photographs being presented.
>
> 5. Assure the witness that regardless of whether an identification is made, the police will continue to investigate the incident.
>
> 6. Instruct the witness that the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification. (Department of Justice, *"Eyewitness Evidence: A Guide For Law Enforcement," supra.*)

D. Santiago Was Not Fully And Fairly Instructed Prior To Being Shown The Lineup

In the present case, Santiago was not fully and fairly instructed prior to being shown the photo lineup. She was never informed of the importance of clearing innocent persons from suspicion as much as identifying guilty parties. Nor was she told that the appearance of the individuals in the photos may be different due to changes in head or facial hair. Additionally, Santiago was not told that the person who attacked her may or may not be in the photographs

presented.[751] To the contrary, she had already been told he was in the photo lineup. (See RTH 4490; 4647.) Moreover, there were numerous other suggestive factors. (See § 3.3.3(G)(1), pp. 870-71 above, incorporated herein.) Therefore, under the totality of the circumstances the photo lineup and Santiago's subsequent in-court identification were not sufficiently reliable to pass constitutional muster.

Accordingly, the Santiago convictions, which were primarily based on Santiago's identifications, should be reversed. (*Chapman v. California* (1967) 386 U.S. 18.) Additionally, because the jurors could have relied on the Santiago charge to convict Lucas on the Jacobs and Swanke charges, those too should be reversed. (See Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein.)

E. The Error Violated The Federal Constitution

The error violated the due process and reliability requirements of the federal constitution (6th, 8th and 14th Amendments) which mandate the exclusion of eyewitness identification evidence that is tainted by suggestive procedures. (See *Manson v. Brathwaite* (1977) 432 U.S. 98; *Neil v. Biggers* (1972) 409 U.S. 188, 199; see also § 3.3.3(E) and (I), pp. 866-67; 878-80 above, incorporated herein.)

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*

---

[751] According to Dr. Buckhout, the instructions given to Santiago were inadequate because they did not expressly inform the witness that "the person who attacked you may or may not be in this lineup." (RTH 17921; 17926-27.)

(1995) 514 U.S. 419, 422; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *Burger v. Kemp* (1987) 483 U.S. 776, 785.)

F. The In-Court Identification Was Tainted By The Photo Lineup

See § 3.3.3(G)(2)(c), p. 876 above, incorporated herein.

G. The Error Was Prejudicial

See § 3.3.2(E), pp. 859-61 and § 3.3.3(J), pp. 880-82 above, incorporated herein.

3 SANTIAGO CASE

3.3 EYEWITNESS IDENTIFICATION OF LUCAS: PRETRIAL ISSUES

ARGUMENT 3.3.5

THE RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION REQUIRE DOUBLE-BLIND SEQUENTIAL PHOTO LINEUPS

A. Introduction

Due to the unreliability of traditional simultaneous photo lineups, the Due Process and Cruel and Unusual Punishment Clauses of the federal constitution (8th and 14th Amendments) should preclude the imposition of criminal liability and the penalty of death if the eyewitnesses whose testimony contributed to the verdicts were shown a simultaneous lineup by a person who knew which photo depicted the suspect. Accordingly, in the present case the failure to hold a double-blind sequential photo lineup was prejudicial federal constitutional error.[752]

B. Reliability Is Required By The Federal Constitution

The Due Process and Cruel and Unusual Punishment Clauses of the federal constitution require heightened reliability in the determination of guilt and penalty before a sentence of death may be imposed. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also § 3.3.3(F) and (I), pp. 867-70; 878-80 above, incorporated herein.)

---

[752] Trial counsel's failure to raise this issue did not waive the issue because it is a pure question of law. (See *People v. Brown* (1996) 42 Cal.App.4th 461, 471; *Hale v. Morgan* (1978) 22 Cal.3d 388, 394.)

C. To Be Reliable A Photo Lineup Should Be "Double-Blind" And Sequential

1. Double-Blind Lineups Increase Reliability

A double-blind lineup is where the administrator of the lineup knows neither the suspect nor the position or order in which the suspect will be shown to the viewer (see 53 Ark L Rev 231). "This prevents the tester from skewing, even unintentionally, the test result. Double-blind testing has long been a near universally accepted staple of scientific research." (*People v. Wilson* (N.Y. Sup. Ct. 2002) 191 Misc.2d 224 [741 N.Y.S.2d 831, 834].)

"[R]esearch indicates that 'blind' line-up or photo-array administration by someone who is unaware of the identity of the suspect reduces the risk of inadvertent contamination of the witness's memory. . . ." (Loftus & Doyle, Eyewitness Testimony - Civil & Criminal § 4-7(a) [Recommended Identification Procedures] (Lexis, 3rd ed. 2000 Cum. Supp.); see also "I'll Never Forget That Face": The Science And Law Of The Double-Blind Sequential Lineup, 26 Champion 28 (2002); Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement, Donald P. Judges, 53 Ark. L. Rev. 231, 2000.)

2. Sequential Lineups Are More Reliable

In a simultaneous lineup the viewer sees all persons at the same time. The viewer is then asked if he or she sees anyone that he or she recognizes. In contrast, in the sequential lineup the viewer sees each person separately, one at a time, for as long as desired. The viewer is told that if he or she recognizes any person to make that fact known.

There are "numerous scientific articles which indicate that the sequential lineup is fairer than the simultaneous lineup. The studies indicate that the sequential lineup reduces the chance of misidentification, while

having no effect on the rate of correct or accurate identifications. [Citations.]. In other words, the sequential lineup is better at weeding out inaccurate identification but has no effect on correct identifications. The studies also show that factors which may be suggestive in a simultaneous lineup have less of an effect on the viewer during a sequential lineup." (*In re Thomas* (N.Y. Sup. Ct. 2001) 189 Misc.2d 487 [733 N.Y.S.2d 591, 593].)

"Psychologists speculate that in a simultaneous lineup the viewer subconsciously believes that he or she should select the person that most resembles the perpetrator. [Citations.]. Since the viewer believes that the alleged perpetrator is in the lineup, the viewer will in all likelihood select a person from the lineup based upon the person who most closely depicts the perpetrator rather than from a recollection that the person is in fact the perpetrator. In a sequential lineup, the viewer performs a 'recall oriented function' in that the viewer compares the person being viewed by him or her at the lineup with the person that he or she recalls as being involved in the incident. [Citation.]. When the viewer of a sequential lineup observes a displayed person there is no other individual with whom the viewer can compare. Thus, any identification made during a sequential lineup is based on a recollection of the incident and not based upon a comparison with other fillers." (*In re Thomas*, *supra*, 733 N.Y.S.2d at 593.)

"As professor Randolph N. Jonakait, in his article in 25 Loyola of Los Angeles Law Review 673 entitled *Symposium: Does Evidence Matter? The Connections Between Evidence Rules, Social Values and Political Realities* states, the law should not only be concerned with the rules of evidence and the constitution, but should also focus on the accuracy of the information received by the jury. As the professor points out in the field of identification law, the law has focused on rules of evidence and the constitution and not on the

accuracy of the identification or how to make a victim's identification more reliable (see generally, *id.* 679-680). The scientific data in this area date back to at least 1981, 20 years ago. The law has been slow in catching up to the scientific data. A potential defendant should undergo the most accurate identification procedure possible under the circumstances of the case and should not be required to undergo a less fair procedure where there are fairer procedures available merely because the executive branch of government has been slow to keep up with scientific knowledge." (*In re Thomas*, *supra*, 733 N.Y.S.2d at 596; but see *People v. Wilson* (N.Y. Sup. Ct. 2002) 191 Misc.2d 224 [741 N.Y.S.2d 831, 834] [court acknowledged the data supporting the reliability of sequential lineup procedures but refused to order that the lineup be conducted in a sequential manner].)

D. The Lineup In The Present Case Was Unreliable

In the present case the lineup was neither sequential nor double-blind. Moreover, there were numerous other suggestive factors. (See § 3.3.3(G)(1), pp. 870-71 above, incorporated herein.) Therefore, under the totality of the circumstances the photo lineup and Santiago's subsequent in-court identification were not sufficiently reliable to pass constitutional muster.

E. The Error Violated The Federal Constitution

The error violated the due process and reliability requirements of the federal constitution (6th, 8th and 14th Amendments) which mandate the exclusion of eyewitness identification evidence that is tainted by suggestive procedures. (See *Manson v. Brathwaite* (1977) 432 U.S. 98; *Neil v. Biggers* (1972) 409 U.S. 188, 199; see also § 3.3.3(E) and (I), pp. 866-67; 878-80 above, incorporated herein.)

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.)

F. The In-Court Identification Was Tainted By The Photo Lineup

See § 3.3.3(G)(2)(c), p. 876 above, incorporated herein.

G. The Error Was Prejudicial

See § 3.3.2(E), pp. 8591-61 and § 3.3.3(J), pp. 880-82 above, incorporated herein.

3 SANTIAGO CASE

3.4 IDENTIFICATION OF LUCAS' HOUSE AND SEAT COVERS: PRETRIAL ISSUES

3.4.1 IDENTIFICATION OF LUCAS' HOUSE AND SEAT COVERS: PRETRIAL STATEMENT OF FACTS[753]

A. Identification Of Lucas' Residence

1. The First Drive-By Session

In the early morning hours of December 15, 1984, after the photo lineup identification and the drink, the detectives asked Santiago to come with them to try to "retrace" the route to the house where she was taken. (RTH 4664.)[754] Detectives Fullmer, Fisher and Henderson were in the car on the drive with Santiago. (RTH 4664-65.)[755] Detective Fullmer was driving, Santiago was in the right front seat while Henderson and Fisher were in the back seat. (RTH 5678-79; 6133.) They started from the area of Baxter's and the apartment complex where Santiago was abducted and drove by Lucas' house. (RTH 5680; 6132-34.) The time was between midnight and 2:00 a.m. (RTH 5679.)

---

[753] The facts set forth in this pretrial statement of facts were before Judge Hammes during pretrial hearings on suggestive identification procedures and related issues.

[754] According to Fullmer, Santiago was generally told: "We're going to take a drive to see if you can see landmarks or identify a route that you were taken on that night." (RTH 5681.)

[755] On December 4, during the interview in Seattle, Santiago said she was "certain" she would recognize the attacker's house if she saw it. (RTH 6109.)

As they went by Lucas' house on the first pass, Santiago did not take note of it. (RTH 5679.) Thereafter, in "a very short period of time [Fullmer] made a U-turn and drove right by Mr. Lucas' house again . . ." (RTH 5679.)[756] Again, Santiago did not make an identification. (RTH 5679; 6133.) They then went to a 7-11 to purchase snacks and a soda and then returned Santiago to the hotel. (RTH 5683; 5691; 6098.)

2. Meeting In The Homicide Office

The detectives arranged to bring Santiago into the homicide office later that morning, December 15, 1984, at 9:00 a.m., to help them in preparing warrants, meet with Deputy DA Dan Williams and look at Lucas' truck. (RTH 5683; 6098.) Fullmer picked up Santiago and Zuniga at the hotel and brought them into the homicide office. (RTH 5684.)

During the time that Santiago was in the office the detectives were preparing a search warrant for Lucas' house at 10104 Casa De Oro Boulevard. (RTH 5685-87; 6099 [Henderson: discussion with DA Williams sometime on 12/15/84 re: search warrant for Lucas' house].)

One of the goals of the search warrant was to look for Santiago's personal property in the residence. (RTH 5686.) While the other officers were working on the warrant, Fullmer had Santiago draw a diagram of the house. (RTH 4687-88; 5317-18; 5685; In Limine Exhibit 65.) All of this took place in the "one room" office which was "not divided or separated." (RT 5686.) The search warrant was openly discussed in Santiago's presence in this office. (RTH 5686.)

---

[756] Fullmer could not remember precisely where he made the U-turn. (RTH 5687.)

3. The Second Drive-By Session

In the early afternoon following the search warrant session, the detectives again drove Santiago by Lucas' house at 10104 Casa De Oro Boulevard. (RTH 5686-87.) Fullmer was again driving. Santiago was in the front passenger seat with Fisher and Zuniga in the back. (RTH 5687.)

There is a contradiction in the evidence[757] as to what happened during these drivebys:

Detective Fullmer: As they drove by the third time there was some conversation between other members in the car that prompted Fullmer to make a U-turn and drive-by again. (RTH 5689.)[758] In the process of making this fourth drive-by Fullmer heard someone in the car say, "What about this house?" (RTH 5689.)[759] Following that statement Santiago identified the house. (RTH 5690.) At first Fullmer said he did not remember whether or not they stopped in front of the house after the identification. (RTH 5690-93.) However, he then said he believed they slowed down but didn't know whether they stopped. (RTH 5697; 5716.)

Detective Fisher: On the first drive-by of Lucas' house in the daylight, Fisher saw Santiago look in the "general direction" of the house. (RTH 6136.) They continued driving to see if Santiago would recognize the place

---

[757] Since the driveby was not recorded and neither detective provided detailed notes (RTH 6217; 6229-30; 6296 [Zuniga: did not take notes]; but see 6225-26) the only record of what really happened on the drive-bys is the testimony of the four persons in the vehicle, which provides four different versions.

[758] Fullmer believed that this U-turn was made at Sierra Madre and Casa De Oro Boulevard. (RTH 5687-88.)

[759] Fullmer didn't recall whether the statement was made when they approached the house or when they were in front of it. (RTH 5689-90.)

where she was found after the assault. (RTH 6136.) On the way back they went by Lucas' house again and Santiago was turning in her seat and looking intently out the window. (RTH 6136-37.) Santiago asked Fullmer to slow the car down which he did near Lucas' residence. (RTH 6137.) Fisher then asked: "Do you recognize something?" (RTH 6139; 6221-22.)[760] Santiago then began describing the appearance of the residence as she looked at it, e.g., a brown house, circular driveway, tree in the middle, concrete steps, etc. (RTH 6139.)[761] They then circled the block and returned so Santiago could get a better look. (RTH 6139; 6226-27.) During that viewing they actually stopped momentarily. (RTH 6230.) Fisher did not hear anyone in the car say, "What about this house?" (RTH 6227.)

Deputy Zuniga: Fullmer, Fisher, Santiago and Zuniga were traveling through the Casa De Oro area while driving Zuniga home. (RTH 6293.) Santiago "suddenly said that the area looked familiar to her." (RTH 6293.)[762] She asked the detective to turn around and drive down the street a second time. (RTH 6293.) Nothing was said by anyone else in the car. (RTH 6293; 6306.)[763] Santiago then again said the area looked familiar to her and that she

---

[760] During the hearing on December 19, 1986 before Judge Kennedy (RTK 1550:14-20) Fisher denied saying: "Do you see something you recognize?" (RTH 6223-24.) The parties stipulated that the judge could consider RTK 1544-60 from December 19, 1986. (RTH 6249.)

[761] Fisher took notes during Santiago's description. (RTH 6225-26; 6229-30.)

[762] These were not Santiago's exact words. (RTH 6305.)

[763] Zuniga testified as follows:

> Q. Were you making any efforts to recollect

(continued...)

thought she had been there before. (RTH 6294.) Zuniga had no knowledge that the area they were in was where Lucas' house was located. (RTH 6295.)

Jodie Santiago: Santiago was not questioned in detail about the identification of Lucas' house. She simply testified that she had picked out a house. (RTH 4674-74.)[764] Back at the Sheriff's Office that afternoon Santiago overheard the detectives say that she had picked out Lucas' house. (RTH 4674.)[765] Prior to trial Santiago made several in-court identifications of Lucas. (RTH 4491-92.)

---

[763](...continued)

specifically what it was the officers were saying to Santiago?

A. At the time?

Q. Yes.

A. They weren't saying anything to her.

Q. So is it your testimony, then, that you were in fact in the vehicle and driven out, I guess, in the direction of where you were living and none of the police said anything whatsoever to Santiago?

A. No, sir. We weren't – you know, if there was any talk, it was – I believe Detective Fisher and I were talking about the Cop'er Bowl, and there wasn't any talk about the specifics of this case, no. (RTH 6307:6-18.)

[764] Santiago testified that she was told the drive-bys were for the purpose of trying to "find the house." (RTH 4673.) She did not provide details of the daytime drive-by except to say that she "made an identification of a house." (RTH 4673.)

[765] On April 27, 1987, the court discussed an actual review of the route that Santiago took on the drive-by on December 14, 1984. (RTH 6562.) The court wanted as close a duplication of the drive-by as possible. The defense agreed to waive the defendant's presence on the drive-by. (RTH 6564.) Lucas waived his right to be present on the drive-by. (RTH 6565.) Fullmer was to be the driver. (RTH 6567.)

B. Santiago's "Identification" Of The Sheepskin Seat Covers On Lucas' Truck

On December 15, 1984, Santiago was shown Lucas' pickup truck. (RTH 5716-18 [Fullmer was present at the homicide office but didn't show the truck to Santiago; Fisher and Hartman may have been present, but Henderson wasn't].)[766] Santiago thought that the sheepskin seat covers were similar to the ones in her abductor's car. (RTH 4674-76.)

[766] However, at trial Santiago testified that she believed it was Fullmer who showed her the truck and Detective Fisher was also present. (RTT 7533.)

3 SANTIAGO CASE

3.4 IDENTIFICATION OF LUCAS' HOUSE AND SEAT COVERS: PRETRIAL ISSUES

ARGUMENT 3.4.2

THE JUDGE ERRONEOUSLY REFUSED TO DETERMINE WHETHER SANTIAGO'S IDENTIFICATIONS OF LUCAS' HOUSE AND SEAT COVERS SHOULD BE SUPPRESSED AS THE UNRELIABLE PRODUCT OF SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES

A. Introduction

Jodie Santiago identified Lucas' residence and the sheepskin seat covers in Lucas' truck under highly suggestive circumstances. However, the judge concluded that suggestive identification of inanimate objects could not be suppressed. Accordingly, the judge refused to consider the defense motion to exclude these identifications and the evidence offered in support of the motion.

In so doing, and in failing to exclude this constitutionally tainted evidence, the judge violated Lucas' state and federal constitutional rights to a fair trial by jury and due process. (Calif. Const. Art. I, sections 1, 7, 15, 16 and 17; U.S. Const. 6th and 14th Amendments.) The judge also violated Lucas' federal constitutional rights to a reliable determination of both guilt and penalty in a capital case. (U.S. Const. 8th and 14th Amendments.)

B. Procedural Background

The defense moved to exclude Santiago's identification of Lucas' seat covers and residence. (CT 8329-31.) The judge ruled that inanimate objects are not subject to exclusion based on the use of suggestive identification procedures. Therefore, she refused to consider the motion to suppress the

identification of Lucas' seat covers and residence because she concluded that there was no authority for the proposition that one could suppress identifications of objects in the same manner that one could for a photographic lineup or of a live lineup. (RTH 24416.)[767]

C. The Exclusionary Principles Mandated By The Federal Constitution Should Apply To Identification Of Inanimate Objects

It has long been recognized that the eyewitness identification of a person may be excluded based on suggestive identification procedures. (See § 3.3.3(F), pp. 867-70 above, incorporated herein.)

But, the case law is much less prolific regarding identification of inanimate objects. Some cases from other jurisdictions have rejected arguments that eyewitness suggestibility invokes the constitutional principles of exclusion with respect to inanimate objects. (See *Hughes v. State* (1999) 735 So.2d 238, 260-62 [and cases cited therein].)

Nevertheless, the relevance of suggestiveness to inanimate objects is clear. (See, e.g., Loftus & Doyle, *Eyewitness Testimony- Civil & Criminal* (Lexis, 3rd ed. 1997) 4-10, p. 90 [unconscious transference applies to objects as well as human faces]; Arnolds, Carroll, Lewis & Seng, *Eyewitness Testimony: Strategies And Tactics* (West, 1984) § 2.43 [The Sequence Of Events]; § 2.44 [Shapes and Dimensions]; § 2.45 [Colors].)[768] Accordingly,

---

[767] In response to this ruling counsel argued that suggestive procedures as to Santiago's viewing of Lucas' house and the seat covers in his truck constituted outrageous governmental conduct which violated the Due Process Clause of the federal constitution per *Rochin v. California* (1952) 342 U.S. 165. (RTH 24418-20.)

[768] In the present case the judge recognized the relevance of the eyewitness factors to inanimate objects by modifying CALJIC 2.92 to (continued...)

there is no reasoned basis for applying the exclusionary rule to the identification of faces and not to inanimate objects – especially where the identification of the object – e.g., Lucas' house – is the functional equivalent of identifying the person as the culprit. The reliability concerns upon which the exclusionary rule is predicated are no less important when suggestive procedures are utilized to obtain identification of the defendant's house as opposed to the defendant himself.

Hence, the due process and reliability requirements of the Eighth and Fourteenth Amendments which have been applied to eyewitness identification of faces (see *Manson v. Brathwaite, supra*; *People v. Caruso, supra*; see also § 3.3.3(E) and (I), pp. 866-67; 878-80 above, incorporated herein), should also apply to the identification of inanimate objects.

Moreover, the federal constitution imposes independent requirements of reliability in all criminal cases. "Reliability is . . . a due process concern." (*White v. Illinois* (1992) 502 U.S. 346, 363-64.) Hence, the Due Process clause of the federal constitution (14th Amendment) requires that criminal convictions be reliable and trustworthy. (See *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646 and cases collected at n. 22 [due process "cannot tolerate" convictions based on false evidence]; *Thompson v. City of Louisville* (1960) 362 U.S. 199, 204.)

Further, the Eighth and Fourteenth Amendments require even greater reliability in the guilt and penalty phases of a capital case. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46.) The fact that capital cases require heightened reliability was reaffirmed by the court in *Kyles v. Whitley* (1995) 514 U.S. 419, 422 in which the court quoted from *Burger v. Kemp* (1987) 483

---

[768](...continued)
specifically include inanimate objects. (CT 14287.)

U.S. 776, 785: "[O]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." (See also *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; see also *Gore v. State* (Fla. 1998) 719 So.2d 1197, 1202 [in a death case "both the prosecutors and courts are charged with an extra obligation to ensure that the trial is fundamentally fair in all respects."].) "[T]he severity of the death sentence mandates heightened scrutiny in the review of any colorable claim of error." (*Edelbacher v. Calderon* (9th Cir. 1998) 160 F.3d 582, 585.)

