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 4

Pages 1061 - 1244

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

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4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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VOLUME 4

4.1 SWANKE CASE: STATEMENT OF CASE (CR 73093)[831]

On March 18, 1985, an information was filed in case number 73093 (hereinafter "CR 73093") in San Diego Superior Court charging David Lucas with the Santiago attempted murder (see Volume 3); the Strang/Fisher murders (see Volume 5, § 5.2) and the Swanke murder. Count Five of the information alleged that on or about November 20, 1984, David Lucas kidnapped Anne Swanke in violation of Penal Code § 207(a) and Count Six alleged that on or about November 20, 1984, Lucas murdered Anne Swanke in violation of Penal Code § 187. The information also alleged that Lucas had personally used a knife in the commission of each alleged crime within the meaning of Penal Code § 12022(b) and had inflicted great bodily injury on Anne Swanke within the meaning of Penal Code § 12022.7. (CT 70-72.) The

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

information further alleged that the murder of Anne Swanke was committed while Lucas was engaged in the commission or attempted commission of a kidnapping, in violation of Penal Code § 190.2(a)(17)(ii), as well as a multiple murder special circumstance. (PC 190.2(a)(3).)) (CT 71.)

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

On December 2, 1985, in CR 73093, the defense filed a motion to sever the Santiago, Strang/Fisher, and Swanke counts. (CT 928-55.)

On December 23, 1985, in CR 73093 and 75195,[832] the prosecution filed a "Notice Of Evidence In Aggravation" pursuant to Penal Code § 190.3. (CT 1263-66; 9214-17; 9503-06.)

On February 7, 1986, Lucas' petition to strike the kidnapping special circumstance (Penal Code § 190.2(a)(17)) was granted by the Court of Appeal. (D004114.)

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

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

On February 9, 1987, in both cases, the presiding judge, Wayne L. Peterson, assigned the case to Judge Laura Palmer Hammes. (CT 4808; 4811.)

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

On March 2, 1987, the defense moved to suppress portions of the

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[832] In CR 75195, Lucas was charged with the murders of Gayle Garcia and Suzanne and Colin Jacobs. (CT 5744-45.)

testimony of witness Frank Clark. The court advised witness Clark of his Fifth Amendment privilege and Clark invoked those rights. (CT 15249.) The prosecution filed a petition for an order compelling the testimony of Frank Clark, pursuant to Penal Code § 1324. (CT 9734-83.) Judge Hammes remanded the matter to Judge Jack Levitt for the purpose of conducting an order-to-show-cause hearing pursuant to Penal Code § 1324. (CT 15249.)

On March 4, 1987, Judge Levitt denied the prosecution's petition to compel the testimony of Frank Clark, pursuant to Penal Code § 1324. (CT 4829.) Thereafter, the prosecution granted Clark immunity. Therefore, Clark continued his testimony in regard to the in limine motions. (CT 2736-37; 4831-32; 9805-09;15252-56.)[833]

On May 11, 1987, the defense filed a motion to dismiss the special circumstances. (CT 2845-51.)

On May 12, 1987, the defense filed a motion to exclude testimony on genetic marker typing. (CT 10446-460.)

On May 13, 1987, the prosecution filed an amended information in CR 75195 (CT 6785-87) and a second amended information in CR 73093. (CT 3452-57.) In CR 75195, Lucas entered a plea of not guilty and demanded his right to a speedy trial. With regard to CR 73093, Lucas requested either a continuance of the arraignment or, in the alternative, that the case be trailed until completion of the 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.)

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[833] Richard Lee Adler was also granted immunity after invoking his Fifth Amendment rights. (CT 4836; 15260.)

On May 26, 1987, Judge Hammes ruled that the prosecution need not prove general acceptance in the scientific community of hair comparison/ identification techniques and that there was no *Kelly-Frye* foundation requirement before introduction of testimony regarding hair comparison evidence. The defense moved to strike the testimony of hair comparison witness James Bailey on "chain-of-custody" grounds. Judge Hammes deferred her ruling, pending the testimony of hair comparison witness John Simms. (CT 4905-06; 15332-33.)

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

On April 22, 1988, Judge Hammes held an *in camera* hearing with the Deputy City Attorney, members of the San Diego Police Department Homicide Division and Dr. Bucklin. The prosecution and the defense were excluded and all records of the proceedings were ordered sealed. (CT 5180.)

On May 5, 1988, additional proceedings were held regarding the *Hitch/Trombetta* issues. (CT 5192-93.) The defense filed a trial brief regarding exclusion of all electrophoretic results and blood testing obtained in violation of Article I, § 15 of the California Constitution and the Sixth Amendment of the United States Constitution. (CT 12369-86.)