In sum, when the defense moves to exclude any crucial eyewitness testimony on the basis that the identification is unreliable, the trial judge should entertain the motion regardless of whether the object involved is animate or inanimate.

D. In The Present Case The Identification Of Lucas' House And Seat Covers Should Have Been Excluded

The evidence of suggestiveness as to Santiago's identification of Lucas' residence was strong. Santiago said that she was certain she would recognize the house if she saw it again. Yet she was driven by the house twice after the photo lineup and she said nothing. (See § 3.4.1(A)(1), pp. 896-97 above, incorporated herein.) The next day Santiago was in the presence of the detectives while they prepared a warrant which specifically referred to the address of the residence. (See § 3.4.1(A)(2), p. 897 above, incorporated herein.) Thereafter Santiago was again driven by the house, this time in the daylight. After the car was slowed in front of Lucas' house and Santiago was asked: "What about this house?" – she made the identification.[769]

---

[769] The record as to what exactly took place before the identification is in conflict. Not everyone remembered when and where the car was slowed (continued...)

These procedures were highly suggestive and, therefore, the identifications should have been excluded.

E. Relief Is Warranted Due To The Trial Judge's Failure To Consider The Motion To Exclude The Identifications

Because the Santiago case was closely balanced and admission of the identifications of the Lucas house and seat covers were substantially prejudicial, relief should be granted as a result of the judge's failure to consider the defense motion to suppress the identifications.

1. The Santiago Evidence Was Closely Balanced

a. Santiago Was The Only Identifying Witness

The case against Lucas in Santiago was based primarily on the identification of a single witness, Jodie Santiago. Any conviction that is predicated on the testimony of a single eyewitness should be viewed with caution. (See *Jackson v. Fogg* (2nd Cir. 1978) 589 F.2d 108, 112; *People v. Sapp* (N.Y. 1983) 469 N.Y.S.2d 803, 804; see also Scheck, Neufeld and Dwyer, *Factors Leading To Wrongful Convictions*.)[770] Moreover, Santiago's identification testimony was subject to special scrutiny due to the combined

---

[769](...continued)
and what exactly was said. (See § 3.4.1(A)(3), pp. 898-01 above, incorporated herein.) However, there certainly was substantial evidence from which the trial judge could have found that the car was slowed in front of the house and that Santiago was asked: "What about this house?"

Moreover, the record is in conflict because the prosecution failed to adequately memorialize what happened. Hence, the prosecution, not the defendant, should suffer the consequences of the inadequate record. (See generally Volume 2, § 2.4.2, pp. 332-48, incorporated herein.)

[770] "In sixty of the first eighty-two DNA exonerations, mistaken eyewitness identification played a major part in the wrongful conviction." (http://www.innocenceproject.org/causes/mistakenid.php)

impact of her amnesia, closed head injuries, Post Traumatic Stress Disorder ("PTSD") and the suggestive identification procedures utilized before, during and after her identifications. (See § 3.2(B)(1), pp. 792-98 above, incorporated herein.)

b. The Photo Spread Was Suggestive

The photo spread shown to Santiago was suggestive. A crucial requirement for a fair photo lineup is for all of the photos to match the description of the culprit which was given by the witness. (See § 3.3.3(G)(2), pp. 871-76 above, incorporated herein.) Here, the lineup was unfair and unreliable because the photo of Lucas was the only one which had bulging eyes, the most distinctive physical characteristic given by Santiago.[771] Hence, this was a photo spread that, based on Santiago's description, included only one person who could have been the suspect and that person was Lucas.

c. Santiago Knew The Detectives Had A Suspect Who Was In The Photo Spread

Under the circumstances Santiago would have reasonably concluded that the detectives had a suspect and that suspect was included in the photo spread. The detectives called Santiago in Seattle and asked her to come look at some photos and immediately flew her to San Diego for the specific purpose of viewing the photo lineup. The detectives met her at the airport and immediately drove her to a hotel where four homicide detectives met with Santiago. The detectives also provided a bodyguard for her. (RTT 3196-97; 3305; 7483-88.)

Under these circumstances there could have been little doubt in

---

[771] Many of the other photos failed to accurately portray other characteristics described by Santiago such as hair style, facial hair and clothing. (See § 3.3.3(G)(2)(b), pp. 873-76 above, incorporated herein.)

Santiago's mind that they had a suspect as suggested by her trial testimony:

> Q. And what were the circumstances under which you first saw Exhibit 179A [the photo spread]?
>
> A. The detectives had asked me if I would be willing to come down and view a photo lineup and pick out, if I could, and if there was a suspect that had attacked me. [Emphasis added.] (RTT 7371:10-14.)

Nor does the record reflect any effort by the detectives to prevent Santiago from assuming they had a suspect.

In sum, under the totality of the circumstances Santiago must have assumed that the detectives had a suspect. Moreover, because Lucas' photo was the only one which matched her description (see § 3.3.3(G)(2)(b), pp. 873-76 and § 3.2(A)(13), pp. 777-79 above, incorporated herein) the totality of the circumstances pointed Santiago to Lucas' photo just as clearly as if the detectives themselves had physically pointed to it during the lineup. Under these circumstances, the probative value of Santiago's identifications at the lineup, and later in court, was far from overwhelming.

d. Post-Lineup Events Reinforced Santiago's Choice Of Lucas' Photo

Santiago's choice of Lucas' photo during the photo lineup was reinforced by subsequent events. Although neither Santiago nor the deputies admitted as much, the jury very reasonably could have inferred that the post-lineup drink in the hotel lobby was a "celebration" of Santiago's correct identification of her attacker. (See § 3.2(A)(13), pp. 777-79 above, incorporated herein.) Certainly the circumstances, if not the direct statements of the detectives, would have made it obvious to Santiago that the detectives believed that Lucas was the attacker and that Santiago was correct in choosing him from the lineup.

This kind of post-lineup reinforcement reduces the reliability and probative value of any subsequent in-court identifications. (See § 3.3.3(G)(2)(c), p. 876 above, incorporated herein.)

e. Santiago Was Cognitively Impaired By Severe Closed Head Trauma And Post Traumatic Stress Disorder

The trauma which Santiago endured resulted, quite reasonably, in substantial cognitive impairment. Both the severe blows to the head and the Post Traumatic Stress Disorder were likely to cause substantial cognitive impairment and loss of memory. (RTT 10146-47; 10156-57; 10179-80 [defense].) Indeed, there was no dispute that Santiago had no memory of anything that happened after she was choked unconscious, including a ten-day period in the hospital. (RTT 7344; 7367.) And, while Santiago claimed to have clearly remembered the events prior to her unconsciousness – including the face of her attacker – the accuracy and reliability of this memory vis-à-vis the closed head injuries and PTSD was never tested.

Moreover, the physical evidence suggested that the events prior to loss of consciousness may not have been accurately perceived and/or remembered by Santiago. The defensive wounds to Santiago's fingers (see RTT 7054-55; § 3.3.1(C), p. 815 above, incorporated herein) indicate that she may not have been unconscious when she was attacked with the knife. Yet, she had no recollection of the knife attack. From this inconsistency the jurors could have inferred that Santiago did not accurately remember everything that happened while she was conscious, including the face of her attacker.

f. Santiago Had An Emotional Need To Identify Someone As Her Attacker

The probative value of Santiago's identifications were further reduced by her emotional instability at the time of making those identifications. As

discussed above, she suffering from depression and PTSD as a result of the June 1984 attack. Moreover, she had a previous trauma in 1973 when she was raped. (RTT 7542.) This prior rape was particularly significant because Santiago had not been able to identify her attacker in that case. (RTT 7542.) Hence, she had an emotional need to identify someone in the present case. (See § 3.2(B)(1)(c), pp. 794-96 above, incorporated herein.)

g. Santiago's Recollection Of The Abductor's License Plate Excluded Lucas As The Attacker

Assuming the jury believed that Santiago's perception and memory of the attack was accurate, a critical part of that recollection – the license plate upon which she specifically focused – directly conflicted with her identification of Lucas as the culprit. She consistently maintained that the license had three numbers and three letters. (See § 3.2(A)(21)(a), pp. 787-88 above, incorporated herein.) This evidence undermined the prosecution's theory because Lucas' license was "CMC INC 2." (*Ibid.*)

h. Other Inconsistencies In The Description Of The Vehicle

The reliability and probative value of Santiago's identification of Lucas was further reduced by her descriptions of the vehicle which conflicted with Lucas' vehicle. For example, Santiago consistently testified that the vehicle had louvers on the hatchback window. (See RTT 7359-60; 7432.) The evidence as to whether Lucas' car had louvers, while in conflict, strongly indicated that it did not. (See § 3.2(A)(21)(b), pp. 788-89 above, incorporated herein.)

Additionally, Santiago didn't hear any computerized voices coming from the vehicle in which she was taken – even though the door was open at the time. On the other hand, a number of witnesses testified that Lucas' 280-Z had a computerized voice which was activated when the door was open. (See

§ 3.2(A)(21)(c), pp. 789 above, incorporated herein.)

Finally, Lucas' car did not have a back seat while Santiago testified that the abductor's had a small back seat in which children could sit. (See § 8(A)(21)(d), pp. 789-91 above, incorporated herein.)

i. Santiago's Alcohol Use Before The Abduction

Santiago testified that she had two or three Margaritas at Baxter's before her abduction between 7:30 p.m. and 10:30-11:00 p.m. (RTT 7323; 7399-7400; 7402-03.) This testimony provided a basis for finding some impairment of Santiago's ability to perceive due to the effects of the alcohol.[772]

j. Impact Of Stress And Weapon Focus

Stress and weapon focus reduce eyewitness reliability. (See § 3.3.1(K)(3)(b), pp. 838-40 above, incorporated herein.)

k. Suggestiveness Of The House Identification

The circumstances concerning the identification of Lucas' house substantially reduce the reliability and probative value of that identification.

On the first occasion the detectives drove Santiago by the house twice and she did not recognize it even though she had said earlier that she was "certain" she would recognize the house. (See § 3.2(A)(14), p. 780 above, incorporated herein.)

On the second occasion, when they drove by the house two more times, the process was highly suggestive because the car was slowed down as they approached the house, and Santiago apparently picked up on the cue, describing Lucas' house aloud as they slowly went by it, as though trying to

---

[772] The jury was instructed that use of alcohol by a witness may be considered vis-à-vis ability to perceive. (CT 14291.)

memorize its appearance. Moreover, someone in the car made a statement which may have further suggested that particular house to Santiago. (See § 3.2(A)(15), pp. 780-84 above, incorporated herein.) Moreover, because the house identification served to reinforce Santiago's identification of Lucas, the suggestiveness of the house identification undermined the reliability of the identification of Lucas.

l. The Jury Deliberated For Ten Days And Requested Readback Of The Testimony

It should be noted that the jury requested readback of some of the Santiago evidence and took over 10 days to reach a verdict. These factors further suggest that the case was closely balanced. (See *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852; cf., *People v. Hernandez* (1988) 47 Cal.3d 315, 352-53.)

2. The Error Was Independently Substantial And Prejudicial

Even if the error did not require exclusion of the in-court identification, the erroneous admission of the house and seat covers was prejudicial because it undermined the primary defense theory of the case.

The defense argued at trial that Santiago had misidentified Lucas in the photo lineup and in court. This theory was supported by substantial evidence of suggestive photo lineup procedures. However, this theory was undermined by the identification of Lucas' house and seat covers because the jury likely viewed them as corroboration of both the photo lineup and in-court identifications of Lucas.

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 Volume 2, § 2.3.1(I)(2), pp. 209-11, 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.)

F. The In-Court Identification Of Lucas Should Also Have Been Excluded Because It Was Intertwined With And Reinforced By The Suggestive Identification Of His House And Seat Covers

Santiago identified Lucas from the photo lineup before she identified his house and seat covers. However, it is well established that such identifications and any subsequent in-court identifications may be tainted by suggestive post-lineup reinforcement. (See Loftus and Doyle, *supra*, § 3.4.)[773]

---

[773] See also Wells & Bradfield, *"Good, You Identified the Suspect:"* (continued...)

In the present case, the highly suggestive house identification tainted Santiago's in-court identification by improperly reinforcing her photo lineup identification. Therefore, both the photo lineup and in-court identifications of Lucas should have been excluded due to the suggestive house identification procedures. The failure to do so was prejudicial error. (See § 3.3.3(J), pp. 880-80 above, incorporated herein.)

G. Alternatively The Matter Should Be Remanded For A New Hearing Before A Different Judge

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 Volume 2, § 2.3.5.1(E), pp. 282-84, incorporated herein.) Accordingly, the matter should be remanded for a different judge to consider the defense motion to exclude Santiago's identification of Lucas' house. (See *People v. Leahy* (1994) 8 Cal.4th 587, 610-11 [remand as proper remedy for erroneous in limine hearing on admissibility of expert testimony]; see also *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.) The matter should be remanded.

2. On Remand A Different Judge Should Be Assigned

Having already determined and ruled that Lucas should be executed,

---

[773](...continued)
Feedback to Eyewitness Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360 (1998); Wells & Bradfield, *Distortions in Eyewitnesses' Recollections: Can the Postidentification Feedback Be Moderated?*, 10 PSYCHOL. SCI. 138 (1999); Bradfield et al., *The Damaging Effect of Confirming Feedback on the Relationship Between Eyewitness Certainty and Identification Accuracy*, 87 J. APPLIED PSYCHOL. 112 (2002).

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.)

3 SANTIAGO CASE

3.5 EYEWITNESS IDENTIFICATION: TRIAL ISSUES

ARGUMENT 3.5.1

EXCLUSION OF THE TESTIMONY OF EYEWITNESS IDENTIFICATION EXPERTS WAS ERROR

A. Introduction

Even though the Santiago attempted murder allegation was not itself a capital offense, it was part of the prosecution's capital allegations. The prosecution relied on the identification in Santiago as evidence of Lucas' guilt as to the other charges. (See generally Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein.)

In this context the Santiago incident provided important prosecution evidence as to the murder counts which were primarily based on circumstantial evidence. Furthermore, apart from its impact on the murder counts, the Santiago incident itself provided added aggravation at the penalty trial.[774]

Accordingly, the jury's determination as to the reliability of Santiago's identification of Lucas was one of the most important factual determinations in the trial.

Yet, due to the judge's exclusion of the testimony by eyewitness identification experts, the jury resolved this crucial factual issue while laboring under false assumptions about the strength and reliability of Santiago's identification. When the jury has reached its guilt and penalty

---

[774] The instructions permitted the jury to consider the Santiago evidence and conviction under factor (a). (See CT 14373.)

verdicts in reliance upon fundamental misconceptions as to the reliability of the prosecution's evidence, those verdicts are inconsistent with the state and federal constitutions.[775]

B. Procedural Background

1. In Limine Motion

The prosecution raised an in limine objection to expert testimony regarding eyewitness identification testimony. (CT 3365-71.)

At the in limine hearing the defense presented Dr. Robert Buckhout (RTH 17880-18014) who testified, inter alia, that:

a. Confidence of the eyewitness does not correlate with accuracy. (RTH [Buckhout] 17934; RTT 9286; 9303-04.)

b. Stress reduces accuracy. (RTH [Buckhout] 17931-37; 18010-11.)

c. Weapon focus reduces accuracy. (RTH [Buckhout] 18008-09.)

d. The photo lineup which resulted in Santiago's identification of Lucas was "biased" and "unfair." (RTH [Buckhout] 18002.)

Judge Hammes ruled that this evidence could not be presented at trial because *People v. McDonald* (1984) 37 Cal.3d 351 only requires that it to be admitted when there is no corroboration. Here, the judge asserted, Santiago was corroborated by the other counts and her own testimony describing the house and car. (RTH 24897-24900.)[776]

---

[775] California Constitution Article I, section 1, 7, 15, 16 and 17; U.S. Constitution, 6th Amendment rights to confrontation and to present a defense, 14th Amendment Due Process; 8th Amendment right to verdict reliability. (See § 3.3.3(F) and (I), pp. 867-70; 878-80 above, incorporated herein.)

[776] Subsequently, the court concluded that, apart from the corroboration issue, the proffered testimony was not relevant to any eyewitness issues (continued...)

In sum, the trial judge effectively ruled that lack of corroboration was a threshold prerequisite to admission of eyewitness expert testimony under *McDonald*. (See RTH 24897-24900; see also RTT 9157:24-27; 9300:4-7.)[777]

2. Renewed Motion

At trial the expert testimony issue was reopened as to the eyewitness testimony of Emmett Stapleton [the man who identified Lucas as responding to a rental advertisement in Garcia]. The request for expert testimony regarding the photo spread was also renewed. (RTT 9149-56.) Dr. Elizabeth Loftus added further testimony regarding juror misconceptions about eyewitness identification. (RTT 9280-9337.) However, Judge Hammes denied defense requests to present such testimony, concluding that neither Loftus nor Buckhout were experts because real crime victims weren't used in the studies they relied upon. (RTH 9358-65.)

3. Voir Dire

The defense was not permitted to voir dire the jurors regarding specific eyewitness identification factors such as weapon focus effects. (RTH 35691-704.)

---

[776](...continued)
because the witnesses – Dr. Buckhout and Loftus – "are not experts." The basis for this finding was the judge's view that the scientific research should be ignored because it did not utilize actual crime victims and witnesses. (RTT 9358-65.)

[777] However, the judge left open the question of whether Buckhout could be used at trial as a suggestive photo spread expert. In ruling on a prosecution objection during the in limine testimony of Dr. Buckhout the trial court observed:

> "I think this is similar to the handwriting comparison situation. Your expert may point out something I hadn't thought of before . . ." (RTH [Buckhout] 17940: 22-24.)

4. Treatment Of Eyewitness Testimony In Defense Counsel's Opening Statements To The Jury

In the defense opening statement counsel informed the jury as follows:

> Now, there will also be evidence presented for you to consider as to the stress that Jodie Santiago-Robertson was under at the time of the incident. She will testify that she's never been so scared in all her life, and you will hear that stress does have an effect on the ability for someone to identify their attacker.
>
> Secondly, you will hear evidence which will indicate to you that there is such a thing as weapon focus. That when a person is attacked by a person who has a weapon in their hand, that there is a tendency to focus on that weapon and to become obsessed with that weapon . . .
>
> You will also hear testimony that the confidence that one has in making an identification does not bear a relationship to the ability for that person to be as sure as they say they are. In other words, that it is common for a person to say that they are sure of their identification even though it may not be the case. (RTT 107:13-108:4.)

5. Discussion Of Eyewitness Identification In Summations To The Jury

Both sides discussed Santiago's eyewitness identification testimony in their summations. The prosecution relied on the Santiago evidence in specific support of conviction in the Santiago case and generally in support of his argument that the same person (Lucas) committed all the charged murders. (See Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein.)

6. Jury Instructions On Eyewitness Identification

See § 3.3.3(D), pp. 865-86 above, incorporated herein.

C. Expert Testimony On Eyewitness Identification Should Be Admitted Whenever Such Testimony May Be Helpful To The Jury In Fairly And Accurately Appraising The Reliability Of Eyewitness Identification Testimony, And Especially Where, As Here, There Is A Danger That The Jury May Give The Eyewitness Testimony A False Aura Of Credibility Based On Misconceptions About Eyewitness Identification And/Or A Failure to Fully Appreciate The Effects Of Suggestive Pretrial Identification Procedures

1. Expert Testimony Should Be Admitted In A Given Case If There Is A Danger That The Jury May Reach Its Verdict Based On Misconceptions As To The Reliability Of The Identification

Thirty-five years ago, the United States Supreme Court observed that "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." (*United States v. Wade* (1967) 388 U.S. 218, 228.) Twenty-five years ago, the Ninth Circuit noted "the extensive empirical evidence that eyewitness identifications are not reliable." (*United States v. Smith* (9th Cir. 1977) 563 F.2d 1361, 1365.) In light of this judicial recognition of the "great potential for misidentification" (*United States v. Russell* (6th Cir. 1976) 532 F.2d 1063, 1066), any doubt should be resolved in favor of admitting expert testimony which will aid the jury in reaching a more reliable verdict. (See generally, *People v. McDonald*, *supra*.)

In the present case, Santiago's identification testimony was the crucial key prosecution evidence. Therefore, fundamental fairness, as well as defendant's Sixth Amendment rights to present a defense and to confrontation guaranteed Lucas the right to present relevant evidence challenging the accuracy and reliability of Santiago's testimony. Further, there were a number of specific dangers in the present case including: Santiago's expression of

confidence and the common misconception of the significance of such confidence; Santiago's level of stress; and the fact that Santiago picked Lucas' photo from a photo lineup which was flawed and suggestive in ways which a jury might not appreciate without expert assistance.

2. The Judge Erroneously Ruled That Drs. Buckhout And Loftus Were Not Experts

At trial the judge excluded the testimony of both Dr. Buckhout and Dr. Loftus (RTT 9339) because "I don't find them to be experts." (RTT 9365.) This ruling flies in the face of this Court's decision in *McDonald* which noted that Dr. Buckhout and Dr. Loftus were "nationally recognized expert[s]" who had testified on numerous occasions in various jurisdictions. (See *People v. McDonald*, *supra*, 37 Cal.3d at 365 fn. 10; see also § 3.3.1(K)(1), pp. 830-32 above, incorporated herein.)

3. The Judge Erroneously Assumed That Lack Of Corroboration Is A Threshold Prerequisite To The Admission Of Eyewitness Expert Testimony

In *McDonald* this Court stated in dicta that an eyewitness need not be admitted if the identification is corroborated:

> We reiterate that the decision to admit or exclude expert testimony on psychological factors affecting eyewitness identification remains primarily a matter within the trial court's discretion. . . .We expect that such evidence will not often be needed, and in the usual case the appellate court will continue to defer to the trial court's discretion in this matter. [Footnote omitted.] Yet deference is not abdication. When an eyewitness identification of the defendant is a key element of the prosecution's case but is not substantially corroborated by evidence giving it independent reliability, and the defendant offers qualified expert testimony on specific psychological factors shown by the record that could have affected the

> accuracy of the identification but are not likely to be fully known to or understood by the jury, it will ordinarily be error to exclude that testimony. (*People v. McDonald, supra*, 37 Cal.3d at 377.)

Judge Hammes interpreted the above quoted dicta as requiring lack of corroboration as a threshold predicate to the admission of expert testimony. (RTT 9157:24-27; 9300:4-7; RTH 24899.) This interpretation was erroneous for several reasons.

First, the mere presence of corroboration does not necessarily establish the reliability of the identification. The ability of the corroboration to verify the reliability of the identification is necessarily dependent on the reliability of the corroboration. An identification is not made more reliable by virtue of unreliable corroboration.

Second, at the trial level a determination as to the weight and credibility of any alleged corroboration should be made by the jury. If the judge relies on disputed or contested corroboration to exclude the expert testimony, and the jury rejects the corroboration, then the ultimate verdict is no more reliable than if there had been no evidence of corroboration to begin with.

Third, any discretionary decision by a trial judge to exclude otherwise relevant evidence should necessarily consider the totality of the circumstances and weigh the probative value of the evidence against any asserted reasons for its exclusion. (See Evidence Code § 352.) Thus, while corroborating evidence may be a valid factor for the judge to consider, all the circumstances should be considered and weighed.

4. Even If Corroboration Is A Threshold Issue, Judge Hammes Improperly Relied On The Other Charges As Corroboration

The judge relied heavily on the other offenses as corroboration of

Santiago's identification of Lucas. This reliance was erroneous for two reasons.

a. The Defense Was Denied A Fair Opportunity To Contest The Other Offenses Before Trial

The judge linked her in limine expert ruling to her in limine cross-admissibility ruling. (RTH 24900; 24903; 25683 [consolidation ruling formally incorporated into identification expert ruling].) However, the cross-admissibility ruling was fundamentally unfair because the defense was not given a fair opportunity to present evidence at the cross-admissibility hearing. (See Volume 2, § 2.3.5.1(E), pp. 282-84, incorporated herein.)

Moreover, the ultimate determination as to any predicate facts regarding the other offenses was for the jury. (Evidence Code § 403.) Thus, while the judge believed that all four of the other incidents corroborated Santiago's identification, in fact the jury found Lucas guilty as to only two of the four. (Jacobs and Swanke: conviction; Strange/Fisher: no verdict; Garcia: not guilty.)

And the jury's verdict as to the Garcia count, for which the defense presented substantial alibi evidence, actually served to undermine the reliability of Santiago's identification (See Volume 5, § 5.1.2(B)(1), pp. 1268-70, incorporated herein.)

In sum, even though the judge believed Lucas was guilty of all the charged offenses – and, hence, an eyewitness expert was not necessary from her perspective – from the jury's perspective, the verdicts as to the other offenses made the eyewitness expert testimony all the more important.[778]

---

[778] The cross-admissibility impact of the Santiago case cannot be disregarded simply because the jury did not convict on all counts. Even (continued...)

b. Reliance On The Other Charges As Corroboration Was Unreliable Due To The Danger Of Improper Bootstrapping

Due to erroneous instruction, improper argument and the inability of the jury to follow the limiting instructions, this case involved a significant risk that Lucas was convicted of several counts without a true jury determination that he was guilty beyond a reasonable doubt as to any single count. (See Volume 2, § 2.3.4.2, pp. 238-52, incorporated herein.)

Hence, the other charged offenses were not sufficiently reliable to provide adequate corroboration to justify excluding expert testimony aimed at removing fundamental juror misconceptions regarding eyewitness identification.

5. In the Present Case, Eyewitness Expert Testimony Was Needed To Dispel Or Counter Common Misconceptions About Eyewitness Identification That Jurors Were Likely To Apply To Santiago's Identification Testimony

a. Juror Misconceptions About Eyewitness Identification Applicable To The Present Case

i. Misconception: Eyewitness Confidence Does Not Correlate With Reliability

Based on the studies of nationally recognized experts, this Court has acknowledged that eyewitness confidence does not correspond to eyewitness reliability. (*People v. McDonald*, *supra*, 37 Cal.3d at 369.) Furthermore, it is both intuitively and scientifically established that most lay jurors

---

[778](...continued)
though there was no conviction on Garcia and Strang/Fisher, the jury was still free under the evidence and instructions to rely on the Santiago identification in resolving the issue of identity against Lucas in the Jacobs and Swanke cases.

misunderstand the above and instead believe that eyewitness confidence increases reliability. (See § 3.3.1(K)(3)(a), pp. 836-38 above, incorporated herein.) Accordingly, even if no other eyewitness testimony is allowed, expert testimony should be permitted in any capital case in which the guilt and/or penalty determination will substantially depend on an eyewitness who expresses confidence or certainty in his or her identification choice.

Moreover, in a capital case 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.)

ii. Misconception: Stress Increases Reliability

See § 3.3.1(K)(3)(b), pp. 838-40 above, incorporated herein.

iii. Misconception: Accuracy As To Particular Details Increases Reliability

See § 3.3.1(K)(3)(c), pp. 840-41 above, incorporated herein.

iv. Misconception: Witness Estimates Of The Durations Of Events Are Accurate

See § 3.3.1(K)(3)(d), pp. 841-42 above, incorporated herein.

v. Misconception: Constructing Composite Drawings Increases Reliability

See § 3.3.1(K)(3)(e), pp. 842-43 above, incorporated herein.

vi. Misconception: The Presence Of A Weapon Increases Reliability

See § 3.3.1(K)(3)(f), pp. 844-45 above, incorporated herein].

6. In the Present Case, Eyewitness Expert Testimony Was Needed To Fully Explain The Flawed Nature Of The Photo Lineup And Its Potential Impact On The Reliability Of Santiago's Identification Testimony

There is a body of scientific literature, which appears in "peer review" journals, that has verified that unreasonably suggestive photographic lineups can impair the fairness and reliability of the identification. (RTT 9310.) While this may be somewhat intuitive to the average juror, there are several crucial consideration which could not be fully understood by the jury without expert testimony.

a. The Photo Lineup Should Be Assembled To Reflect The Features Described By The Victim

See § 3.3.1(K)(2)(a), pp. 832-34 above, incorporated herein.

b. The Photos Should Be Similar To Each Other

See § 3.3.1(K)(2)(b), pp. 834-36 above, incorporated herein.

c. Prior To The Photo Lineup The Witness Should Be Expressly Told That The Suspect May Not Be Among The Photos

In the present case Santiago was given the "standard" instructions prior to the photo lineup which instructed her as follows:

> I am going to ask you to look at a group of 6 photographs. You should not infer anything from the facts that photographs are being shown to you, or that we have any suspect in custody at this time. Please look through the photographs and see if you can identify any of the individuals pictures." (RTH 5476-77; In Limine Exhibit 63.)

These instructions were deficient because they didn't inform the witness that the suspect may not be in the photo spread. (See RTH 17921; 17926-27; see also § 3.3.4, pp. 883-90 above, incorporated herein.)

d. Other Instructions Regarding The Suspect Should Be Given

See § 3.3.4(C), pp. 884-88 above, incorporated herein.

e. Impact Of Not Performing A Double-Blind Sequential Lineup

See § 3.3.5, pp. 891-95 above, incorporated herein.

f. Impact Of Post-Lineup Reinforcement

See § 3.4.2(F), pp. 913-14 above, incorporated herein.

7. In the Present Case, Eyewitness Expert Testimony Was Needed To Explain The Potential Impact Of Post Event Factors, In Addition to The Photo Lineup, On The Reliability Of Santiago's Identification Testimony

a. Memory Is Not A Video Tape Machine

See § 3.3.1(K)(4)(a), p. 845 above, incorporated herein].

b. Post-Event Information Affects Reliability

See § 3.3.1(K)(4)(b), pp. 845-47 above, incorporated herein.

c. The Adverse Impact Of New Information On Reliability Increases With The Passage Of Time

See § 3.3.1(K)(4)(c), p. 847 above, incorporated herein.

d. Composite Drawings

See § 3.3.1(K)(3)(e), pp. 844-45 above, incorporated herein.

e. Suggestive Photo Lineup

See § 3.3.1(K)(2), pp. 832-36 above, incorporated herein.

8. In the Present Case, There Were A Number Of Factors Casting Doubt On Any Conclusion That Santiago's Identification Testimony Was Reliable And Thus Making The Need For Eyewitness Expert Testimony All The More Compelling

a. Deficiencies In The Record Of The Present Case

As discussed elsewhere in this brief (§ 3.3.2(B)(1), pp. 848-55 above, incorporated herein), many of the crucial eyewitness contacts and procedures were not adequately memorialized. Even if these deficiencies were not sufficient to require suppression of the identification, they sufficiently impaired its reliability so as to militate in favor of allowing the eyewitness expert testimony.

b. Contradictions In The Record

In part due to the deficiencies in the record discussed above, the record contains many substantial contradictions as to factual issues bearing on the reliability of Santiago's identifications. (*Ibid.*)

These contradictions sufficiently compromised the impact of any corroborating evidence to warrant admission of the expert testimony.

c. The Photo Lineup Procedures Were Suggestive

Expert testimony was also necessary due to the suggestive identification procedures used in the present case, which rendered the resulting identification unreliable. (See § 3.3.3, pp. 863-82 above, incorporated herein.)

9. The Judge Misstated The Evidence In Ruling On The Motion

In denying the suppression motion the judge stated, inter alia, 1) this was a "good lineup," and 2) Santiago mentioned her attacker's distinctive eyes "early on." (RTH 24586-87.) Both of these conclusions misstated the record.

An objective evaluation of the photo lineup demonstrates that it was not a "good one." As Dr. Buckhout testified, the lineup was "unfair" and

"biased." (See RTH 18002.) Moreover, the lineup was also inadequate because it was not blind and sequential. (See § 3.3.5, pp. 891-95 above, incorporated herein.) And, the instructions given to Santiago before the lineup were woefully inadequate. (See § 3.3.4, pp. 883-90 above, incorporated herein.)

Similarly, the judge's conclusion that Santiago described the bulging eyes "early on" is a mischaracterization of the record. (See § 3.3.3(H)(1), pp. 876-78 above, incorporated herein.)

10. Conclusion: The Expert Testimony Was Erroneously Excluded

In sum, even though the record did contain evidence which, if believed by the jury, would have provided some corroboration of the identifications, in light of all the circumstances, the reliability of Santiago's identification was a closely contested factual issue. Hence, the expert testimony was necessary to limit the risk that the jurors would rely on their misconceptions about eyewitness testimony in resolving the identification issues and ensure that it understood the potentially reliability-undermining impact of the photo lineup and other post-event occurrences.

D. The Santiago Evidence Was Closely Balanced

See § 3.4.2(E)(1), pp. 906-12 above, incorporated herein.

E. The Error Was Federal Constitutional Error

To the extent that the exclusion of relevant evidence under a domestic rule of evidence infringes upon the accused's federal constitutional rights (e.g., due process, Sixth Amendment right to confrontation and the right to present a defense, 8th Amendment reliability), exclusion of the evidence is federal constitutional error. (*Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308; *Washington v. Texas* (1967) 388 U.S. 14.) This rule is especially applicable

in a capital case. (*Green v. Georgia* (1979) 442 U.S. 95) Each of those constitutional rights was violated by the trial court's erroneous exclusion of the proffered eyewitness identification expert testimony. 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, supra,* 388 U.S. at 19), and to 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, supra*, 410 U.S. at 294, 302; *Webb, supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The High 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, 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.)

Finally, because the error arbitrarily denied Lucas his state created rights under the California Constitution (Art I., sections 1, 7, 15, 16 and 17) and statutory law, 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, 801; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

F. The Error Was Prejudicial

Exclusion of the eyewitness expert testimony was prejudicial on several fronts.

First, because Judge Hammes did not credit Buckhout and Loftus as expert witnesses at the suppression hearing, her in limine ruling was an uninformed, unreliable abuse of discretion. A sound exercise of judicial discretion requires that "all the material facts . . . 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, pp. 406-408.) Thus, the trial judge did not exercise "informed discretion" (*People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8) and, therefore, Santiago's identifications of Lucas should not have been admitted in the first place. And, not only was the failure to exclude the identifications clearly prejudicial as to Santiago, it also was prejudicial to

Swanke and Jacobs. (See § 3.3.2(E)(2), pp. 860-61 above, incorporated herein.)

Second, even if the identifications had been properly admitted, exclusion of the defense expert testimony at trial skewed the verdict in favor of conviction since the jurors evaluated Santiago's identification in light of their unreliable lay misconceptions and without an understanding of the potential reliability-undermining impact of various post-event occurrences, including the flawed and suggestive photo lineup. Hence, exclusion of the expert testimony was substantial error in a closely balanced case[779] and, therefore, 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 and the importance of the Santiago identification in both Jacobs and Swanke, the prosecution cannot meet its burden under *Chapman*. Therefore, the judgment should be reversed.

In sum, because the eyewitness testimony was crucial to the Santiago conviction, and because the Santiago conviction was likely relied upon by the jurors to convict in the Jacobs and Swanke cases, all the convictions should be reversed.

Finally, even if the error was not sufficiently prejudicial to require

---

[779] See § 3.4.2(E)(1), pp. 906-12 above, incorporated herein [discussion of multiple reasons indicating how the Santiago case was closely balanced].

reversal of the guilt judgment, it was prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced as demonstrated by the difficulty the jury had in reaching a verdict.[780] Therefore, any substantial error at the guilt trial should be considered prejudicial as to the penalty because a major defense mitigating theory at penalty was lingering doubt. (See *People v. Robertson* (1982) 33 Cal.3d 21, 54.) The error was particularly prejudicial as to the penalty trial since the Santiago conviction could have been used both to counter the defense theory of lingering doubt and as an independent aggravator under factor (a). (See CT 14373.)

---

[780] 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.].

3 SANTIAGO CASE

3.5 EYEWITNESS IDENTIFICATION: TRIAL ISSUES

ARGUMENT 3.5.2

EXCLUSION OF SANTIAGO'S SUBJECTIVE IMPRESSION OF THE PHOTOS IN THE LINEUP WAS ERROR

A. Exclusion Of Santiago's Observations About The Lineup Was Error

One of appellant's primary defense theories as to Santiago was that the in-court identification was the product of a suggestive photo lineup. (See § 3.3.3, pp. 863-82 above, incorporated herein.) The defense contended that the lineup was suggestive because the photo of Lucas was the only one which matched Santiago's description of her attacker. On the other hand, the prosecution and trial judge contended that the lineup was not unduly suggestive. (RTH 24586 [judge concludes: the lineup is a "good one"].)

However, the real question was not how the defense, prosecution or judge viewed the lineup but how Santiago viewed it. If she subjectively believed that any or all of the other photos did not comport with her description, then this would have been a basis for questioning the reliability of her identification of Lucas' photo at the lineup. (See generally *People v. Floyd* (1970)1 Cal.3d 694, 713.)

Hence, the judge erroneously precluded the defense from conducting such cross-examination. (RTH 7489-94; 7506-14.)[781]

---

[781] The court ruled that the defense could ask questions like: "Is it a fact that you disregarded person number one because his mustache did not comport with the description you previously gave?" (RTT 7514-15.) However, such questions could only have served to reinforce Santiago's (continued...)

B. The Error Violated The Federal Constitution

Regardless of the admissibility of the evidence under state law, the judge's ruling violated Lucas' federal constitutional rights (6th, 8th and 14th Amendments) to due process, confrontation, compulsory process and trial by jury. (See *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Davis v. Alaska* (1974) 415 U.S. 308; *Washington v. Texas* (1967) 388 U.S. 14.) This rule is especially applicable in a capital case. (*Green v. Georgia* (1979) 442 U.S. 95) Each of the above constitutional rights was violated by the trial court's erroneous exclusion of Santiago's subjective belief about the photo spread. Moreover, 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, supra,* 388 U.S. at 19), and to present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas, supra,* 483 U.S. at 55; *Chambers v. Mississippi, supra,* 410 U.S. at 294, 302; *Webb, supra*, 409 U.S. at 98; *Washington, supra*, 388 U.S. at 19.) The High Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from

---

[781](...continued)
identification of Lucas without requiring Santiago to directly answer the question. All she would need to say in response to such a question would be: "I excluded it because Photo # 2 was the assailant." Such a question would have allowed the witness to, on the one hand, answer the question in the negative and, on the other hand, reinforce her opinion that Lucas was the assailant.

Hence, the fact that defense counsel did not ask the court-approved question, after the question they really wanted was disallowed by the judge, did not waive the error.

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.)

Exclusion of the evidence also undermined the reliability of the ensuing conviction and death sentence. 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.)

Further, because the error arbitrarily denied Lucas his state created rights under the California Constitution (Art I., sections 1, 7, 15, 16 and 17) and statutory law, 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.)

C. The Error Was Prejudicial

The error was prejudicial because, in fact, Jodie Santiago did not

believe that any of the other photos met her description of the culprit. (See § 3.3.1(G), p. 829 above, incorporated herein.) Thus, the jury was not permitted to consider a crucial factor bearing on the reliability of Santiago's identification. This omission, by itself, and when combined with the other eyewitness identification errors, impaired the reliability of the jury's determination of a close factual issue. "'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 Santiago charges were closely balanced. (See § 3.4.2(E)(1), pp. 906-12 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.

Additionally, the error was also prejudicial as to the Jacobs and Swanke cases. (See § 3.3.2(E)(2), pp. 860-61 above, incorporated herein.)

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.)

3 SANTIAGO CASE

3.6 SANTIAGO CREDIBILITY/RELIABILITY ISSUES

ARGUMENT 3.6.1

FAILURE TO PERMIT NEUROPSYCHOLOGICAL AND PSYCHOLOGICAL TESTING AGREED TO BY SANTIAGO WAS ERROR

A. Introduction

Jodie Santiago indicated, on the record, that she would be willing to undergo neuropsychological and psychological testing. The defendant sought this testing to determine whether Santiago was competent to testify in light of her amnesia, closed head injuries and Post Traumatic Stress Disorder coupled with suggestive pretrial identification procedures. However, notwithstanding Santiago's stated willingness to undergo the neuropsychological and psychological testing, the trial judge ruled that the defense could not contact Santiago and conduct the tests. Thus, the trial court erroneously deprived the defense of the right to contact and obtain crucial relevant evidence from a willing witness.

B. Proceedings Below

On July 14, 1986, in CR 73093 before Judge Orfield, the defense filed a motion for psychiatric and neurological examination of witness Jodie Santiago. (CT 1725-56; RTO 6501.)[782]/[783]

---

[782] Defense attorney Landon, who filed the motion in CR 73093, stated that he anticipated defense attorney Saunders, then counsel in 75195, would be joining in the motion. On July 15, 1986 the joinder motion was filed. (CT 6858-61.) However, while the cases were still proceeding toward separate trials the joinder was withdrawn to be re-filed during the in limine motions for (continued...)

On July 16, 1986, in the course of a pretrial hearing concerning the motions to suppress evidence and the *Ballard* motion, Judge Orfield received testimony from Dr. Heywood Zeidman, the psychiatrist who treated Santiago at Grossmont Hospital in June 1984 shortly after the attack. (RTO 6725-41.) However, Dr. Zeidman declined to testify as to matters to which the patient-

---

[782](...continued)
that case. (RTO 8990.)

In case number CR 73093 evidence was taken and the motion was initially denied by Judge Orfield on September 26, 1986 (RTO 7905-06); reopened due to defense counsel's belated receipt of the Seattle medical reports (RTO 7926); then denied again on November 3, 1986. (RTO 8597.) (The original denial was unsuccessfully challenged by a pretrial writ petition in the Court of Appeal (# D005135) and Petition for Review in the California Supreme Court.)

In case number 75195 some testimony was received before Judge Kennedy (Lucy Berliner and Wendy Freed) but the hearing was still incomplete when the case was referred to Judge Hammes after Judge Kennedy's disqualification. (RTH 17135.)

The motion was ultimately heard and denied by Judge Hammes as to both cases (RTH 24587-94) with portions of the Orfield and Kennedy evidence considered by stipulation. (RTH 18640-42.)

[783] In addition to the evidence presented during the in limine hearings before Judge Hammes, the parties stipulated that the following prior testimony could also be considered (RTH 18640-41; 23167; In Limine Court's Exhibit 13):

RTK 1002-1007 [Madeline Alaimo]
RTK 1643-1710 [Lucy Berliner]
RTK 1711-1754 [Wendy Freed]
RTO 7842-7908 [Wendy Freed]
RTO 7956-8013 [Dr. Snow]
RTO1780-96 [Dena Warr]
PHT (CR 79195; 7/1/85) 728-48 [Detective Gillis]
Santiago's Medical Records [Preliminary Hearing (CR 73093) Exhibit EE]

psychiatrist privilege applied. (RTO 6730-32.)[784]

Nonetheless, Santiago – who initially opposed release of her medical and mental treatments by four Seattle doctors (RTH 4637) – waived her privilege as to her medical records from Grossmont Hospital in San Diego. (CT 4735; RTO 6731.)[785] Zeidman then completed his testimony. Thereafter, on September 23, 1986 Santiago executed written waivers as to the four Seattle doctors: Snow, Davis, McLean, and Kamm. (CT 6893-6901.) During her testimony Santiago explained that she waived her privilege because she had "nothing to hide." She also suggested that she would be willing to voluntarily submit to neuropsychological and psychological testing:

Mr. Feldman:	You've previously waived your right to confidentiality with respect to statements that you made to your psychiatrist, isn't that correct?
Ms. Santiago:	That's correct.
Mr. Feldman:.	Initially, in connection with the overall litigation of the case, you declined to do so, isn't that correct?
Ms. Santiago:	Originally.
Mr. Feldman:	What, if anything, caused you to change your mind?
Ms. Santiago:	The fact that I have nothing to hide.
Mr. Feldman:	In that regard, would you agree to voluntarily submit to a series of neuropsychological and

[784] Because Santiago had earlier consented to release of her hospital records (RTO 3077 (4/1/86); RTO 6730-31), the defense was permitted to authenticate Dr. Zeidman's report. (RTO 6732-35; see also RTO 7113-14 [Zeidman request for a written waiver from Santiago].)

[785] The Grossmont Hospital records (In Limine Exhibits 590, 591, 592) were admitted before Judge Hammes on November 25, 1987. (RTH 17677; CT 5071.)

psychological tests?

Ms. Santiago: I don't see why not.

Mr. Feldman: With respect to the waiver of your privilege, do you recall whose idea it was?

Ms. Santiago: Of the – the waiver?

Mr. Feldman: Yes.

Ms. Santiago: Mine.

(RTH 4637:19-4638:13 [Emphasis added].)

. . .