On May 10, 1988, the prosecution filed a statement of facts in support of trial brief regarding chain of custody of physical evidence concerning the stained sheepskin seat cover and fibers, fingernail clippings, and dog chain. (CT 3444-51; 12395-402.)

On May 12, 1988, Judge Hammes ruled that all of the vital links in the chain-of-custody were sufficiently established as to the sheepskin, dog chain, and fingernails. (CT 5199-200.)

On May 16, 1988, Judge Hammes further considered the chain of

custody and hair evidence issues. The court found that the evidence seized was the same which was brought into court. (CT 5201-02.)

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.)

On June 6, 1988, the defense filed supplemental points and authorities in opposition to the prosecution's consolidation motion. (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 July 11, 1988, the prosecution filed the consolidated information. (CT 4107-4116; 15516; 12970-73.) Lucas objected to the consolidated information and refused to enter a plea. The court directed the court clerk to read the consolidated information to Lucas, defense counsel waived reading of the consolidated information and Lucas joined in the waiver. The court formally entered a plea of "not guilty" on Lucas' behalf for each of the charges listed in the consolidated information, as well as a denial of the truth of each of the allegations and special circumstances appended to the various crimes charged. The defense requested a new preliminary hearing or convening of the grand jury on the consolidated charges and the court denied both requests. (CT 5222-23; 15518-19.)

On August 11, 1988, Judge Hammes denied the defense motion to exclude all of the electrophoretic analysis because counsel was not present during testing. (CT 5234; 15530.)

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 March 15, 1989, the defense renewed its request to sever the Swanke case from the other cases. (CT 5450-51.)

On March 27, 1989, Judge Hammes filed an opinion entitled "*Kelly-Frye* Admissibility of Electrophoretic Tests on Evidentiary Blood Samples." (CT 13822-46.)

On April 12, 1989, the prosecution rested its 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 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.)

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 commenced closing argument. (CT 5550-51.) 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 misconduct 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,[834] 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 special circumstance allegation (§ 190.2(a)(3)). (CT 5573; 14240.) The jury was deadlocked as to the Strang/Fisher murders and Judge Hammes declared a mistrial as to those counts. (CT 5563.) The jury found Lucas not guilty of the murder of Gayle Garcia. (CT 5567; 14234.)

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

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[834] 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.

4.2 THE SWANKE CASE: STATEMENT OF FACTS[835]

A. Prosecution Evidence

1. Background

a. Alcohol And Drug Use By Frank Clark And David Lucas

Frank Clark used methamphetamine a couple of times a week between the summer of 1984 and November of 1984. (RTT 3799.)[836] During this time, whenever Clark used methamphetamine or marijuana it was usually with Lucas or some of the other cleaners at the business. (RTT 3799.) Clark and Lucas also drank alcohol on a fairly regular basis. (RTT 3800.) Clark usually kept a supply of beer in the house and routinely drank beer after work. (RTT 4253; 4287.)[837]

During 1984 Lucas purchased cocaine from Rhonda Strang. (RTT 3775-76; 4182-85.)

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[835] Reporter's Transcript of the Trial (Volumes 1 through 73) are referred to as "RTT" The Clerk's Transcripts are referred to as "CT."

[836] Clark also freebased cocaine in 1984 on one occasion. (RTT 3923; 3958.)

[837] Clark couldn't remember how much marijuana or other drugs or alcohol he used on November 19, 20, and 21, 1984. (RTT 4264.) Clark couldn't remember if he smoked marijuana during the day in question, or if he had anything to drink earlier in the day. (RTT 4262; 4265; 4286.) He admitted to drinking some days during that time period, that he would customarily drink 3-5 beers at the business after work, and that he "possibly" customarily smoked 1-2 joints per day. (RTT 4263; 4281; 4286.) His use of marijuana increased prior to November 1984. (RTT 4390.)

b. Activities Of Frank Clark[838] And David Lucas On November 19, 1984

Frank Clark and David Lucas worked at their business, Carpet Maintenance Company ("CMC") on Monday, November 19, 1984.[839] (RTT 3796.) At the end of the work day Clark and Lucas left work together in Lucas' Toyota truck. (RTT 3797; 3806-07.) At approximately 7:00 or 7:30 p.m., they went to a bar and drank between three and five beers each. (RTT 3797-98; 4280; 4283; 4289; 4320.)[840] Later that evening, they bought a quarter gram of crystal methamphetamine. (RTT 3797; 4284; 4320.) They consumed the methamphetamine and then, at about 9:00 p.m., bought some more beer. (RTT 3797; 4284-85; 4294.) Clark called his wife around 10:00 p.m. to let her know he would be coming home and that Lucas was with him.