Mr. Feldman: Do you recall what Mr. Williams said to you in conjunction with the conversation that you had with him regarding the waiver of your privilege?

Ms. Santiago: It was basically along the lines that you wanted to see the documents, the court wanted to review them, and it was up to me to decide whether or not I wanted to negate that privilege.

(RTH 4639:3-9.)

. . .

Mr. Feldman: Was any statement made to you by Mr. Williams, in connection with that conversation you just mentioned, that it was the prosecution's belief or Mr. Williams' belief that if you declined to waive you might in some way endanger the case?

Ms. Santiago: No.

(RTH 4639:15-20.)

In light of this testimony, defense counsel, who never directly

contacted Santiago,[786] requested permission from the judge to contact Santiago and arrange for any testing to which she would voluntarily submit. (RTH 11611-12; see also RTH 16939-40 [request renewed]; 22554-56 [request renewed during final argument on the motion].) However, the judge denied these requests ruling that the consent expressed by Santiago during her testimony were not really voluntary:

> Mr. Feldman: The second matter of business involves Jodie Santiago. When Miss Santiago was present on cross-examination she agreed to submit to a psychological evaluation. The defense has made the arrangements and can effectuate that interaction, that contact, with reasonable notice before the 8th of August or subsequent to the 15th of August. We have people that we can move to make the appropriate connections.
>
> Given that situation, we would just ask that the court direct the People to contact Miss Santiago. . . .her present home number, and in any event I perceive that she's somewhat hostile to the defense, . . . and so we request the court to direct the district attorney to contact her so we can expedite those arrangements.
>
> . . .
>
> Mr. Clarke (Deputy District Attorney): I might ask Mr. Williams to address that. I don't believe Miss Santiago has those feelings.
>
> The Court: No. That was not my impression either. My impression from her testimony was she would do anything required of her to assist in the trial of the case, and I believe it's the court's decision whether she's to be psychiatrically examined.
>
> So that will remain with the court and that issue is still to be argued; that's one of the motions still to be argued.

---

[786] Thus, for example, the defense did not formally subpoena Santiago's medical records and all communications concerning Santiago's waiver of her psychiatrist-patient privilege were made through the district attorney. (See e.g., RTO 7664; 7792.)

(RTH 11611:19-11612:16.)

. . .

Mr. Feldman: I can't find you the page and line citation of the transcript, but it's my recollection that Jodie Santiago testified that she would voluntarily submit to a neuro-psychological battery, and . . . the defense . . . was moving to arrange that voluntary test.

You, as I recollect it, indicated, your honor, that it was your view that this was a matter of law for you to decide whether or not it was appropriate. I don't know whether we're now discussing the same issue or not, but it seems to the defense, anyway, that to the extent a witness voluntarily acquiesces, the court should not interfere with the ability of a defendant in any case, really, to obtain that which he may need to properly present a defense, and the circumstance where the credibility of the witness or ultimately the conclusions of the witness really are all, insofar as the facts of the case are concerned, because I think the court now can see, based on the prosecution's evidence, that at least with respect to the Santiago case I would describe it almost a pure identification case, as opposed to the others.

The Court: We disagree to the effect, I think, of what her statement was. I saw her statement as simply being an indication that if required to do anything to further the case along, she would do it. Not that she felt that she wanted to do it or that she was coming forward to say, "Yes, I will do it" I did not see that whatsoever. In fact, her other testimony with regard to the trauma she suffered when she even received the paper subpoena was sufficient to tell this court it's not something she, in essence, voluntarily would do. It's something she would acquiesce, if required to do so for court purposes, and I am not about, at this point, to order that. If shown something else by this further evidence, we may get into that.

(RTH 16939:2-16940:8.)

. . .

Mr. Landon: . . . [T]he defense position on this issue is that if Miss Santiago is willing to have such an evaluation done

> freely and voluntarily, that it should make this issue moot, that she should be allowed to just have the examination; and it does not require the court then to order it. And that is, we believe, the state of the situation right now and would ask just to proceed and be allowed to set up the testing and evaluation that is needed.

(RTH 24557:2-9.)

. . .

> The Court: I do not find that Mrs. Robertson [Santiago] has volunteered willingly to take a psychiatric test. I think the evidence is clear that she is still very much traumatized by the continued court appearances and that these do affect her, and that any further examinations would not be done willingly by her, but in fact would only be done because she felt a duty to comply with whatever was required of her.

(RTH 24587:9-15.)

As a result, despite her expressed consent, the defense was never permitted to contact Santiago and have her tested.

C. A Privilege May Be Waived By The Beneficiary Of The Privilege

It is axiomatic that a party may waive rights that exist for his or her own benefit. (See *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 371.) "Permitting waiver . . . is consistent with the solicitude shown by modern jurisprudence to [a party's] prerogative to waive the most crucial of rights." (*People v. Robertson* (1989) 48 Cal.3d 18, 61]; see also *Cowan*, *supra*, 14 Cal.4th at 371; Civil Code § 3513 [party may waive right that exists for the party's benefit].)

Hence, even though Santiago's privilege not to undergo testing protected important privacy rights, it was her prerogative to waive those rights.

D. Denial Of The Right To Obtain And Present Exculpatory Evidence On A Material Issue Is Fundamental Constitutional Error

The judge's ruling violated Lucas' state and federal constitutional rights to due process, to fair trial by jury, to effective assistance of counsel, to present a defense, to confrontation, to compulsory process, and to reliable capital guilt and sentencing determinations. (California Const. Article I, §§ 1, 7, 15, 16 and 17; U.S. Const. 6th, 8th and 14th Amendment.)

The erroneous denial of access to potentially exculpatory evidence clearly implicates 14th Amendment federal due process principles. (See e.g., *Arizona v. Youngblood* (1988) 488 U.S. 51, 57-58 [governmental bad faith required]; *Kyles v. Whitley* (1995) 514 U.S. 419, 436 [governmental bad faith not required]; *Brady v. Maryland* (1963) 373 U.S. 83, 87 [same].) Criminal defendants are constitutionally assured "a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) The guarantee arises from the Confrontation and Due Process Clauses (see e.g., *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588) and applies to criminal defendants in state court. (See *California v. Trombetta*, *supra*, 467 U.S. at 485.) Those rights are violated when a defendant is prevented from presenting evidence important to his defense. (See e.g., *Gilmore v. Taylor* (1993) 508 U.S. 333, 344 and cases cited therein; *Lopez-Alvarez*, 970 F.2d at 588 [limitation on cross-examination of prosecution witness about hearsay statements that could have cast doubt on his credibility].)

The federal constitutional rights to due process, compulsory process and confrontation and to present a defense (6th and 14th Amendments) mandate that the defendant be allowed to present evidence and valid defense theories in response to a criminal prosecution. (See *Martin v. Ohio* (1987) 480

U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) 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, supra,* 388 U.S. at 19), and to 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, supra*, 410 U.S. at 294, 302; *Webb, supra*, 409 U.S. at 98; *Washington, supra*, 388 U.S. at 19.) The high 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.)

In light of the above described constitutional principles, the opportunity to investigate and present defense evidence must not be arbitrarily denied. Accordingly, by precluding Lucas from obtaining potentially exculpatory evidence from Santiago, to which she did not object, the trial court violated Lucas' California (Art. I, §§ 1, 7, 15,16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process, compulsory process, confrontation, trial by jury, effective representation of counsel, and to present a defense.

Moreover, because the judge's ruling precluded the defense from

presenting evidence bearing on the reliability of Santiago's identification the federal constitutional rights to verdict reliability at both the guilt and penalty phases of trial were violated. In a capital case the Cruel and Unusual Punishment and Due Process Clauses of the federal constitution (8th and 14th Amendments) require heightened reliability in the determinations of guilt, death eligibility, and the appropriate sentence. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley, supra,* 514 U.S. at 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor, supra,* 508 U.S. at 342.)

E. Precluding An Accused From Contacting A Consenting Material Witness Violates The Federal Constitution

The right of a criminal defendant to contact a consenting material witness is grounded upon many fundamental constitutional principles. Incomplete investigation violates the right to effective assistance of counsel (6th and 14th Amendments; *Strickland v. Washington* (1984) 466 U.S. 668) while denial of access to material evidence violates the rights to due process, compulsory process, trial by jury and to present a defense. (See *Kyles v. Whitley, supra,* 514 U.S. 419; *Brady v. Maryland* (1963) 373 U.S. 83.) Further, the right of a criminal defendant to present evidence is a fundamental element of the Due Process, Trial By Jury and Compulsory Process clauses of the 6th and 14th Amendments to the United States Constitution. (See *Webb v. Texas, supra,* 409 U.S. at 98; *Washington v. Texas, supra,* 388 U.S. at 19.) Accordingly, it was a violation of Lucas' fundamental constitutional rights to preclude him from contacting a consenting material witness.

F. In The Present Case Santiago's Testimony Reasonably Indicated That She Would Consent To The Testing Requested By The Defense

Jodie Santiago indicted a willingness to undergo psychiatric testing. Her consent was neither qualified nor conditional. Nor did she say anything suggesting that she felt obligated to consent. Her reason for consenting to testing was obviously the same reason why she consented to release of her medical and psychiatric records – she believed she had "nothing to hide." (RTH 4637-38.)

Given the fact that Santiago knew that she was not obligated to waive her privileges (see e.g., RTH 4639:15-20), the only reasonable interpretation of her stated willingness to consent is that she meant what she said. Certainly if she hadn't really wanted to waive her psychiatric privilege the district attorney and the court would have honored her wishes. (See e.g., RTH 4631 [Santiago trusted the law enforcement personnel]; RTO 7664; 7792 [all communications with Santiago were made through the district attorney].)

Moreover, the judge impliedly found that Santiago's waiver of the patient-psychiatrist privilege was voluntary since the judge raised no objection to the admission of privileged matters on the basis that Santiago's waiver was involuntary.

The testing would have been no more of an intrusion than the release of Santiago's psychiatric/medical records to which she had already waived her privilege. In fact, the records were actually a greater intrusion since they included Santiago's personal and confidential discussions with her doctors, psychiatrists and counselors.[787] Those records which she had already

---

[787] Submission to the testing would not have required Santiago to (continued...)

voluntarily released included highly private and personal matters such as Santiago's prior suicide attempt, her drinking problems, her depression, etc. (See § 3.2(B)(1), pp. 792-98 above, incorporated herein.)

In sum, having already found that Santiago voluntarily consented to waiver of her psychiatric privilege, and given Santiago's on-the-record expression of consent, the judge erred in finding, as a matter of law, that Santiago's consent was involuntary. Even if the record could be interpreted to provide some evidence of involuntariness, such evidence was not sufficient under the circumstances to justify barring the defense from seeking to obtain relevant evidence from a willing witness. (See generally *Green v. Georgia* (1979) 442 U.S. 95; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284.)

G. The Error Was Prejudicial

As discussed above, barring the defense from obtaining relevant evidence from a willing witness undermines the most rudimentary state and federal constitutional rights of a criminal defendant to due process, fair trial by jury, compulsory process and effective representation of counsel. (6th and 14th Amendments.)

In the present case the bar imposed on the defense was especially egregious because the evidence was relevant to the reliability of a single eyewitness whose identification of Lucas was utilized by the prosecution to obtain three murder convictions and a death sentence against Lucas. (See Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein.) Therefore, the guilt judgment should be reversed under the state harmless-error standard. (*People*

---

[787](...continued)
further testify since the test results would have been used as the basis for expert testimony regarding Santiago's competency and credibility.

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 Santiago case was closely balanced. (See § 3.4.2(E), pp. 906-12 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 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.

Furthermore, the error was also prejudicial as to the Jacobs and Swanke cases. (See 3.3.2(E)(2), pp. 862-63 above, incorporated herein.)

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.)

3 SANTIAGO CASE

3.6 SANTIAGO CREDIBILITY/RELIABILITY ISSUES

ARGUMENT 3.6.2

EXCLUSION OF EXPERT TESTIMONY AS TO SANTIAGO'S ABILITY TO REMEMBER THE MATTERS TO WHICH SHE TESTIFIED WAS ERROR

A. Proceedings Below

The judge precluded both the prosecution and the defense experts from specifically testifying as to Jodie Santiago's ability to remember the events to which she testified. (RTT 9067-77; see also RTH 24587-99 [denial of Motion for Psychiatric & Neurological Testing of Santiago].) This ruling was based primarily on Evidence Code § 352 and the judge's strong desire not to allow the trial to become a "battle of the experts." (RTT 9067; 10058.)

B. Constitutional Right To Present Defense Evidence

The right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the 5th and 14th Amendment to the United States Constitution. (See *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19; *Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848 [refusal to permit defendant to present voice exemplar evidence to establish that he does not speak with an Hispanic accent violated right to present a defense; domestic rule excluding voice exemplar evidence was an unreasonable application of clearly established federal law providing that a defendant has the constitutional right to present favorable evidence to the jury]; *People v. Marshall* (1996) 13 Cal.4th 799, 836; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787 [noting the "right of a criminal defendant to present a defense and witnesses

on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution"].)

The defendant's right to present a defense also derives from the 6th and 14th Amendment rights to compulsory process, trial by jury and effective representation of counsel. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 637-43, Kennard, J. dissenting, for a discussion of the defendant's constitutional right to present a defense under the compulsory process and due process clauses of the federal constitution]; *DePetris v. Kuykendall* (9th Cir. 2000) 239 F.3d 1057, 1061-63; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [federal constitutional error to exclude husband's prior violent behavior toward former wife and others to show wife's subjective belief in the need to defend herself]; *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871 [". . . the right to present defense witness testimony . . . is a right arising . . . under the 5th and 14th Amendment right to due process and the 6th Amendment right to compulsory process"]; *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394 [right to present defense witness testimony resides in the compulsory due process clause and the due process clause of the federal constitution]; Imwinkelried & Garland, *Exculpatory Evidence* (Lexis, 2nd ed. 1996) § 2-2(d) [6th Amendment right to confrontation] and § 2-2(e) [6th Amendment right to compulsory process]; Hollander & Bergman, *Everytrial Criminal Defense Resource Book* (West, 1999)§ 45-2 [defendant's right to call witnesses].)

C. Domestic Rules Of Exclusion Must Be Balanced Against The Federal Constitutional Rights Of The Accused: Due Process And Right To Present A Defense

The U.S. Supreme Court has consistently held that domestic rules of evidence may not be invoked to preclude a criminal defendant from presenting

relevant evidence important to his defense. (See *Rock v. Arkansas* (1987) 483 U.S. 44; *Green v. Georgia* (1979) 442 U.S. 95; *Davis v. Alaska* (1974) 415 U.S. 308; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14.)

The Supreme Court has applied a balancing test in resolving conflicts between state rules of evidence and federal constitutional provisions, weighing the interest of the defendant against the state interest in the rules of evidence. (*Chambers*, *supra*, 410 U.S. at 295; *Green v. Georgia*, *supra*, 442 U.S. at 97; *Washington v. Texas*, *supra*, 388 U.S. at 19-23.) Several federal circuit courts of appeal have also utilized such a test. (*Pettijohn v. Hall* (1st Cir. 1979) 599 F.2d 476, 486; *Dudley v. Duckworth* (7th Cir. 1988) 854 F.2d 967, 970; *Alicea v. Gagnon* (7th Cir. 1982) 675 F.2d 913, 923; see also *Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848 [refusal to permit defendant to present voice exemplar evidence to establish that he does not speak with an Hispanic accent violated right to present a defense; domestic rule excluding voice exemplar evidence was an unreasonable application of clearly established federal law providing that a defendant has the constitutional right to present favorable evidence to the jury]; *Perry v. Rushen* (9th Cir. 1983) 713 F.2d 1447, 1449; see also *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Corona* (1989) 211 Cal.App.3d 529, 544 ["[A] rule of evidence may not be enforced if it would infringe the right to a fair trial"].

This balancing principle has also been recognized in California. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 684; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Exclusion of evidence has been found to be arbitrary or disproportionate "where it has infringed upon a weighty interest of the accused." (*United States v. Scheffer* (1998) 523 U.S. 303, 308; see also

Franklin v. Duncan (9th Cir. 1995) 70 F.3d 75, 83 [exclusion of evidence violated defendant's constitutional right to present a defense].) A domestic rule of evidence may not be used to exclude evidence if it "significantly undermined fundamental elements of the accused's defense." (*Scheffer*, 523 U.S. at 315.) However, rules excluding evidence from criminal trials "do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" (*Id.* at 308.)

D. Domestic Rules Of Evidence Must Be Balanced Against The Federal Constitutional Rights Of The Accused: The Presumption Of Innocence And Trial By Jury

Exclusion of relevant defense evidence violates two other constitutional guarantees besides the defendant's right to present a defense: the presumption of innocence and trial by jury. (See Katherine Goldwasser, *Vindicating the Right to Trial By Jury and the Requirement of Proof Beyond a Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, (1998) 86 Geo.L.J. 621; see also Imwinkelried & Garland, *Exculpatory Evidence* (Lexis, 2nd ed. 1996) § 6-4, 1998 cum.supp.) "[W]hen viewed through the lens of the reasonable doubt rule, to exclude defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable." (Goldwasser, 86 Geo.L.J. at 635-36.) As to the right to trial by jury, "unreliability-based rules sacrifice precisely the thing we purport to care about in guaranteeing the right to trial by jury -- namely, providing for the kind of decision maker who is most likely to listen to, actually hear, and be open to full and separate consideration of, each and every item of evidence an accused may offer in support of his or her case." (*Id.* at 639.)

E. In The Present Case The Balance Favored Admission Of The Evidence

In the present case, contesting Santiago's memory was the heart of the defense. Indeed, the primary factual issue for the jury to resolve as to Santiago was whether she accurately remembered her attacker's face. Therefore, expert testimony concerning Santiago's ability to remember was material and relevant evidence which should not have been excluded and which no other evidence directly addressed.

F. The Error Violated Lucas' Federal Constitutional Right To Present A Defense

This ruling violated Lucas' federal constitutional right to present a defense which is predicated upon the rights to a fair trial by jury, due process, compulsory process, confrontation, to effective representation of counsel and to present a defense. (U.S. Const. 6th and 14th Amendments.) (See *Rock v. Arkansas, supra,* 483 U.S. 44; see also Volume 2, § 2.3.4.2(D), pp. 247-49, incorporated herein.)

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.)

G. The Error Was Prejudicial

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 Santiago case was closely balanced. (See § 3.4.2(E), pp. 906-12, 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.

Furthermore, the error was also prejudicial as to the Jacobs and Swanke cases. (See 3.3.2(E)(2), pp. 862-63 above, incorporated herein.)

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.)

3 SANTIAGO CASE

3.6 SANTIAGO CREDIBILITY/RELIABILITY ISSUES

ARGUMENT 3.6.3

IT WAS ERROR TO EXCLUDE EVIDENCE AS TO THE IMPORTANCE OF TESTING IN EVALUATING SANTIAGO'S ABILITY TO REMEMBER

A. Proceedings Below

The judge whipsawed the defense with regard to Lucas' efforts to contest Jodie Santiago's ability to identify Lucas and his residence. On the one hand, the judge precluded the defense from providing its expert with the foundational facts necessary to evaluate Santiago's ability to remember in light of her psychiatric (PTSD) and neurological impairments. (RTT 10064-65; 10271-73.) On the other hand, the judge refused to allow the defense to explain to the jury why its expert did not conduct such testing. (RTT 10066-68.)

Moreover, the court specifically instructed the jury to consider the foundation of an expert's opinion in deciding the weight to be given that testimony. (CT 14303-05.) Thus, the cumulative impact of the judge's whipsaw ruling was to undermine the credibility and probative value of a crucial defense expert. These rulings violated Lucas' federal constitutional right to present a defense which is predicated upon the rights to a fair trial by jury, due process, confrontation and compulsory process. (U.S. Const. 6th and 14th Amendments.) The rulings also implicated Lucas' federal constitutional rights to a reliable guilt and penalty determination. (U.S. Const. 8th and 14th Amendments.)

B. A Criminal Defendant Has A Constitutional Right To Present Defense Evidence

See Volume 2, § 2.3.5.1(E), pp. 282-84, and § 3.6.2(B) , pp. 951-52 above, incorporated herein.

C. Domestic Rule Of Exclusion Must Be Balanced Against Federal Constitutional Right To Present Defense Evidence

See Volume 2, § 2.6.4(H), pp. 470-73, and § 3.6.2(C), pp. 952-54 above, incorporated herein.

D. Domestic Rule Of Evidence Must Be Balanced Against The Right To Proof Beyond A Reasonable Doubt And Trial By Jury

See § 3.6.2(D), p. 954 above, incorporated herein.

E. In The Present Case The Balance Favored Admission Of The Evidence

In the present case the failure of Dr. Zigelbaum to test and interview Santiago was likely to be viewed by the jury as a serious deficiency in the defense case. Certainly one of the first questions any reasonable person would have after hearing Zigelbaum's testimony would be "how does all of this actually impact Santiago and why didn't Zigelbaum address this?"

"Jurors' uncertainties about missing witnesses should be treated as one part of a larger set of unresolved questions. The court should provide guidance by instructing the jury . . ." [Footnotes omitted]. (Robert Stier, *Revisiting the Missing Witness Inference--Quieting the Loud Voice From the Empty Chair*, 44 Md.L.Rev. 137, 170 (1985); see also *Yuen v. State* (Md. App. 1979) 43 Md.App. 109 [403 A.2d 819, 823] [". . . even in the absence of an instruction, the jury is not precluded from [drawing an adverse inference from missing evidence]"].)

Moreover, not only did the judge fail to provide any instruction to

combat this prejudicial inference, it affirmatively instructed the jury to consider the basis for the expert's opinion in weighing the testimony.[788]

In sum, the error was prejudicial because it created a major hole in the defense case. And, because the Santiago case was closely balanced and the excluded evidence was crucial. (See § 3.4.2(E), pp. 906-12 above, incorporated herein.) Therefore, the prosecution cannot meet its burden of demonstrating that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

---

[788] The court gave the following instructions on expert testimony:

EXPERT TESTIMONY

A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates.

A duly qualified expert may give an opinion on questions in controversy at a trial. To assist you in deciding such questions, you may consider the opinion with the reasons given for it, if any, by the expert who gives the opinion. You may also consider the qualifications and credibility of the expert.

You are not bound to accept an expert opinion as conclusive, but should give to it the weight to which you find it to be entitled. You may disregard any such opinion if you find it to be unreasonable. [Emphasis added.] (CT 14303.)

RESOLUTION OF CONFLICTING EXPERT TESTIMONY

In resolving any conflict that may exist in the testimony of expert witnesses, you should weigh the opinion of one expert against that of another. In doing this, you should consider the relative qualifications and credibility of the expert witnesses, as well as the reasons for each opinion and the facts and other matters upon which it was based. [Emphasis added.] (CT 14305.)

3 SANTIAGO CASE

3.6 SANTIAGO CREDIBILITY/RELIABILITY ISSUES

ARGUMENT 3.6.4

THE JUDGE ERRED IN EXCLUDING EVIDENCE THAT SANTIAGO LEFT A BAR WITH A STRANGER THE NIGHT BEFORE THE ATTACK

A. Introduction

The defense contended that Jodie Santiago's recollection of the events leading up to her attack was not reliable due to her admitted amnesia and memory gaps resulting from the trauma of the attack. In this connection, the defense sought to offer the theory that Santiago was not abducted but was attacked after going off with a stranger from the bar she visited that night. This defense theory was predicated on the fact that, the night before Santiago spent the night with a stranger, Neil Reynolds, whom she met at another bar.

However, the judge excluded the Neil Reynolds evidence as irrelevant, thus erroneously denying Lucas the opportunity to present this defense theory to the jury.

B. Procedural Background

The defense sought admission of evidence that the night before she was attacked Jodie Santiago met a stranger, Neil Reynolds, at a bar and ended up spending the night with him at his apartment. (RTH 24934; 14884-85; 24941-45.)

However, Judge Hammes excluded this evidence as irrelevant:

> [W]hat's really concerning me here is what I see is an attempt to discredit her as being a loose lady or however you want to characterize that when, in fact, that's really irrelevant to what's going on here . . . I don't see the relevance. . . . (RTH 25095.)

C. Statement Of Facts

For a period of over five months after her attack in June 1984, Santiago was interviewed on numerous occasions by law enforcement, medical and psychiatric personnel. However, it wasn't until a December 4, 1984 interview with the homicide detectives that she mentioned anything about meeting and spending the night with a stranger the night before she was attacked. (See § 3.2(A)(12), pp. 775-76 above, incorporated herein.) At the December 4, 1984 interview, and in her testimony thereafter, Santiago stated that on Thursday, June 7, 1984 Santiago and her brother went to a Mexican restaurant where she had some Margaritas and she met a man by the name of Neil Reynolds. Reynolds, whom Santiago had never met before, took her back to his apartment where they spent the night. (RTH 4567-68; 4609-11; 5636-37.)[789/790]

D. The Evidence Was Admissible

Under the California Constitution and Evidence Code the Neil Reynolds incident was admissible. While a character trait is not admissible to prove conduct on a specific occasion (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; 1 Witkin, *California Evidence*, § 42), it is admissible to "attack the credibility of a witness." (Witkin, *supra*; see also *People v. Millwee* (1988) 18 Cal.4th 96, 130-31.) Moreover, "[e]xcept as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such

---

[789] When she testified on March 23, 1987, Santiago could not remember Neil's last name. (RTH 4567.)

[790] The prosecution made an offer of proof that neither Reynolds nor Lucas could be excluded as the possible donor of the semen in her vaginal tract. (See RTH 25090.)

person's conduct) is admissible to prove a person's character or a trait of his character." [Emphasis added.] (Evidence Code § 1100; see also 3 Witkin, *supra*, § 243.)

Hence, evidence that she left a bar with a stranger the night before the attack was admissible to impeach the credibility of Santiago's recollection that she left Baxter's alone on the night of the attack.

Moreover, the Due Process and Confrontation Clauses of the federal constitution (6th and 14th Amendments) mandate that "[D]efense 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." (*Davis v. Alaska* (1974) 415 U.S. 308, 318.)

E. Exclusion Of The Defense Theory Evidence Violated The State And Federal Constitutions

Lucas' right, as a criminal defendant to present a defense and witnesses on his behalf is a fundamental element of due process, trial by jury and compulsory process guaranteed under the 5th, 6th and 14th Amendment to the United States Constitution. (See *Webb v. Texas* (1972) 409 U.S. 95, 98; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 19.) The right to call witnesses is also expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.)

The state (Cal. Const. Art. I, §§ 7, 15 and 16) and federal (6th and 14th Amendments) right to confrontation require the trial judge to permit an accused to present facts to the jury and allow the jury to draw inferences germane to the assessment of witness reliability. (See *Davis v. Alaska* (1974) 415 U.S. 308, 316-17; see also *Douglas v. Alabama* (1965) 380 U.S. 415,

418.)

Moreover, by undermining the defense theory of third party guilt, the exclusion of the Neil Reynolds testimony violated Lucas' right to present a defense, a fundamental element of due process, trial by jury, confrontation, compulsory process, and effective representation of counsel as guaranteed by the Fifth, Sixth and Fourteenth Amendments of the federal constitution and by the California Constitution. (Art I, §§ 1, 7, 15, 16 and 17.) (See *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19; *Martin v. Ohio* (1987) 480 U.S. 228, 233-34; *Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Rock v. Arkansas* (1987) 483 U.S. 44; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871 [". . . the right to present defense witness testimony . . . is a right arising . . . under the 5th and 14th Amendment right to due process and the 6th Amendment right to compulsory process"]; *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394 [right to present defense witness testimony resides in the compulsory due process clause and the due process clause of the federal constitution].)

Additionally, criminal defendants are constitutionally assured "a meaningful opportunity to present a complete defense." (*California v. Trombetta* (1984) 467 U.S. 479, 485.) This guarantee arises from the Confrontation and Due Process Clauses. (See *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 588.) The guarantee applies to criminal defendants in state court. (See *Trombetta*, 467 U.S. at 485.) It may be violated when a defendant is prevented from presenting evidence important to his or her defense. (See e.g., *id.* at 488-89 [failure to preserve breath samples that might have provided grounds for impeachment]; see also *Gilmore v. Taylor* (1993) 508 U.S. 333 and cases cited therein; *Lopez-Alvarez*, 970 F.2d at 588

[limitation on cross-examination of prosecution witness regarding hearsay statements that could have cast doubt on his credibility].)

These rights require that the jury be allowed to consider any defense theory which the defendant offers to negate an element of the charge. (See *Mathews v. United States* (1988) 485 U.S. 58, 63; *Martin v. Ohio*, *supra*, 480 U.S. 228 at 233-34 [instruction that jury could not consider self-defense evidence in determining whether there was a reasonable doubt about the State's case would violate *Winship*]; *United States v. Hicks* (4th Cir. 1984) 748 F.2d 854, 857-58; *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1442 [legislature cannot deny defendant an opportunity to prove he or she did not possess a statutorily required mental state]; *Strauss v. United States* (5th Cir. 1967) 376 F.2d 416, 419; *United States v. Douglas* (7th Cir. 1987) 818 F.2d 1317, 1322; *United States ex rel. Means v. Solem* (8th Cir. 1980) 646 F.2d 322, 327-28; *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739-40.)

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, section 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.)

Accordingly, the judge's foreclosure of a defense theory under Evidence Code § 352 was error under state law and the federal constitution.

F. The Error Was Prejudicial

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 Santiago case was closely balanced. (See § 3.4.2(E), pp. 908-14 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.

Further, the error was also prejudicial as to the Jacobs and Swanke convictions. (See § 3.3.2(E)(2), pp. 860-61 above, incorporated herein.)

Finally, even if the error was not sufficiently prejudicial to require reversal of the guilt judgment, it was prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced as demonstrated by the difficulty the jury had in reaching a verdict.[791] Therefore, because a major defense mitigating theory at penalty was lingering doubt, any substantial error at the guilt trial should be considered prejudicial as to the

---

[791] 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.].

penalty under both the state and federal standards of prejudice.[792] The error was particularly prejudicial as to the penalty trial since the Santiago count could have been used both to counter the defense theory of lingering doubt and as an independent aggravating fact.

---

[792] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing state and federal standards of prejudice at penalty].

3 SANTIAGO CASE

3.7 ISSUES RELATING TO THE CREDIBILITY OF THE INVESTIGATING DETECTIVES

ARGUMENT 3.7.1

THE JUDGE ERRONEOUSLY EXCLUDED EVIDENCE THAT THE SANTIAGO HOMICIDE DETECTIVES GAVE FALSE AND/OR MISLEADING TESTIMONY AND BLATANTLY VIOLATED THE SUSPECT'S *MIRANDA* RIGHTS IN ANOTHER INVESTIGATION

A. Introduction

The central defense theory in Santiago was that Santiago's memory impairment, coupled with suggestive identification procedures orchestrated by the homicide detectives, produced an inaccurate and unreliable identification of both David Lucas and his residence. The key actors with regard to the issue of suggestive procedures were the homicide detectives: Fullmer, Henderson, Fisher and Hartman.[793]/[794]

There were substantial factual disputes concerning what these detectives did and didn't do before, during and after Santiago's identifications. Therefore, the defense sought to introduce evidence that, in

---

[793] The credibility of the homicide detectives was also an important question throughout the § 1538.5 litigation. The validity of both the warrantless and warrant arrests and searches was dependent on the credibility and good faith of the detectives. (See § 1538.5 Statement of Facts, CT 2277-2426.)

The detectives' credibility was also relevant to the good faith issues presented by the destruction of evidence issues. (See Volume 2, § 2.4.2, pp. 333-48, incorporated herein.)

[794] As part of the *Cavanaugh* motion the defense requested that the § 1538.5 hearing be re-opened. (RTH 4830-32.)

another case, *People v. Cavanaugh*[795], Detectives Fullmer and Henderson gave untruthful and/or misleading testimony. The defense also sought to produce evidence that these same detectives violated the suspect's *Miranda* rights in *Cavanaugh* and in other cases including the present one. This evidence was probative because it demonstrated the detectives' character traits and/or habits of dishonesty, disrespect of a suspect's constitutional rights and a willingness to lie or mislead under oath in order to help convict the criminal defendants they have arrested.

Judge Hammes' exclusion of this evidence was an abuse of discretion because she (1) erroneously assumed that presentation of the evidence would take weeks; (2) failed to correctly recognize the underlying admissibility of specific acts to prove character traits and/or habit under Proposition 8; and (3) incorrectly concluded that the testimony of the homicide detectives was merely "tangential."

B. The *Cavanaugh* Case

In November 1985, Evanna Cavanaugh shot and killed her brother, Charles Phegley, during an argument at their mother's home. Detectives Henderson, Fullmer, Fisher and Hartman investigated the *Cavanaugh* case. (In Limine Court's Exhibit 1.)[796]

---

[795] *People v. Evanna Marie Cavanaugh*, San Diego Superior Court, North County Branch, Case No. CRN 10868, Herbert B. Hoffman, Judge. (CT 9914.)

[796] Appellate counsel believes that this transcript was included in the *Cavanaugh/Pitchess* materials reviewed by Judge Hammes. (In Limine Court's Exhibit 1.) However, because In Limine Court's Exhibit 1 was sealed and appellate counsel's request to be provided with those materials was denied by this Court and the Superior Court, Appellant's Motion For Orders Re: this Court's Order of September 19, 2001, p. 2, appellate counsel has been unable

(continued...)

The defendant, Mrs. Evanna Cavanaugh, challenged the legality of her taped confession and the seizure of a tape recording of the actual killing that was secretly made by a tape recorder Cavanaugh had in her purse during the killing. Cavanaugh contended, inter alia, that Detective Henderson erroneously continued to converse with her about the case after she had invoked her right to counsel. She also contended that detectives Fullmer and Henderson gave untruthful and/or misleading testimony concerning their conduct during the investigation. (*Ibid.*)

After the hearing, Judge Herbert Hoffman suppressed both the confession and the tape recording of the slaying. Judge Hoffman ruled that the confession was illegally obtained in violation of *Miranda* and the tape recording was inadmissible because it was seized without a warrant. (CT 10064.) To reach this latter conclusion Judge Hoffman necessarily found that Detective Fullmer lied about the circumstances under which the tape recorder

---

[796](...continued)
to review and verify the materials in the exhibit. Accordingly, counsel hereby renews the motion for copies of all materials from In Limine Court's Exhibit 1.

The *Cavanaugh* materials were originally filed with the trial court on March 16, 1987. (CT 4843.) The judge marked them as In Limine Court's Exhibit 1 and held them under seal. (*Ibid.*)

In his original record completion motion appellant requested a copy of these sealed materials. (Item G-28 on page G-3.) After the Superior Court denied this request appellant renewed it in this Court in his MOTION FOR ORDERS RE: SETTLEMENT, CORRECTION AND COMPLETION OF RECORD (filed November 10, 1997), pp. 6-10, Exhibit T. (Requested *Cavanaugh* materials from 3/12/87; 3/16/87 and 4/2/87.) However, this Court's order of September 19, 2001, p.2 denied appellant's request as to these materials.

Appellant's counsel has *Cavanaugh* materials from trial counsel's files, but needs access to the actual materials on file in order to verify and properly cite to these materials.

was seized. (CT 9929.)

C. Statement Of Facts

1. Perjury And Misconduct Of Detectives Henderson And Fullmer In The *Cavanaugh* Case

a. Overview: The Detectives Committed Serious Misconduct

In ruling for the defense on the motion to suppress in *People v. Cavanaugh,* Judge Hoffman found that Detectives Henderson and Fullmer committed serious misconduct in the performance of their official duties during the investigation of *Cavanaugh* case. (CT 9915-41; see also RTH 4950-51 [Judge Hammes finds that "serious suspicion" is cast on the detectives].) This misconduct manifested itself both in misconduct during the investigation and in being deceitful, misleading and/or less than forthright coming when testifying about the investigation.

b. Detective Henderson's Miranda Violations In Cavanaugh

i. Overview

As in the Lucas case, the suspect in the *Cavanaugh* case, Evanna Cavanaugh, asserted her *Miranda* rights during interrogation. (CT 9928; 9930.) And, as in the Lucas case, the San Diego County Homicide detectives ran roughshod over the constitutional rights of the accused.[797]

---

[797] After Lucas' arrest, Detectives Henderson and Fullmer interrogated him. (CT 9911-12.) Even though Lucas requested counsel during the interview the detectives ignored his request and continued with the interrogation. (*Ibid.*) Judge Orfield ruled that Lucas' Miranda rights were violated. (RTO 2897.)

ii. *Miranda* Violation During The Seven Minutes After Cavanaugh Asked For An Attorney

After the *Miranda* warnings were given to Mrs. Cavanaugh, the following exchange took place between Cavanaugh and Detectives Henderson and Fisher:

> Q. And understanding these rights and having them in mind, are you willing to talk about the situation that occurred today?
>
> A. Well, uh, I, I can't afford an attorney. Could, do you have one handy?
>
> Q. Well, no, we don't have one handy. Do you want an attorney here with you?
>
> A. I think it's a good idea, but I can't afford one.[798]

Both Henderson and Fisher interpreted this as an invocation of the suspect's constitutional rights and the tape recorder was shut off. (*Ibid.*)

However the interview wasn't actually terminated at that point. Mrs. Cavanaugh and Detective Henderson continued to converse for seven minutes after the tape recorder was turned off.[799]

During the seven-minute hiatus Mrs. Cavanaugh first asked, "What does it mean, appoint an attorney. Appoint a new attorney or . . . I don't understand that." (7 Minute Transcript, p. 1:2-3.)[800] Rather than cutting off

---

[798] In Limine Court's Exhibit 1 [Interview of Evanna Cavanaugh, Nov. 19, 1985 by Detectives Henderson and Fisher, pg. 2].

[799] After the preliminary hearing the sheriff discovered a master tape which the sheriff's monitoring system had recorded of this seven minute post-invocation discussion, even though Henderson's tape recorder had been turned off. Henderson was not aware of this master tape at the preliminary hearing. (In Limine Court's Exhibit 1, PHT 78.)

[800] This citation refers to the transcript of the San Diego County (continued...)

any more discussion, or explaining that an attorney would be appointed to represent her, even if she couldn't afford one, Henderson told Mrs. Cavanaugh that her request for an attorney simply meant that she would not be questioned further: ". . . [W]hat will happen is in order for us to talk to you we have to have a knowledgeable waiver of your rights by yourself. . . . [I]f. . ., as you have indicated that you can't afford an attorney or that you would like to have an attorney here, we don't question you any further regarding that." (Seven Minute Transcript, p. 1:4-9.)

And then, without missing a beat, Henderson launched into a discussion of the circumstances of the crime and informed the suspect about "our questions . . . regarding how the situation developed. . . ."[801] Henderson then insinuated that Mrs. Cavanaugh brought the gun with the "intent upon doing what was done" and this prompted a response which, for the first time, discussed the actual facts of the incident:

> Q. [Henderson] As we understand it, you brought the gun with you from your home this morning, to the residence with you. That, to our way of thinking. . .
>
> A. [Cavanaugh] Isn't too good for my (unintelligible). . .
>
> Q. Well, it would show that you had some intent upon doing what was done.
>
> A. Well, I brought it because my mother's gun was

---

[800](...continued)
Sheriff's master tape made November 19, 1986 of the seven minute discussion between Evanna Cavanaugh and Detective Henderson. This discussion took place after Cavanaugh invoked her *Miranda* rights. (See In Limine Court's Exhibit 1.)

[801] "What we have is, uh, your brother is dead. He died at the, at the house but we have our questions relating, or regarding how the situation developed and whether or not it's a self-defense issue, whether or not, uh, how this occurred." (Seven Minute Transcript, p. 1:10-14.)

taken by my brother. I brought it to give to her. . . ." (Seven Minute Transcript, p. 1:14-17.)

Subsequently, when Mrs. Cavanaugh again tried to inquire about the appointment of counsel, Henderson again diverted the discussion to the question of "what occurred" in the following exchange:

> A. [Cavanaugh] What would an attorney, would he help me in court anyway?
>
> Q. He would . . .
>
> A. I mean if I don't have any money, would anybody help me if I need anybody or, I mean I don't have anything to hide. I don't mind you recording this.
>
> Q. I understand an attorney would be looking to protect your rights, uh, essentially what we want to do is to find out what occurred . . . (Seven Minute Transcript, p. 3:8-17.)

Mrs. Cavanaugh eventually told Henderson to "turn on the recorder" after he again stressed that "what we're trying to do is to find out the basis of what occurred and why it occurred." (Seven Minute Transcript, p. 4:15-17.)[802]

---

[802] A. [Cavanaugh] Well, I don't have anything to hide. I mean, you might as well record it, because, uh, I won't tell the lawyer anything different than I'll tell you. I mean . . .

Q. I understand . . .

A. What, what happened was just fairly cut and dry.

Q. The, uh, essentially as far as asking you any questions about what occurred at this point we're uh, we're kind of precluded from doing that, uh, by the state law constitution. They have, uh, said that once a person has invoked that privilege that we should cease questioning, which is essentially where we're not, uh, going to ask any further questions regarding what happened, uh, if you have a statement which, uh, you are making, that can be recorded. It's just that, uh, what we're trying to do is to find out the basics of what occurred and why it occurred and, uh . . .

(continued...)

In sum, as suggested by Judge Hoffman, the statements made by Henderson during the seven minute tape were "tantamount" to questioning. (In Limine Court's Exhibit 1, Hoffman Transcript, p. 122.) And, more importantly, what Detective Henderson said during the seven minutes appeared to be a calculated strategy designed to encourage the suspect to make an incriminating statement.

In sum, because Henderson ignored the suspect's invocation of her constitutional rights, and continued his efforts to obtain incriminating statements, eventually obtaining a confession, Judge Hoffman suppressed the confession. (CT 9928-30.)

iii. Miranda Violation By Direct Questioning After Cavanaugh's Statement

As discussed above, Cavanaugh made a recorded statement after the seven minute hiatus following her invocation of the right to counsel. Also as discussed above, Detective Henderson's statements to Cavanaugh during the seven minute hiatus violated *Miranda*.

However, independent of those statements, both Detectives Henderson and Fisher blatantly violated *Miranda* by directly and extensively interrogating Cavanaugh after she made her statement. (See *Cavanaugh* Interrogation Transcript, pp. 10-22.)[803]

---

[802](...continued)

A. Well, you can go ahead and turn on the recorder.

Q. I'll turn on the tape recorder.

A. (Unintelligible) See what . . . (Seven Minute Transcript, p. 4:1-19.)

[803] Detectives Henderson and Fisher each asked well over 20 direct questions of Mrs. Cavanaugh. (*Ibid.*)

c. *Detective Henderson's Misleading Testimony About The Miranda Violation*

i. Seven Minute Hiatus Violation

In his sworn description of the seven minute hiatus Detective Henderson testified at the preliminary hearing as follows:

> [Henderson]: I turned the tape off after she indicated that she did, in fact, want or felt she needed an attorney present.
>
> Q. And after you turned the tape recorder off, did you question her about the crime at all?
>
> A. No.
>
> Q. What happened after you turned the tape off?
>
> A. Mrs. Cavanaugh was concerned with the condition of her brother. She wanted to make a statement regarding the situation.
>
> Q. Whose idea was it for her to make a statement?
>
> A. It was Mrs. Cavanaugh's. [Emphasis added.] (In Limine Exhibit 1, PHT 64:10-20.)

This description of what happened during the seven minute hiatus was incomplete, misleading and decidedly slanted in the prosecution's favor.

First, to say that Mrs. Cavanaugh was "concerned with the condition of her brother" was a gross mischaracterization of the seven-minute conversation. Nothing in the tape remotely suggested that Mrs. Cavanaugh wanted to give a statement out of concern for the condition of her brother. In fact, at the outset Henderson informed Mrs. Cavanaugh that her brother was dead. (In Limine Court's Exhibit 1, Seven Minute Transcript, p. 1:9-11.)[804] Instead the tape reveals two major concerns that Mrs. Cavanaugh had:

---

[804] Henderson told Mrs. Cavanaugh: "What we have is . . . your brother is dead. He died at the house. . . ." Mrs. Cavanaugh did not respond directly to this statement. Nor did she ever express a "concern [] with the condition of her brother." (In Limine Court's Exhibit 1.)

1) To better understand her right to appointment of counsel, and

2) To respond to Henderson's accusation that she brought a gun to the house with the intent to kill her brother. (*Id.* at pp. 1-4.)