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[838] Clark was granted immunity from being prosecuted for his illegal drug use. (RTT 3800; 3916-19; Trial Exhibit 559.)

[839] The evidence regarding the activities of Lucas and Clark on November 19, 1984, came primarily from the testimony of Frank Clark. Clark originally told law enforcement authorities that all of these activities took place on Tuesday, November 20, 1984. (RTT 4203-04; 4251.) However, Clark testified that it really was November 19 because "Fatal Vision, Part Two" was on the television that night. (RTT 3797; 3803-04.) "Fatal Vison, Part Two" aired on November 19, 1984. (RTT 4422-26.)

Rick Adler's prior testimony contradicted Clark's testimony that Clark was with Lucas on the evening of November 19. (See § 4.2(A)(1)(e)(i), pp. 1074-77 below, incorporated herein.)

[840] Clark testified that he may have had something to drink before he and Lucas went to the bar but that he didn't have a specific recollection whether Lucas had or not. (RTT 4282-83.) He also testified that he drank between two and four beers before they got to the bar, and believed Lucas did too. (RTT 4289; 4291; 4319.)

(RTT 4377; 4402.)[841]

They arrived at Clark's house in Mission Valley around 10:00 to 10:30 p.m. and drank more beer. (RTT 3797; 3799; 3802: 4286-89; 4320; 4377-78; 4381.) Clark's wife was watching "Fatal Vision" Part Two on TV when Frank and Lucas were there. She had watched Part One the previous night. (RTT 3797; 3803-04.)[842] Clark and Lucas may have watched parts of the movie; but they were more or less talking between themselves. (RTT 3804.)[843] Lucas left Clark's house at approximately midnight or shortly thereafter. (RTT 3797; 3806; 4296; 4321.) According to Clark, Lucas was able to walk without stumbling and didn't have any difficulty talking. (RTT 3803; 3805; 4321.) Lucas didn't appear intoxicated or impaired. (RTT 3802-03; 4321.)[844] Altogether, Clark drank between 8 and 12 beers and had the

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[841] Clark's wife was acquainted with Lucas and she was not very fond of him. (RTT 3797-98; 4253-54; 4384.)

[842] Penny Martin, program director at Channel 39 TV, authenticated Exhibits 205 and 206, broadcast logs for November 18, 1984 and November 19, 1984. (RTT 4422-23.) On November 18, Fatal Vision Part One aired from 9:00 to 10:58 p.m. as the NBC Sunday Night Movie. On Monday, November 19, 1984, Fatal Vision Part Two was aired from 9:00 to 10:58 p.m. (RTT 4424-26.)

[843] Clark's wife testified that the three of them discussed the movie she was watching. (RTT 4378.) Lucas said the movie was about a man who had blown away his family. (RTT 4378-79.) "Fatal Vision: Part One" was shown on Sunday night. (RTT 4379.) She watched Part Two in its entirety on Monday. (RTT 4381.) After the movie was over, they watched the 11:00 news and the beginning of Johnny Carson. (RTT 4381.)

[844] Clark didn't feel he was intoxicated. He felt he was completely sober and that the effects of the methamphetamine overcame any effect of the alcohol. (RTT 3802-03; 4292-94; 4320-21.) Clark didn't think the alcohol he had after taking the methamphetamine had any effect on his cognitive

(continued...)

crystal methamphetamine, but he didn't feel it had any effect on his sobriety. (RTT 4290; 4292.)[845]

c. Activities Of Anne Swanke

On November 19, 1984, Anne Swanke was on her way home from a sorority function at the University of San Diego and stopped by to see Gregory Oberle. (RTT 4439.) Oberle and Swanke had been dating for three years, and they were very close. (RTT 4439.)

Swanke arrived at approximately 7:00 p.m. (RTT 4443.) There were two other friends of theirs at Oberle's and the four of them spent some time talking by the pool. After their friends left, Swanke and Oberle continued to talk between themselves. (RTT 4440.) They did not have sexual intercourse that evening. (RTT 4451; 4454.)[846] Swanke left sometime between 12:30 and 1:00 a.m. on Tuesday, November 20. (RTT 4441; 4443.) Swanke was driving a Dodge Colt which was low on gas. (RTT 4440-44.)

d. The Abduction Of Anne Swanke

Gale Graham was working as an attendant at the Shell gas station on Jackson Drive in La Mesa during the early morning hours of November 20th, 1984. (RTT 4455.) Sometime after midnight, a woman (whom he later learned was Anne Swanke), walked into the gas station from the direction of Fletcher Parkway and got gas in a small gas can. (RTT 4457-60.)