Yet, Henderson's sworn testimony as to what happened omitted both of these obvious concerns and instead falsely stated that her statement was motivated by a concern which Mrs. Cavanaugh never expressed.

Moreover, during the seven-minute hiatus Henderson, on three separate occasions, told Mrs. Cavanaugh about the need of the Sheriff and district attorney to "find out" what happened. (*Ibid.*) Yet again, apparently because it would not have benefitted the prosecution, Henderson failed to include this in his description of what happened.

ii. Direct Questioning *Miranda* Violation

Although both Henderson and Fisher each asked many questions following Cavanaugh's *Miranda* invocation, they failed to acknowledge this in their testimony. (In Limine Court's Exhibit 1, PHT 56; (1-12-87, 33-36).)

d. Detective Fullmer's False Testimony Concerning Discovery Of The Tape Recorder

i. Background

Besides Mrs. Cavanaugh's confession, which was suppressed as described above, another crucial part of the prosecution's case against Mrs. Cavanaugh was a tape recording found by Detective Fullmer in Mrs. Cavanaugh's purse. The tape recording was made by a cassette recorder in the purse which started recording around 10:00 a.m. on the day of the killing, November 19, 1986. (CT 9929.)

Judge Hoffman ruled that the recording could not be admitted on the prosecution's theory that Mrs. Cavanaugh subsequently consented to its

seizure. However, alternatively, Judge Hoffman allowed the prosecution an opportunity to justify the seizure on the grounds of inevitable discovery. (CT 9931-32.) The success or failure of this inevitable discovery theory depended on the circumstances under which Detective Fullmer originally seized the purse. If, as Fullmer testified, he saw the tape recorder in the purse with the red recording light on, then the inevitable discovery theory would have been viable and the evidence admissible. In this case the evidence would have been inevitably discovered because seeing the recorder with the red light on would have provided probable cause to obtain a search warrant. On the other hand, if Fullmer was being untruthful about the red light then a warrant for the recorder would not have been issued and the inevitable discovery would not apply. (CT 9935.)

ii. Entry Of Mrs. Cavanaugh's House At 12:30 p.m.

Detective Fullmer entered Cavanaugh's house legally, pursuant to the consent[805] of Marie Phegley, the occupant of the residence, at approximately 12:30 p.m[806] on November 19. (CT 9925-26.)

---

[805] There was a "close" factual question as to whether consent to enter was actually given. (CT 9934-35.)

[806] There was a factual question as to whether or not Fullmer entered the residence when he first arrived at 10:30 a.m. or waited until 12:30 p.m. when consent was obtained. Pursuant to the Sheriff's Internal Affairs investigation (In Limine Court's Exhibit 1), Scott Cea, one of the patrol officers at the scene, stated that Detective Fullmer, Henderson and Hartman entered the house when they first arrived which was around 10:30 a.m. (In Limine Court's Exhibit 1, Cea Interview, p. 10; see also pp. 5-8.) In his Internal Affairs interview Fullmer stated that Cea was mistaken. (In Limine Court's Exhibit 1, Fullmer Interview, p. 18.) However, Fullmer also said that under normal circumstances he would have gone right into the house and would have been on firm legal ground. However, in this case, they decided

(continued...)

iii. Fullmer's False Statement That He Could See The Tape Recorder In The Purse When He First Entered

In his preliminary hearing testimony regarding the seizure of the purse, Detective Fullmer said he saw the tape recorder in the purse as it was sitting on the counter when he first entered the residence. (Preliminary Hearing (4/3/86) pp. 29-30; pretrial (1/5/87) pp. 12, 30; see also CT 9926.) However, photographs of the scene "clearly depicted that the purse was on the counter in the corner with no indications at all that you could see inside of it or that there was a tape recorder inside of it. . . ." (CT 9936-37.)[807]

iv. Fullmer's False Statement That He Moved The Purse And Then Saw The Red Light

After being proven wrong by the photos of the scene, Fullmer changed his story. "He then testified that he had moved the purse to the middle of the table, and it was at that point in time that he . . . saw the tape recorder with the red light on." (CT 9937; Pretrial (1/12/87), p/ 69.)

However, once again the physical evidence proved Fullmer's testimony to be false:

> That evidence . . . was contradicted by the direct evidence, unrefuted by the People, that the tape shuts off in 60 minutes. And if you give the fact that there's a 12:30 entry time, and that was the only tape that was in the tape recorder, the tape of the shooting, which I've listened to , the tape had to have been off. And if it was off, the light was off. (CT 9937; see also CT 9929.)

---

[806](...continued)
to wait for consent and stuck with that decision. (*Ibid.*; see also p. 21.)

[807] The purse was leaning up against a wall in a manner that it was not possible for Fullmer to see inside. (Pretrial (1/12/87), pp. 68-69.)

v. Fullmer's Assertion Of The Fifth Amendment At The Internal Affairs Investigation

Fullmer attempted to assert the Fifth Amendment during the Internal Affairs investigation. However, because the investigation was deemed to be administrative in nature, he was required to answer. (In Limine Exhibit 1, Interview with Deputy Robert Fullmer, p. 1.) Ordinarily the exercise of the Fifth Amendment privilege against self-incrimination may not be considered in assessing the credibility of a witness. (Evidence Code § 913.) However, this rule should be limited to situations where the witness fears prosecution for a "nontestimonial crime." [Emphasis added.] (*People v. Garner* (1989) 207 Cal.App.3d 935, 938.) Where the privilege is exercised because the testimony would reveal the falsity of previous testimony, the exercise of the privilege itself should be considered as to the witness' credibility. (*Ibid.*)

e. Failure Of The Detectives To Take Adequate Notes In Cavanaugh

As in the Lucas case (see e.g.,§ 3.3.2(B)(1), pp. 848-55 above, incorporated herein), whether by design or mere incompetence, the homicide detectives in *Cavanaugh* inexcusably failed to fully and accurately record crucial details of their investigations:

> . . . I think all of our jobs would have been a lot easier if the detectives would have made notations of times that certain actions were taken; for example, the entry and exit of the house, the call to Mrs. Phegley and the like. These times during the course of the testimony appear to be significant pieces of evidence, although every time the questions were asked, the witnesses were extremely hazy with respect to when times occurred, and in fact sometimes varied during the course of the detectives' testimony by an hour or more in their recollection of when certain things occurred, how long they waited to get into the premises. There's no excuse for that. It's easy to take notes

> and make time notations of when activities took place during the course of a crime as serious as the one that is before the court. (CT 9929-30.)

As Judge Hoffman observed, the failure of an investigator to take accurate and detailed notes of a homicide investigation is an inexcusable malfeasance. (See 9929-30 [comments of Judge Hoffman].) The reasons for failing to do such an important task may not necessarily be related to honesty and veracity; e.g., they could be the result of simple negligence or incompetence. On the other hand, the failure to take detailed notes is also consistent with a desire and willingness to lie about the circumstances as necessary to obtain conviction of the suspect. If there are not detailed notes, then the detective has free rein to adjust his or her testimony to fit the needs of the prosecution. On the other hand, the more detailed and comprehensive the notes, the less room for maneuvering later on.

2. Miranda Violations In The Lucas Case

The defense also relied on the *Miranda* violations in the present case as evidence of the detectives' character traits for disregarding a suspect's constitutional rights. (CT 9911-12.) As stated in defense counsel's declaration:

> In [the interrogation of Lucas by Henderson and Fullmer on December 16, 1984] the defendant invokes his right to remain silent or to have counsel present at least 20 or more times but each time the detectives willfully and maliciously denied those requests in the sole hope of obtaining incriminating evidence. (CT 9912.)

3. *Miranda* Violations In Cases Besides the Lucas And *Cavanaugh* Cases

At least two other cases involved blatant *Miranda* violations by these

detectives. (See CT 9412.) The specifics of these cases were not put in the record. However, in light of Judge Hammes' ruling that any such evidence would be excluded as unduly time consuming, it would have been futile to present specific evidence of other *Miranda* violations by these detectives.[808]

D. Rulings Below

On January 15, 1987, citing the Cavanaugh case, the defense made an informal *Pitchess* motion. (RTK 2490-97.) Subsequently, a formal *Pitchess* motion was filed. (CT 10050-64.)

On March 12, 1987, Judge Hammes ruled that the defense should be given discovery of the Internal Affairs investigation but not the conclusions and findings of that investigation. (RTH 4466.)

After reviewing the Internal Affairs records (In Limine Exhibit 1) and the transcripts in *People v. Cavanaugh*, Judge Hammes ruled that the specific evidence of misconduct in *Cavanaugh* should be excluded under Evidence Code § 352 because the homicide detectives were merely "tangential witnesses." (RTH 24496.) The judge also concluded that Santiago's testimony was otherwise corroborated and the *Cavanaugh* evidence would "take weeks" and thus require undue consumption of time. (RTH 24494-98.)

---

[808] Counsel is not required to make futile objections. (*People v. Bain* (1971) 5 Cal.3d 839, 849, fn. 1; *Douglas v. Alabama* (1965) 380 U.S. 415, 422 ["No legitimate state interest would have been served by requiring repetition of a patently futile objection . . . in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair"]; see also 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal, § 387 at pp. 437-38].) Where a court has made its ruling, counsel must not only submit thereto but it is his duty to accept it, and he is not required to pursue the issue. (*People v. Diaz* (1951) 105 Cal.App.2d 690 696; see also *People v. Woods* (1991) 226 Cal.App.3d 1037, 1052.)

E. Specific Acts Of Misconduct By The Homicide Detectives Were Relevant

In the *Cavanaugh* case Detectives Henderson and Fullmer were accused of committing perjury and other acts of professional misconduct in order to obtain the conviction of the suspect. In the present case, the defense contended that the detectives similarly broke the rules in order to convict Lucas. (See e.g., § 3.7.2, pp. 994-97 below, incorporated herein.) Accordingly, the *Cavanaugh* matter was relevant to the present case because it tended to prove relevant character traits of the detectives by specific prior acts.

"A person lacking in veracity is an untrustworthy witness, and may be impeached by proof of this bad character trait." (3 Witkin, *California Evidence*, (4th Ed. 2000) § 280, p. 353 [citing Evidence Code § 780(e) and other authorities].) "Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of such person's conduct) is admissible to prove a person's character or a trait of his character." [Emphasis added.] (Evidence Code § 1100; see also 3 Witkin, *supra*, § 43.) Hence, an untrustworthy character trait may be proven by opinion (1 Witkin, *supra*, § 294), reputation (3 Witkin, *supra*, § 288-90) or by specific acts. (3 Witkin, *supra*, § 286; see also *People v. Mickle* (1991) 54 Cal.3d 140, 168 [under Proposition 8, evidence that prosecution witness had threatened witnesses in proceedings against him was admissible; traits of willingness to harm others and to subvert truth-finding process indicated morally lax character and readiness to lie]; *People v. Harris* (1989) 47 Cal.3d 1047, 1082; *People v. Wheeler* (1992) 4 Cal.4th 284, 295; *People v. Adams* (1988) 198 Cal.App.3d

10, 18; *People v. Lankford* (1989) 210 Cal.App.3d 227, 236.)[809]

F. To Be Admissible, Prior Acts Of Giving Untruthful Or Misleading Testimony Need Not Be Conclusively Proven So Long As Substantial Evidence Of The Prior Act Is Presented

The defense presented substantial evidence that Detectives Fullmer and Henderson gave untruthful and/or misleading testimony in the *Cavanaugh* case. Accordingly, the evidence was admissible even though the prosecution could have advanced theoretically innocent explanations for the false testimony: e.g., honest mistake, malfunction of the tape recorder, etc. (See *People v. Saldana* (1984) 157 Cal.App.3d 443, 454 [where the defendant's testimony or version of the evidence seems remote, the jury must be afforded the opportunity to consider it if it could be accepted by a reasonable juror or at least raise a reasonable doubt].)

G. Exclusion Of Evidence Of The Perjury And Misconduct Was An Abuse Of Discretion

1. Introduction

Judge Hammes excluded the *Cavanaugh* evidence because the homicide detectives were merely "tangential" witnesses, the testimony of Santiago was corroborated, the evidence of misconduct by the detectives would at most cause the jury to "raise an eyebrow" and the evidence would "take weeks" to put on resulting in the undue consumption of time. (RTH 24496-98.) This ruling was an abuse of discretion because the homicide detectives were key witnesses in Santiago, their credibility was a crucial issue which the jury was required to resolve, the prior acts of untruthfulness were highly probative and the judge erroneously assumed that the evidence would

---

[809] The specific act may also constitute criminal conduct. (3 Witkin, *supra*, § 314, p. 394.)

take "weeks" to present.

2. The Credibility Of The Detectives Was A Crucial Factual Issue In Santiago

The credibility of investigating homicide detectives Henderson and Fullmer was a central focus of the defense in Santiago. For example, Detective Henderson testified that Lucas did not become a suspect until he was picked out of the photo lineup by Santiago on December 14, 1984.[810]

---

[810] Detective Henderson testified as follows:

> Q. Did you tell [Santiago] that you had a suspect?
> A. I don't believe that I did.
> Q. Are you certain?
> A. I could be just about certain because normally, even when you are showing a photo lineup, you have a form which is often used and you never indicate to them that you do or do not have a suspect contained in the lineup. I doubt very much that I would have told her we had a suspect.
> Q. But do you recall telling her on the telephone when you call [sic] her up?
> A. As a matter of fact, no, I didn't tell her that we had a suspect, because until she had identified the individual we really didn't. We had certain things that started to point in that direction.
> Q. It is your testimony then that before Santiago identified Lucas, Lucas was not a suspect in any of the homicide cases that you were looking at.
> A. No. He was being viewed as being a possible suspect from the time that we talked to Matthew Limback on the 11th. But as to being a suspect, and I had a suspect, not until Santiago had come to San Diego. (RTK 1136:23-28-1137:1-15; see also RTH 23300 [Judge Hammes states, "I just find nothing in this record to indicate that the sheriffs knew of Mr. Lucas or had him as a suspect at the time that they went up to get Santiago"].)

However, Detective Fullmer had a different version:

(continued...)

However, the defense sought to establish that the detectives actually had Lucas as a suspect months earlier.[811]

Moreover, the record is uncontradicted that Detectives Fullmer and Henderson were key players in the early hospital interviews of Santiago which could have influenced the "reconstructing" of her recollection of the attack and her attacker. (See § 3.2(A)(7), pp. 771-72 above, incorporated herein.) The truthfulness of the detectives' testimony regarding these early contacts was crucial. For example, the defense contended that in one of her earliest responses, Santiago indicated that she was abducted in a brown Colt. (RTH 5320.) This would have been exculpatory of Lucas, who did not drive a Colt. However, the detectives contended that the brown Colt response was not from a question about the abductor's vehicle. (RTH 5320.) On the other hand, a nurse at the hospital, Dena Warr testified that Santiago was responding to a question about the abductor's car. (RTH 1795-96.) Given this evidentiary dispute evidence that Henderson and Fullmer had made misleading statements under oath would have been highly probative.

The detectives were also directly involved in the December 4, 1984

---

[810](...continued)

Q. And were you aware that at least as of the time Mr. Lucas was arrested, as you said, on the 13th of December, he, Lucas, was a suspect at least in the Swanke and Santiago affairs?

A. I don't know if I understand your questions. Prior to his arrest on the 13th, did I believe he was a suspect in the Swanke and Santiago case? Yes.

Q. And also the Strang/Fisher affair, the Strang/Fisher case, as well?

A. Yes. (RTH 23383:22-28-23384:1-3.)

[811] See CT 2279; 2308-11.

interview of Santiago in Seattle, the drawing of the second composite on December 4 and the photo lineup procedures during which Santiago picked Lucas' photo. Obviously, the veracity of the detectives' testimony regarding these events was crucial. Important contested issues included whether or not Santiago was informed that they had a suspect who was in the photo spread, whether there was a post-identification "celebration" in the hotel lounge, whether the identification was "immediate"[812] and whether Santiago was shown the lineup more than once.[813] (See § 3.2(A)(13), pp. 777-79 and § 3.3.1(F), pp. 825-29 above, incorporated herein.)

Yet another crucial issue that hinged on the credibility of the detectives was whether or not they intentionally constructed the photo lineup so Lucas' photo would be highlighted. (See § 3.7.2, pp. 994-97 below, incorporated

---

[812] The unreliability of the record is illustrated by the major discrepancy between the testimony of Santiago and the detectives regarding the length of time it took Santiago to pick Lucas' picture. Santiago testified that it took approximately two minutes. However, the form filled out by Fullmer stated that the identification was "immediate." (See § 3.2(A)(13), pp. 777-79 above, incorporated herein.) Even though this form was not admitted at trial, such a major discrepancy demonstrates that either the detectives were being intentionally untruthful or Santiago inaccurately remembered a crucial fact regarding the photo lineup process.

Moreover, the *Cavanaugh* evidence was also relevant to the in limine motions regarding the eyewitness identification issues.

[813] Zuniga testified that she wasn't present when Santiago was originally shown the photo spread. However, the following day, December 15, 1984, Zuniga saw the photo spread at the Homicide Office and Santiago was also present. It was not a formal showing of the photo spread at that time. (RTT 9261; 9263; 9274.) Detectives Fullmer, Hartman and Fisher were also present. (RTT 9268-69.) Zuniga saw Santiago point out the photographs at that time. (RTT 9274.) On the other hand, Fullmer claimed that Santiago only saw the photo lineup once, when she made the identification. (RTT 9005.)

herein.)

Furthermore, the credibility of the detectives was especially important in evaluating the suggestiveness of the house identification procedures. The evidence presented to the jury contained discrepancies and conflicts about what was said and done immediately prior to Santiago's alleged identification of Lucas' residence. (See § 3.4.1(A), pp. 898-903 above, incorporated herein.)[814]

3. Santiago Was Crucial To The Other Counts

Because the cases were cross-admissible, any evidence important to Santiago was necessarily important to all of the other charges. Santiago was the only charge which involved direct identification of Lucas and the prosecution argued that each charge was evidence of Lucas' guilt as to the other charges. (See Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein.)

4. The Prior Acts Of Untruthfulness Were Highly Probative

Judge Hammes suggested that the jury would only "raise an eyebrow" when they heard that Detectives Fullmer and/or Henderson made untruthful or misleading statements under oath to aid in the prosecution of a suspect they had arrested. However, in this regard the judge failed to objectively evaluate the probative value of the evidence. As set forth above, the credibility of the homicide detectives was a central issue in the Santiago case. Moreover, both Fullmer's and Henderson's untruthfulness was proven by undisputed physical and/or tape recorded evidence. Thus, the jury quite reasonably could have found that these acts demonstrated a clear intent and willingness to mislead

---

[814] In fact, the pretrial evidence suggested that Santiago may even have learned the address of the residence prior to identifying it, since the detectives were preparing the search and arrest warrants in her presence at the homicide office. (See § 3.4.1(A)(2), p. 899 above, incorporated herein.)

the fact finder in order to help convict an accused. Such a revelation would have put key components of the Santiago case in a completely different light. Hence, the evidence was highly probative.

5. Judge Hammes Finding Of Corroboration As To Santiago Improperly Assumed That The Detectives Were Telling The Truth

In excluding evidence of the detectives' misconduct and perjury, Judge Hammes concluded that "there is enormous corroboration for [Santiago's] testimony. There is enormous corroboration through all of her identifications, her Identi-Kit drawing, the identifications that she gave physically [of] Mr. Lucas, the description of the house, the description of the car. All of this was done before the suspect, Mr. Lucas, came into the case itself." (CT 24496:27-24497:4.) This conclusion was erroneous.

First, the judge's assessment that the evidence constituted "enormous corroboration" is grossly exaggerated. While part of this evidence was generally consistent with Lucas, other parts were specifically inconsistent with him, such as the license plate, lack of computerized voice and louvers on the car (see § 3.2(A)(21), pp. 787-92 above, incorporated herein), the failure to mention the attacker's distinctive bulging eyes for five months (see § 3.3.3(H)(1), pp. 876-78 above, incorporated herein), the failure to identify Lucas' house until the fourth drive by (see § 3.2(A)(14) and (15), pp. 780-84 above, incorporated herein), among other things. (See e.g., § 3.2(B), pp. 792-806 above, incorporated herein.)

Second, Judge Hammes' assumption that the corroboration all occurred before Lucas became a suspect is itself dependent on the credibility of the detectives. It is only upon their word that it can be concluded that Lucas was not a suspect before December, 1984. The detectives consistently maintained

that they couldn't have improperly influenced Santiago prior to December, 1984, because they had no suspect prior to that time. However, other witnesses testified that Lucas was a suspect in Strang/Fisher as early as October 26, 1984. (CT 2808-09.) Furthermore, according to these witnesses, the detectives said they had a suspect under surveillance in Santiago for several months. (CT 2309.) In sum, Judge Hammes engaged in improper bootstrapping by assuming the detectives were credible in order to exclude evidence that they were not credible.

6. The Judge Erroneously Assumed That The Evidence Would Take "Weeks" To Present

Judge Hammes' Evidence Code 352 analysis was predicated on her assumption that it would "probably take weeks" to put on the evidence. (RTH 24497.) This assumption was a gross exaggeration. First, even the entire *Cavanaugh* case itself did not take weeks.[815] Second, much of the *Cavanaugh* evidence would not have been presented. The only issues in Lucas would have been:

1) Whether or not the detectives violated Cavanaugh's *Miranda* rights – which could have easily been proven through the tape of Mrs. Cavanaugh's interrogation.

2) Whether Henderson's testimony about the *Miranda* violation was untruthful or misleading – which could have been quickly proven with the relevant transcript passages.

3) Whether Fullmer lied under oath about seeing the tape recorder in the purse when he first entered the Cavanaugh house – which could have been quickly and easily proven by the transcripts and the photos of the scene.

---

[815] See transcripts included in In Limine Court's Exhibit 1.

4) Whether Fullmer lied under oath about seeing the red light on the tape recorder when he moved the purse – which could have been easily proven by the undisputed evidence that the tape had recorded the killing, which occurred at 10:00 a.m. Thus, because the tape was only 60 minutes in duration, it could not have been running and the red light would have been off 2 ½ hours later at 12:30 p.m. when Fullmer claimed to see it. (CT 9929; 9937.)

In sum, the evidence would, at most, have taken only hours, not weeks, to present.

Accordingly, the judge abused her discretion by excluding the evidence because her "undue consumption of time" finding was based on a grossly erroneous assessment of how much time would be involved.

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, pp. 406-408.)

Accordingly, in the present case the trial judge did not exercise "informed discretion" and the *Cavanaugh* evidence was erroneously excluded. (See *People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8.)

H. The Error Violated Lucas' Federal Constitutional Rights

Lucas' right, as a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process, trial by jury and compulsory process guaranteed under the 6th and 14th Amendment to the

United States Constitution. (See *Webb v. Texas* (1972) 409 U.S. 95, 98; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294; *Washington v. Texas* (1967) 388 U.S. 14, 19.) The right to call witnesses is also expressly guaranteed under the California Constitution. (See *People v. Chavez* (1980) 26 Cal.3d 334, 353.)

Further, because Lucas was arbitrarily denied his state created rights 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.)

The state law errors discussed in the present argument and throughout this brief cumulatively produced a trial setting that was fundamentally unfair and in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

I. The Error Was Prejudicial

The erroneous exclusion of probative evidence upon which the jury could discredit important prosecution witnesses is clearly a substantial error.

The erroneously excluded evidence concerning the willingness of Detectives Fullmer and Henderson to ignore the law in conducting an investigation and to testify falsely and misleadingly in order to obtain a conviction could clearly have led one or more jurors to distrust and discount the testimony of Fullmer and Henderson, which in turn, in light of the other

evidence providing reason to doubt the reliability of Santiago's identification testimony (including evidence concerning her memory impairments and emotional need to identify someone) could have left jurors unable to confidently rely upon Santiago's identifications of Lucas and Lucas' home. Without that identification testimony to rely upon, the jurors would not have been able to convict Lucas as the person who kidnapped and assaulted Santiago, and hence, the exclusion of the *Cavanaugh* evidence was clearly prejudicial as to the Santiago counts 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.

Further, the error was also prejudicial as to the Jacobs and Swanke convictions. (See § 3.3.2(E)(2), pp. 858-60 above, incorporated herein.)

Finally, even if the error was not sufficiently prejudicial to require reversal of the guilt judgment, it was prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced as demonstrated by the difficulty the jury had in reaching a verdict.[816] Therefore,

---

[816] See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein (continued...)

because a major defense mitigating theory at penalty was lingering doubt, any substantial error at the guilt trial should be considered prejudicial as to the penalty under both the state and federal standards of prejudice.[817] The error was particularly prejudicial as to the penalty trial since the Santiago count could have been used both to counter the defense theory of lingering doubt and as an independent aggravating fact.

J. Alternatively, The Matter Should Be Remanded For A New In Limine Hearing Regarding The Admissibility Of Santiago's Identification

The credibility of the detectives was an important question at the in limine hearing to suppress Santiago's identification of Lucas. Therefore, the trial judge's exclusion of the *Cavanaugh* evidence removed crucial evidence from the in limine determinations. When a judge fails to consider important evidence the resulting ruling is not an "informed exercise of discretion." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, n. 8.)

Therefore, the matter should be remanded for a full and fair in limine hearing. (See *People v. Leahy* (1994) 8 Cal.4th 587, 610-11.)

---

[816](...continued)
[close balance at penalty demonstrated by near-deadlock, length of deliberations, request for readback of testimony, request for re-instruction, etc.].

[817] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing state and federal standards of prejudice at penalty].

3 SANTIAGO CASE

3.7 ISSUES RELATING TO THE CREDIBILITY OF THE INVESTIGATING DETECTIVES

ARGUMENT 3.7.2

THE JUDGE ERRONEOUSLY PRECLUDED THE DEFENSE THEORY THAT THE DETECTIVES INTENTIONALLY ASSEMBLED A SUGGESTIVE PHOTO LINEUP

A. Introduction

The defense contended that the Santiago photo lineup was suggestive, on its face. (E.g., RTT 12100.) This defense theory did not depend on showing that the detectives intentionally created a suggestive lineup. However, the defense also contended that the detectives intentionally led Santiago to the identification of Lucas. (See e.g., RTT 12106:5-6 ["she was led in a suggestive way to a particular individual"]; RTT 12113 [Santiago was led to her identification of the sheepskin seat covers].) This theory of intentional, rather than inadvertent, suggestion was especially important to the defense because it provided a basis for the jury to infer that Santiago had been "led" to Lucas through the entire pretrial identification process, not just at the lineup. Whether or not to draw such an inference was a critical factual issue for the jury because there is a void in the record as to what was actually said and done during most of the pretrial contacts with Santiago, including two lengthy composite sketch sessions and the critical identification of Lucas' house. (See § 3.2(A)(9)(12)(14) and (15), pp. 773-76; 780-84 above, incorporated herein.)

However, the judge precluded the defense from presenting important evidence in support of the intentional suggestion defense theory. This ruling

emasculated a theory of the defense and implicated Lucas' state and federal constitutional rights to present a defense, confrontation and compulsory process.

B. Procedural Background

At the in limine hearing the evidence provided a basis for inferring that the detectives had intentionally obtained and used a photograph of Lucas that was larger than the other photos, thus highlighting Lucas' eyes. (See § 3.3.1(K)(2)(b), pp. 834-36 above, incorporated herein.)[818]

At trial, the defense sought to present this same evidence to prove that the detectives had decided that Lucas was the culprit and had designed the photo lineup so that Santiago would identify Lucas. (RTT 10124-36.) The judge denied this request because the "entire line of questioning is irrelevant under 352." (RTT 10136.)

C. The Defendant's Constitutional Rights To Present Evidence Supporting The Defense Theory Of The Case

The right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution. (See *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19; see also *Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848 [refusal to permit defendant to present voice exemplar evidence to establish that he does not speak with an Hispanic accent violated right to present a defense; domestic rule excluding voice exemplar evidence was an unreasonable application of clearly

---

[818] This was highly suggestive because Santiago focused upon the culprit's eyes during the 15 minute car ride and the person's "bulging eyes" were the one characteristic that Santiago described as distinctive. (RTH 5660; 5611.)

established federal law providing that a defendant has the constitutional right to present favorable evidence to the jury]; *People v. Marshall* (1996) 13 Cal.4th 799, 836; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787 [noting the "right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution"].)

The defendant's right to present a defense also derives from the 6th and 14th Amendment of the federal constitution. (See *People v. Cudjo* (1993) 5 Cal.4th 585, 637-43, Kennard, J. dissenting, for a discussion of the defendant's constitutional right to present a defense under the compulsory process and due process clauses of the federal constitution]; *DePetris v. Kuykendall* (9th Cir. 2000) 239 F.3d 1057, 1061-63; *Franklin v. Henry* (9th Cir. 1997) 122 F.3d 1270, 1273 [federal constitutional error to exclude husband's prior violent behavior toward former wife and others to show wife's subjective belief in the need to defend herself]; *Richmond v. Embry* (10th Cir. 1997) 122 F.3d 866, 871 [". . . the right to present defense witness testimony . . . is a right arising . . . under the 5th and 14th Amendment right to due process and the 6th Amendment right to compulsory process"]; *Taylor v. Singletary* (11th Cir. 1997) 122 F.3d 1390, 1394 [right to present defense witness testimony resides in the compulsory due process clause and the due process clause of the federal constitution]; Imwinkelried & Garland, *Exculpatory Evidence* (Lexis, 2nd ed. 1996) § 2-2(d) [6th Amendment right to confrontation] and § 2-2(e) [6th Amendment right to compulsory process]; Hollander & Bergman, *Everytrial Criminal Defense Resource Book* (West, 1999)§ 45-2 [defendant's right to call witnesses].)

D. Exclusion Of The Defense Theory Evidence Was Prejudicial Error

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 Santiago charges were closely balanced. (See § 3.4.2(E), pp. 908-14 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.

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

ARGUMENT 3.8.1

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

[The legal basis for this claim has already been briefed in Volume 2, § 2.3.1, pp. 139-213, incorporated herein. Here, in Volume 3, that claim is renewed and the previous briefing is fully incorporated herein by reference.]

A. Jacobs Should Not Have Been Cross-Admissible With Santiago

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 Santiago and Jacobs because those incidents were not so unusual and distinctive, nor so similar, as to reflect the "signature" of a single perpetrator. (See Volume 2, § 2.3.1(F), pp. 202-03, incorporated herein.)

B. The Error Was Prejudicial As To Santiago

As to prejudice, joining the counts for trial and allowing the jurors to consider the Jacobs case on the issue of identity in Santiago was reversible error. 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 so because of the jurors' tendency to convict the accused on the basis

of perceived disposition to commit criminal acts. (*People v. Thompson*, *supra*, 27 Cal.3d at 317.) Moreover, the prosecution relied heavily on the other offenses. (See Volume 2, § 2.3.5.1(H), pp. 293-99, incorporated herein, for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.)

The error was prejudicial because the Santiago case was closely balanced due to numerous critical factors which undermined the accuracy and reliability of Santiago's identifications. (See § 3.4.2(E), pp. 908-14 above, incorporated herein.) 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.) In the present case the error was substantial and the Santiago charges were closely balanced.

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed because the prosecution cannot demonstrate 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.)

C. The Error Was Prejudicial As To Jacobs And Swanke

The error was prejudicial as to the Jacobs and Swanke cases because the jurors were permitted and encouraged to consider each charge to corroborate and bolster the other charges. (See § 3.3.2(E)(2), pp. 860-61 above, incorporated herein.) In this regard the Santiago case was particularly prejudicial because of the eyewitness identification testimony. (*Ibid.*)

D. The Error Was Prejudicial As To Penalty

Even if the error was not sufficiently prejudicial to require reversal of the guilt judgment, it was prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced as demonstrated by the difficulty the jury had in reaching a verdict.[819] Therefore, because a major defense mitigating theory at penalty was lingering doubt, any substantial error at the guilt trial should be considered prejudicial as to the penalty under both the state and federal standards of prejudice.[820] The error was particularly prejudicial as to the penalty trial since the Santiago count could have been used both to counter the defense theory of lingering doubt and as independent aggravation under factor (a): circumstances of the crimes for which Lucas was convicted in the present proceeding. (CT 14373.)

---

[819] 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.].

[820] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing state and federal standards of prejudice at penalty].

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

ARGUMENT 3.8.2

THE SWANKE CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SANTIAGO, AND THUS THE JUDGE 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 SANTIAGO INCIDENT

The judge ruled that all five charges 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 the Santiago and Swanke incidents because those incidents did not share characteristics so unusual and distinctive as to be like a signature and, in fact, are marked by significant differences. (See Volume 2, § 2.3.1(F), pp. 202-03, incorporated herein.)

Additionally, Judge Hammes failed to consider a number of differences between the Santiago and Swanke cases. For example, Santiago suffered blunt force trauma to the head – Swanke did not (RTT 3695; 3714; 3717); Santiago did not have her clothes cut – Swanke did (RTT 4706); Santiago was left on a public street (RTT 2997-99; 3033-34) – Swanke was left in a remote area. (RTT 4549-53; 4701-02; 4722); Santiago had one external jugular vein severed but the internal jugulars and carotid arteries were not cut (RTT 3686) – Swanke had both carotid arteries and jugular veins cut. (RTT 4867; 4870); Santiago was 34 years old at the time of the attack (RTT 21 [Op. Arg]) –

Swanke was 22 (RTT 21 [Op. Arg]); Santiago survived – Swanke did not.

Accordingly, Judge Hammes erroneously allowed joinder and cross-admissibility because the Swanke and Santiago cases were not so distinctively similar as to be signatures of each other. This error violated the state and federal constitutions. (See Volume 2, § 2.3.1(H), pp. 207-08, incorporated herein.)

The Santiago convictions should be reversed as a result of this error. (See § 3.8.1(B), pp. 998-99 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs charges those convictions should also be reversed. (See § 3.8.1(C), p.999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

ARGUMENT 3.8.3

THE STRANG/FISHER 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 STRANG/ FISHER CRIMES AS EVIDENCE CONNECTING HIM TO THE SANTIAGO INCIDENT

[The legal basis for this claim has already been briefed in Volume 2, § 2.3.3, pp. 224-29, incorporated herein. Here, in Volume 3, that claim is renewed and the previous briefing is fully incorporated herein by reference.]

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 should 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 Santiago charges. (See *People v. Albertson* (1944) 23 Cal.2d 550, 578-80.) Moreover, the judge also erred in joining the counts and allowing cross-admissibility because the Santiago and Strang/ Fisher offenses did not share characteristics so unusual and distinctive as to be like a signature and, in fact, are marked by significant differences. (See Volume 2, § 2.3.1(F), pp. 202-03, incorporated herein.)

The error in joining the counts and allowing the jurors to consider the

Strang/Fisher cases as to identity in Santiago was highly prejudicial. Therefore, the Santiago convictions should be reversed. (See § 3.8.1(B), pp.998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 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 jury find that appellant 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 alibi 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.

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 3.8.4.1

THE PRELIMINARY INSTRUCTIONS GAVE UNDUE AND PREJUDICIAL EMPHASIS TO THE OTHER CRIMES EVIDENCE

[This claim is fully briefed in Volume 2, § 2.3.4.1, pp. 231-3, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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 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].)

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 3.8.4.2

THE OTHER CRIMES INSTRUCTION ERRONEOUSLY FAILED TO REQUIRE THE JURORS TO DETERMINE THAT THE DEFENDANT COMMITTED THE OTHER OFFENSE BEFORE CROSS-CONSIDERING IT

[This claim is fully briefed in Volume 2, § 2.3.4.2, pp. 237-51, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

As a result of the error the judgment should be reversed because conviction of an accused based on mere suspicion undermines the structural integrity of the trial. Accordingly, structural error was committed and the

Santiago 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 error was prejudicial under harmless-error analysis as to guilt and penalty because the Santiago case was closely balanced and the error was substantial. (See § 3.4.2(E), pp. 908-14 above, incorporated herein.)

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 3.8.4.3

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

[This claim is fully briefed in Volume 2, § 2.3.4.3, pp. 252-59, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

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 Santiago charges. Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.)

Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 3.8.4.4

THE OTHER CRIMES INSTRUCTION UNCONSTITUTIONALLY FAILED TO PRESENT THE DEFENSE SIDE OF THE ISSUE

[This claim is fully briefed in Volume 2, § 2.3.4.4, pp. 260-69, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

This improper, one-sided other crimes instruction was a substantial error because it improperly allowed the jurors to rely on the other charges to convict Lucas of the Santiago charges without conveying the relevance of that evidence as a potential basis for acquittal. Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges

those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 3.8.4.5

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

[This claim is fully briefed in Volume 2, § 2.3.4.5, pp. 270-74, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago

charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 3.8.4.6

THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT[821]

[This claim is fully briefed in Volume 2, § 2.3.4.6, pp. 275-76, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

In Volume 2, § 2.3.4.2, pp. 237-51, 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 and the failure to use that standard was reversible error.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the

---

[821] *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*.

Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 3.8.5.1

IN DECIDING THE CROSS-ADMISSIBILITY/CONSOLIDATION MOTION THE JUDGE ERRONEOUSLY REFUSED TO CONSIDER THE CONFESSION OF JOHNNY MASSINGALE AND OTHER DEFENSE EVIDENCE

[This claim is fully briefed in Volume 2, § 2.3.5.1, pp. 277-300, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.[822]

In support of its motion for cross-admissibility and consolidation the

---

[822] Even though the jurors' split verdict implicitly 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 of the Jacobs, Swanke and Santiago charges. (See Volume 2, § 2.3.5.1(H), pp. 294-300, incorporated herein.)

prosecution presented much of its case-in-chief evidence. (See Volume 2, § 2.3.5.1(C), pp. 279-80, incorporated herein.) However, in response to appellant's request to present defense evidence in opposition to cross-admissibility (such as the 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.[823] 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].)

Because the cross-admissibility ruling severely prejudiced Lucas, the Santiago, Jacobs and Swanke convictions as well as the death sentence should be reversed. (See § 3.8.1(B), (C) and (D), pp. 998-1000 above, incorporated herein.) Alternatively, the matter should be remanded for a new hearing before a different judge. (See Volume 2, § 2.3.5.1(I), pp. 299-300, incorporated herein.)

---

[823] 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.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 3.8.5.2

THE TRIAL JUDGE ERRONEOUSLY FAILED TO CONSIDER EXPERT TESTIMONY REGARDING THE INABILITY OF JURORS TO HEED LIMITING INSTRUCTIONS IN CROSS-ADMISSIBILITY CASES

[This claim is fully briefed in Volume 2, § 2.3.5.2, pp. 301-06, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

Because the cross-admissibility ruling severely prejudiced Lucas, the Santiago, Jacobs and Swanke convictions as well as the death sentence should be reversed. (See § 3.8.1(B), (C) and (D), pp. 998-1000 above, incorporated herein.) Alternatively, the matter should be remanded for a new hearing before a different judge. (See Volume 2, § 2.3.5.1(I), pp. 299-300, incorporated herein.)

ARGUMENT 3.8.5.3

THE JUDGE ERRONEOUSLY FAILED TO RULE ON THE CROSS-ADMISSIBILITY OF EACH OFFENSE INDEPENDENTLY

[This claim is fully briefed in Volume 2, § 2.3.5.3, pp. 307-12, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

Because the cross-admissibility ruling severely prejudiced Lucas, the Santiago, Jacobs and Swanke convictions as well as the death sentence should be reversed. (See § 3.8.1(B), (C) and (D), pp. 998-1000 above, incorporated herein.) Alternatively, the matter should be remanded for a new hearing before a different judge. (See Volume 2, § 2.3.5.1(I), pp. 299-300, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 3.8.5.4

BY BOOTSTRAPPING HER FINDINGS THE JUDGE DENIED LUCAS A FAIR AND RELIABLE IN LIMINE DETERMINATION AS TO CROSS-ADMISSIBILITY AND OTHER CRUCIAL EVIDENTIARY ISSUES

[This claim is fully briefed in Volume 2, § 2.3.5.4, pp. 312-20, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

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.

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 Santiago, Jacobs and Swanke convictions, as well as

the death sentence, should be reversed. (See § 3.8.1(B), (C) and (D), pp. 998-1000 above, incorporated herein.) Alternatively, the matter should be remanded for new hearings before a different judge. (See Volume 2, § 2.3.5.1(I), pp. 299-300, incorporated herein.)

3 SANTIAGO CASE

3.8 SANTIAGO: CROSS-ADMISSIBILITY ISSUES

3.8.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 3.8.5.5

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

[This claim is fully briefed in Volume 2, § 2.3.5.5, pp. 320-31, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

In response to Lucas' assertion of his statutory speedy trial rights, the prosecution moved to consolidate the two cases and amended its Notices of Aggravation. The defense had 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. 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. However, Judge Hammes unfairly precluded the defense from presenting evidence on this issue.

Accordingly, the Santiago, Jacobs and Swanke convictions, as well as the death sentence, should be reversed. (See § 3.8.1(B), (C) and (D), pp. 998-1000 above, incorporated herein.) Alternatively, the matter should be remanded for an evidentiary hearing before a different judge. (See Volume 2, § 2.3.5.1(I), pp. 299-300, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.1

THE PRELIMINARY GUILT PHASE INSTRUCTIONS TILTED THE FIELD IN FAVOR OF THE PROSECUTION

[This claim is fully briefed in Volume 2, § 2.9.1, pp. 529-37, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

A. Introduction

The old adage that "you never get a second chance to make a first impression" is especially applicable to the preliminary instructions of a jury trial. Those first instructions can have a huge impact on the jury because they are the first formal instructions from the court and are given before the jury hears any evidence.

In the present case the preliminary instructions were prejudicial to the defense and beneficial to the prosecution for two reasons:

1. The most fundamental principles of the presumption of innocence and prosecution's burden to prove guilt beyond a reasonable doubt were entirely omitted from the preliminary instructions.

2. The preliminary instructions specifically set forth the prosecution's primary theory of the case, but not the defendant's.

Accordingly, the preliminary instructions violated Lucas' state and federal constitutional rights.

B. Failure To Properly State The Jurors' Duty

See Volume 2, § 2.9.1(B), pp. 531-33, incorporated herein.

C. Failure To Instruct On The Prosecution's Burden To Prove Guilt Beyond A Reasonable Doubt

See Volume 2, § 2.9.1(C), pp. 533-34, incorporated herein.

D. Improper Admonition That Jury Must "Determine The Question Of "Guilt Or Innocence"

See Volume 2, § 2.9.1(D), p. 534, incorporated herein.

E. Improper Emphasis Of Cross-Admissibility Of Other Crimes In The Preliminary Instructions

See Volume 2, § 2.9.1(E), p. 534, incorporated herein.

F. The Prosecution-Oriented Preliminary Instructions Were Likely To Have Influenced The Jurors In Favor Of The Prosecution

See Volume 2, § 2.9.1(F), pp. 534-35, incorporated herein.

G. The Preliminary Instructions Were Prejudicial

Because the preliminary instructions tilted the playing field in favor of the prosecution, 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 Santiago convictions should be reversed under the state and federal harmless-error standards. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also

prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.2

BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF "THE PEOPLE" THE TRIAL JUDGE VIOLATED LUCAS' STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

[This claim is fully briefed in Volume 2, § 2.9.2, pp. 538-50, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

During voir dire and throughout trial the prosecutors, over defense objection, referred to themselves as "The People." This description was corroborated by the comments and instructions of the trial judge who also consistently referred to the prosecution as "The People." Reference to the prosecution in this manner was fundamentally unfair and contrary to the letter and spirit of the state and federal constitutions.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.3

THE JUDGE'S CONSISTENT AND ARBITRARY DENIAL OF REQUESTED PRELIMINARY FINDING INSTRUCTIONS, WHICH WERE MANDATORY UNDER EVIDENCE CODE § 403(c), VIOLATED LUCAS' DUE PROCESS RIGHTS

[This claim is fully briefed in Volume 2, § 2.9.5, pp. 563-69, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

The defense requested, under the mandatory authority of Evidence Code § 403(c), numerous instructions admonishing the jurors that they must make certain preliminary findings of fact before considering various crucial items of evidence. These instructions were erroneously denied.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.4

THE TERM "EXPERT WITNESS" SHOULD NOT HAVE BEEN USED AT TRIAL OR IN THE JURY INSTRUCTIONS

[This claim is fully briefed in Volume 2, § 2.9.6, pp. 572-75, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

By using the term "expert" to describe certain witnesses, many of whom were the standard bearers of the prosecution's theory of the case, the judge unfairly commented on the evidence in violation of Lucas' state (Cal. Const. Art. I, sections 1, 7, 15, 16 and 17) and federal constitutional rights (6th and 14th Amendments) to a fair trial by jury and due process.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.5

THE JUDGE IMPROPERLY REJECTED THE DEFENSE REQUEST TO DEFINE THE TERM "INFERENCE" IN THE JURY INSTRUCTIONS

[This claim is fully briefed in Volume 2, § 2.9.7, pp. 574-78, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Because the term "inference" was included in important jury instructions, the defense requested that the term be defined to assure the jurors properly understood and applied the instructions. The judge's refusal of this request violated state law and the federal constitution.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.6

THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY TO NOT CONSIDER ALL THE EVIDENCE

[This claim is fully briefed in Volume 2, § 2.9.8, pp. 581-86, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

In the present case numerous jury instructions were given which used the permissive terms "should consider" or "may consider." (See e.g., CT 14287; CT 14294; CT 14295; CT 14298; CT 14299; CT 14303; CT 14305; CT 14306; CT 14310; CT 14311.) These instructions erroneously allowed the jurors to not consider portions of the evidence. If the jury is permitted, at its option, to not consider evidence which has been admitted, then the accused's state and federal constitutional right to due process, fair trial by jury, confrontation, compulsory process, effective assistance of counsel and verdict reliability are violated. (Calif. Const. Art. I, sections 1, 7, 15, 16 and 17; U.S. Const. 6th, 8th and 14th Amendments.) This is so because all of the above rights depend on fair jury consideration of all evidence presented at trial.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago

charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.7

THE JUDGE SHOULD HAVE DELETED THE INSTRUCTION TITLES FROM THE WRITTEN INSTRUCTIONS OR CAUTIONED THE JURY REGARDING USE OF THE TITLES

[This claim is fully briefed in Volume 2, § 2.9.10, pp. 592-601, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Twelve copies of the written instructions were given to the jury during the guilt deliberations (RTT 12177; CT 14347) and the penalty deliberations. (RTT 13239; CT 14395.)

Many of the individual instructions were on separate pages with a specific title at the top in all capital letters. This was improper and prejudicial because certain important and discrete principles were not included in a separate titled instruction, and did not appear at all in the title of any of the given instructions. This had the effect of giving undue emphasis to some principles and less emphasis to others.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death

judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.8

THE JUDGE IMPROPERLY COERCED THE JURORS BY ADMONISHING THEM THAT THEY WERE EXPECTED TO REACH A JUST VERDICT

[This claim is fully briefed in Volume 2, § 2.9.11, pp. 602-06, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

The jury was never expressly instructed regarding the propriety and/or desirability of not reaching a verdict. In the preliminary instructions the jurors were told: ". . . each of you, for yourself, must determine the question of the guilt or innocence of the defendant." (RTT 13.)

In the final instructions the jurors were admonished that they would be expected to render a "just verdict."[824] Although another instruction hinted that a verdict need not be reached,[825] the absence of any specific instruction on the matter failed to assure that the verdicts were uncoerced.

At best the jurors were left in a state of confusion; at worst, they

---

[824] "Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence, apply the law, and reach a just verdict regardless of the consequences." (CT 14276, last sentence.)

[825] "The People and the defendant are entitled to the individual opinion of each of you. [¶] Each of you must consider the evidence for the purpose of reaching a verdict if you can do so." (CT 14347, first paragraph and first sentence of second paragraph.)

improperly believed that they should reach a verdict because the judge and all the parties expected them to do so.

Hence, the instructions were deficient. Unless the jurors understand that they are not required to reach a verdict there is a danger of improper juror coercion. (See *Jiminez v. Meyers* (9th Cir. 1993) 40 F.3d 976.) It is essential that all the jurors understand that conscientiously held beliefs must not be surrendered simply for the purpose of reaching a verdict. (See *United States v. Mason* (9th Cir. 1981) 658 F.2d 1263, 1268; see also *Packer v. Hill* (9th Cir. 2002) 291 F.3d 569, 580; *Jiminez v. Meyers*, *supra*.) However, when conflicting instructions are given on the issue the required assurance is lacking.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.9

THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT

[This claim is fully briefed in Volume 2, § 2.9.12, pp. 607-23, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

A. Introduction

Numerous instructional deficiencies in the final instructions were individually and cumulatively deficient and prejudicial.

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

B. The Judge Improperly Framed The Issues In Terms Of Finding Guilt Or Innocence

See Volume 2, § 2.9.12(B), pp. 607-08, incorporated herein.

C. The Willfully False Instruction Improperly Failed To Define "Material"

See Volume 2, § 2.9.12(C), pp. 609-10, incorporated herein.

D. The "Probability Of Truth" Language In CALJIC 2.21.2 Lessened The Prosecution's Burden

See Volume 2, § 2.9.12(D), pp. 610-12, incorporated herein.

E. The Credibility Of Witness Instruction Was Improperly Limited To Persons Who Testified Under Oath

See Volume 2, § 2.9.12(E), pp. 612-17, incorporated herein.

F. Numerous Instructions Were Improperly Limited To The Testimony Of "Witnesses"

See Volume 2, § 2.9.12(F), pp. 617-20, incorporated herein.

G. The Instructions Improperly Failed To Instruct The Jurors Regarding Transcripts Read Into The Record

See Volume 2, § 2.9.12(G), pp. 620-21, incorporated herein.

H. The Instructional Errors Were Cumulatively Prejudicial

See Volume 2, § 2.9.12(H), pp. 621-23, incorporated herein.

3 SANTIAGO CASE

3.9 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 3.9.10

THE INSTRUCTIONS GIVEN IN THE LUCAS TRIAL WERE NOT SUFFICIENTLY UNDERSTANDABLE TO SATISFY THE 8TH AND 14TH AMENDMENT RELIABILITY REQUIREMENTS OF THE FEDERAL CONSTITUTION

[This claim is fully briefed in Volume 2, § 2.9.13, pp. 624-34, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Because heightened reliability is required as to both guilt and penalty in a death penalty case, it is especially important that the jurors fully understand the instructions they are given by the judge. However, three independent resources of the highest stature – the United States Supreme Court, the California Judicial Council's Blue Ribbon Committee and respected researchers – have all questioned the understandability of the instructions given in Lucas' trial. As a result of the United States Supreme Court criticism, the most critical guilt phase instruction – CALJIC 2.90 – was revised for purposes of clarity. As a result of the Blue Ribbon Committee findings a "total re-writing" of the California instructions has been undertaken. And, as a result of numerous studies by the academic community it has been empirically demonstrated that Lucas' jurors more than likely labored under fundamental misunderstandings of the crucial precepts it was required to apply before imposing a death sentence.

Moreover, this likelihood was demonstrated by actual juror questions

in the present case which demonstrated misunderstanding of the most basic and fundamental sentencing principles upon which they had been instructed.

In view of this substantial error, both the guilt and penalty judgments in the present case should be reversed because the failure of the instructions to satisfy the most fundamental and rudimentary reliability requirements constituted structural error which infected the entire trial. (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 Santiago convictions should be reversed under both the state and federal harmless-error standards. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

ARGUMENT 3.10

JURY INSTRUCTIONS: BURDEN OF PROOF

[These claims are fully briefed in Volume 2, § 2.10.1 through 2.10.9, pp. 633-99, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, these claims are renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

A. Introduction

For numerous reasons the instructions given in the present case regarding the prosecution's burden of proving guilt beyond a reasonable doubt were deficient.

The errors violated the state and federal constitution.

The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

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.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, 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.)

The errors were reversible per se. The giving of an instruction which dilutes the standard of proof for conviction is reversible error per se. Any error in defining reasonable doubt for a jury cannot be deemed harmless because the error goes to the very heart of our system of criminal trials and deprives the criminal defendant of his or her right to be convicted only upon a finding by the jury of guilt beyond a reasonable doubt as correctly defined. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) This court has reached a similar conclusion (*People v. Vann* (1974) 12 Cal.3d 220, 225-226).

Further, because the errors individually and cumulatively violated Lucas' federal constitutional rights, the Santiago convictions should be reversed unless the prosecution demonstrates beyond a reasonable doubt that there is no reasonable possibility they could have affected the proceedings. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt

judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

B. The Instructions Were Constitutionally Deficient Because They Failed To Adequately Explain And Define The Burden Of Proof

The basic burden of proof instruction (CT 14285; RTT 12189) and other crucial instructions given in the present case used the term "burden" or "burden of proof" in defining the presumption of innocence and the prosecution's burden of proof. However, while these terms may be well known and understood by lawyers and judges, they should have been further defined and explained to the jury. (See Volume 2, § 2.10.1, pp. 633-42, incorporated herein.)

C. The Instructions Were Deficient And Misleading Because They Failed To Affirmatively Instruct That The Defense Had No Obligation To Present Or Refute Evidence

The instructions in the present case omitted one of the most fundamental underpinnings of the presumption of innocence: that the accused need not present any evidence for the jury to have a reasonable doubt. This omission, in light of all the other instructions, erroneously conveyed the impression that the evidence presented by the defense must raise a reasonable doubt. (See Volume 2, § 2.10.2, pp. 645-55, incorporated herein.)

D. The Burden Of Proof Instruction Failed To Adequately Define The Standard Of Proof

From the language of CALJIC 2.90 it would not have been clear to reasonable jurors[826] that proof beyond a reasonable doubt is a substantially higher standard than the clear and convincing evidence standard. Hence, the

---

[826] Jury instructions should be reviewed in light of how they would be understood by a reasonable juror . (See *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

trial judge erroneously refused to provide a better explanation of the standard of proof in the presumption of innocence instruction. (See generally *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Cage v. Louisiana* (1990) 498 U.S. 39.) (See Volume 2, § 2.10.3, pp. 656-60, incorporated herein.)

E. The Judge Erroneously Refused The Defense Request For Instructions Comparing The Burden Of Proof Beyond A Reasonable Doubt With Other Burden

As discussed above, it would not have been clear to reasonable jurors that prove beyond a reasonable doubt is a substantially higher standard than the clear and convincing evidence standard. Hence, the trial judge erroneously refused to provide a better explanation of the standard of proof by providing a comparison of the beyond a reasonable doubt and clear and convincing burdens. (See Volume 2, § 2.10.4, pp. 661-66, incorporated herein.)

F. The Reasonable Doubt Instruction Erroneously Implied That Reasonable Doubt Requires The Jurors To Articulate Reason And Logic For Their Doubt

Because this case presented the jurors with closely balanced factual issues to resolve, an accurate definition of reasonable doubt was critical. Therefore, the judgment should be reversed because the definition of reasonable doubt given by the judge implied that the jurors must articulate logic and reason for their doubt. (See Volume 2, § 2.10.5, pp. 667-72, incorporated herein.)

G. The Reasonable Doubt Instruction Unconstitutionally Admonished The Jury That A Possible Doubt Is Not A Reasonable Doubt

The judge gave the standard CALJIC definition of reasonable doubt which provided as follows:

> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. (CT 14285; CALJIC 2.90 (5th Ed. 1988).)

The language admonishing the jury that "reasonable doubt . . . is not a mere possible doubt . . ." was unconstitutional because it failed to adequately limit the scope of possible doubt. (See Volume 2, § 2.10.6, pp. 673-79, incorporated herein.)

H. The Judge Erroneously Instructed The Jurors To Take Into Account Moral Considerations In Deciding Guilt

Use of the terms "moral certainty" and "moral evidence" in the version of CALJIC 2.90 given in the present case was erroneous. (See Volume 2, § 2.10.7, pp. 680-84, incorporated herein.)

I. The Circumstantial Evidence Instructions (CALJIC 2.01 And 2.02) Unconstitutionally Lightened The Prosecution's Burden Of Proof, And Also Created A Mandatory Conclusive Presumption Of Guilt, Under The Circumstances Of This Particular Case

The circumstantial evidence instructions given in the present case undermined the accuracy of the verdicts, operated as a mandatory conclusive presumption, and misled the jury about the burden of proof on the ultimate issue of guilt or innocence, violating the Sixth, Eighth and Fourteenth Amendments. The error was prejudicial and reversible. (See Volume 2, § 2.10.8, pp. 685-92, incorporated herein.)

J. The Burden Of Proof Principles Of CALJIC 2.01 Were Unconstitutionally Limited To Circumstantial Evidence

This case involved crucial factual issues which required the jury to evaluate and weigh direct evidence. Indeed, two of the most important factual issue in the Santiago case – Santiago's identification of Lucas and his residence – were direct evidence issues. Hence, the defense requested that the standard circumstantial evidence instructions (CALJIC 2.01 and 2.02) be supplemented with an instruction informing the jury that "if direct evidence is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt." (CT 14496; see also RT 11308-08; 11398-400.) The trial judge's refusal of this instruction erroneously permitted Lucas to be convicted upon direct evidence despite the existence of a reasonable interpretation of that evidence pointing to the defendant's innocence. This error prejudicially undermined the presumption of innocence and violated Lucas' state (Article I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (See Volume 2, § 2.10.9, pp. 691-97, incorporated herein.)

3 SANTIAGO CASE

3.11 DELIBERATION ISSUES

ARGUMENT 3.11.1

THE JUDGE VIOLATED STATE LAW AND THE FEDERAL CONSTITUTION BY ALLOWING THE JURORS TO READ THE TRIAL TRANSCRIPTS IN THE JURY ROOM

[This claim is fully briefed in Volume 2, § 2.11.1, pp. 700-26, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

When a deliberating jury asks for specific trial testimony the procedures used to convey the testimony to the jury are critically important. By asking for the testimony the jurors have identified matters which could influence their ultimate verdict. Hence, it is imperative for the trial judge to closely supervise the procedure and assure both that the requested testimony is fully considered and that no undue emphasis or other prejudice results from the procedure.

However, in the present case, the judge erroneously and prejudicially abdicated her duty to supervise by simply sending redacted transcripts into the jury room in lieu of having the testimony read to the jurors. This violated Lucas' federal constitutional rights to personal presence, to the representation of counsel and to the presence of the judge. Furthermore, the judge failed to give the jurors any special directions or cautionary instructions regarding their use of the transcripts. (See § 3.11.3 pp. 1054-55 below, incorporated herein.)

Accordingly, the Santiago convictions should be reversed. (See § 3.8.1(B), (C) and (D), pp. 998-1000 above, incorporated herein.) Moreover,

because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.11 DELIBERATION ISSUES

ARGUMENT 3.11.2

ALLOWING THE JURY TO READ BACK TESTIMONY TO THEMSELVES IN THE JURY ROOM VIOLATED LUCAS' PUBLIC TRIAL RIGHTS

[This claim is fully briefed in Volume 2, § 2.11.2, pp. 725-30, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Because the "readback" of testimony was not conducted in open court Lucas' state and federal constitutional rights to a "public trial" were violated.[827]

Lucas had a constitutional right to have the testimony read back to the jury in open court pursuant to his right to a public trial. By requiring the jurors to conduct their own, unsupervised readback in the jury room Judge Hammes abridged Lucas' right to a public trial.

The error was structural and, therefore, should be reversible per se. (See generally *Arizona v. Fulminante* (1991) 499 U.S. 279.) Alternatively, the Santiago convictions should be reversed under the state and federal harmless-error standards. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions

---

[827] "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." (U.S. Const. 6th Amendment.) ¶ "The defendant in a criminal case has the right to a . . . public trial. . . ." (Calif. Const. art. 1 § 15.)

should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.11 DELIBERATION ISSUES

ARGUMENT 3.11.3

THE JUDGE ERRED IN ALLOWING THE JURY TO READ PORTIONS OF THE TESTIMONY DURING DELIBERATIONS WITHOUT ANY INSTRUCTIONS AS TO THE PROPER USE OF THE TRANSCRIPTS

[This claim is fully briefed in Volume 2, § 2.11.3, pp. 731-35, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Elsewhere in this brief Lucas demonstrates that trial transcripts should not have been sent into the deliberation room in response to juror requests for readback of testimony. (See Volume 2, § 2.11.1 and 2.11.2, pp. 698-724, incorporated herein.) However, even if such a procedure were constitutionally permissible, transcripts should not have been submitted unless accompanied by a strong and complete admonition concerning the jury's use and consideration of the transcripts.

In the present case, numerous transcripts of selected testimony were given to the jury during their deliberations (at both the guilt and penalty trials) without any instruction as to the use of such transcripts. Because this procedure was fraught with the danger of undue influence, and other prejudices, the judge's failure to admonish the jurors regarding their use of the transcripts was reversible error.

The error was structural and, therefore, should be reversible per se. (See generally *Arizona v. Fulminante* (1991) 499 U.S. 279.) Alternatively, the

Santiago convictions should be reversed under the state and federal harmless-error standards. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

3.11 DELIBERATION ISSUES

ARGUMENT 3.11.4

THE JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY REGARDING THE SELECTION, DUTIES AND POWERS OF THE FOREPERSON

[This claim is fully briefed in Volume 2, § 2.11.4, pp. 738-42, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 3, the claim is renewed as to the Santiago convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

The judge left the jurors entirely on their own regarding the foreperson by merely instructing:

> You shall now retire and select one of your number to act as foreperson. He or she will preside over your deliberations. (CT 14355.)

As a result, the foreperson was permitted to exercise undue influence over the other jurors thus undermining the fairness and reliability of the guilt and penalty deliberations. Therefore, guilt and penalty judgments should be reversed.

The error was structural and, therefore, should be reversible per se. (See generally *Arizona v. Fulminante* (1991) 499 U.S. 279.) Alternatively, the Santiago convictions should be reversed under the state and federal harmless-error standards. (See § 3.8.1(B), pp. 998-1000 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Santiago charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 3.8.1(C), p. 999 above, incorporated herein.) Finally, because the Santiago charges were also prejudicial as to the penalty

determination, the death judgment should be reversed even if the guilt judgments are not. (See § 3.8.1(D), p. 1000 above, incorporated herein.)

3 SANTIAGO CASE

ARGUMENT 3.12

CUMULATIVE ERROR: SANTIAGO

A. Introduction

The arguments below address the cumulative effect of the errors identified throughout this brief. The term "cumulative" refers to all the errors identified in the Santiago briefing (Volume 3) as well as the errors in the Jacobs (Volume 2), Swanke (Volume 4) and/or Strang/Fisher briefing (Volume 5), all of which could have affected the Santiago verdicts by virtue of the ruling allowing cross-admissibility of all the charges.

B. The Errors Cumulatively Violated The Federal Constitution

State law errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (See *Greer v. Miller* (1987) 483 U.S. 756, 765; *Marshall v. Walker* (1983) 464 U.S. 951, 962; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-45; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622.)

In the present case Lucas' trial on the Santiago charges was fundamentally unfair because the numerous state law and federal constitutional errors precluded Lucas from adequately defending against the charges and the jurors' verdict from meeting the heightened reliability requirements constitutionally mandated in a capital proceeding, and deprived Lucas of his rights to due process, fair trial by jury, confrontation, compulsory process, representation of counsel and the right to present a defense, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (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.)

C. The Errors Were Cumulatively Prejudicial

The errors were also cumulatively prejudicial. The doctrine of establishing prejudice through the cumulative effect of multiple errors is well settled. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial: the combined (aggregate) prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone]; *Delzell v. Day* (1950) 36 Cal.2d 349, 351; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Ford* (1964) 60 Cal.2d 772, 798; *Du Jardin v. City of Oxnard* (1995) 38 Cal.App.4th 174, 180; *People v. McGreen* (1980) 107 Cal.App.3d 504, 519-520.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, the combined effect of the errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59; *In re Rodriguez* (1981) 119 Cal.App.3d 457, 469-470.) Accordingly, this Court's review of guilt phase errors is not limited to the determination of whether a single error, by itself, was prejudicial.

In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, Lucas has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each of these errors individually, and all

the more clearly when considered cumulatively, deprived Lucas of due process, of a fair trial, of the right to compulsory process and to confront the evidence against him, of a fair and impartial jury, of the right to present a defense, of the right to representation of counsel, and of fair and reliable guilt and penalty determinations in violation of Lucas' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of the guilt and/or death judgment. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

D. The Santiago Errors Were Prejudicial As To The Jacobs And Swanke Convictions

The errors raised in Volume 3 are directly applicable to the Santiago charges. However, the prejudicial impact of those errors also extended to the Jacobs and Swanke charges because of the judge's cross-admissibility ruling which allowed the jurors to rely on Santiago to convict in Jacobs and/or Swanke. (See Volume 2, §2.3.5.1(H), pp. 293-300, incorporated herein.) Hence, because the Santiago convictions should be reversed, the Jacobs and Swanke charges should also be reversed under both the state (*People v. Watson* (1956) 46 Cal.2d 818) and federal (*Chapman v. California* (1967) 386 U.S. 18) standards.[828]

E. The Swanke, Jacobs And Strang/Fisher Errors Were Prejudicial As To Santiago

Because the Santiago case was closely balanced and the jurors were allowed to consider the Jacobs, Swanke and Strang/Fisher charges to convict

---

[828] See § 3.4.2, pp. 904-17 above, incorporated herein and Volume 4, § 4.3(L), pp. 1144-45, incorporated herein [discussing evidentiary balance in Jacobs and Swanke].

on Santiago, the errors in the Jacobs (see Volume 2, incorporated herein) Swanke (see Volume 3, incorporated herein) and Strang/Fisher (see Volume 5, § 5.2, incorporated herein) cases were prejudicial as to Santiago at both the guilt and penalty phases.

Moreover, because the errors 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 errors 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.

F. The Santiago Errors Were Prejudicial As To The Penalty Determinations

Even if the errors were not sufficiently prejudicial to require reversal of the guilt judgment, they were prejudicial, individually and cumulatively, at the penalty trial. The penalty trial was closely balanced as demonstrated by the difficulty the jury had in reaching a verdict.[829] Therefore, because a major defense mitigating theory at penalty was lingering doubt, any substantial error at the guilt trial should be considered prejudicial as to the penalty under both

---

[829] 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.].

the state and federal standards of prejudice.[830] The errors were particularly prejudicial as to the penalty trial since the Santiago count could have been used both to counter the defense theory of lingering doubt and as independent aggravation under factor (a).

[830] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing state and federal standards of prejudice at penalty].