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[844](...continued)
abilities. (RTT 4295-96.)

[845] Clark couldn't remember if they smoked marijuana that day. (RTT 4286.)

[846] According to Oberle, it was "possible" that he and Swanke engaged in sexual activity without genital contact that involved removal of clothing, including their underwear. (RTT 4452-54.)

Richard Leyva, who was driving home, stopped at the intersection of Fletcher Parkway and Jackson Drive at approximately 1:15 or 1:30 a.m. on November 20, 1984. (RTT 4549-53; 4599-4600.)[847] Leyva was in the eastbound lane of Fletcher Parkway and was waiting at the red light to make a left turn. (RTT 4553-54). There were street lights at the intersection. Leyva saw a car parked on Jackson Drive near the gas station. (RTT 4554-55; 4600.) When he glanced over he noticed someone towards the left rear of the car. (RTT 4555-56.) The person appeared to be putting gas in the car. (RTT 4556; 4600-01.) Leyva had been there about a minute and was just gazing around when lights flashed into his eyes. He happened to glance toward the location of the car and saw that there was now a second vehicle parked behind the first vehicle, but he thought nothing of it. (RTT 4556-58; 4602.) He didn't know where the second vehicle had come from. (RTT 4601.) The vehicles were parked at the curb just south of Fletcher Parkway, northwest of the gas station. They were not big cars and were approximately the same size. (RTT 4557; 4561; 4598; 4614-15.) Leyva could see that the first vehicle was a car; he wasn't sure if the second vehicle was a car or truck. (RTT 4597-98; 4604.)[848]

The light turned green and Leyva made a left turn crossing the intersection on to Jackson Drive. As he was approaching the rear of the second vehicle, he glanced at the license plate and remembered it was an unusual combination of letters that stuck in his mind. (RTT 4558; 4562.) It was a combination of three letters, followed by three more letters and a

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[847] But see § 4.2(A)(1)(e)(ii), p. 1077 below, incorporated herein.

[848] Leyva told Detective Henderson that the second vehicle may have been similar in size to the first vehicle and that it was a sedan as opposed to a van or a truck. (RTT 4606.)

number; something like "TNC CNC or CNC TNC," or possibly "CNC INC" with a number at the end he couldn't make out. The plate reminded him of "TIN CAN" for some reason. (RTT 4562-63; 4610; 4616-18.) It was a light colored plate, and may have had an orange or yellow background that reminded Leyva of either Oregon, Illinois, or Iowa plates. (RTT 4562-63; 4609-10; 4613.)

As he passed the vehicles he glanced and saw the silhouette of two people, one slightly taller than the other by maybe two or three inches, in an embrace. (RTT 4558; 4560; 4607-09.) He thought it was a lover's embrace; then as he passed the front of the first vehicle, he thought that it might be a kidnapping, but that's as far as the thought went. He saw no weapon or force being used, and didn't notice whether either of the people had their feet off the ground. (RTT 4558; 4607; 4618.) He couldn't make out any detail concerning the silhouettes; whether they were male or female, or what race they were. (RTT 4561; 4607) The details weren't important to Leyva; he was thinking about going home. (RTT 4560.) He drove on to his apartment and went to bed. (RTT 4559; 4563; 4602.)

During the early morning hours of November 20, 1984, Officer Charles Drake of the La Mesa Police Department was on patrol and was called by Highway Patrol officers to meet with them at the intersection of Jackson Drive and Fletcher Parkway. (RTT 4620; 4627-28) When he arrived he was met by the CHP officers who pointed out an abandoned brown Dodge Colt with California license of 1 KTU 482. (RTT 4620-21.) Drake opened the driver's door of the vehicle and found ownership information in a wallet on the front passenger seat. (RTT 4624; 4629.) He learned that the car belonged to Anne Catherine Swanke. (RTT 4621-22; 4628.)

There was a flashlight on the left rear corner of the trunk, and the gas

tank top and keys were also on top of the trunk lid. (RTT 4621; 4623; 4629.) The gas tank flap was open and there was a gas can on the ground. (RTT 4623.) The vehicle was secured at the scene that night. (RTT 4625; 4631.)

e. Post-Abduction Events

i. Scratches On Lucas' Face

On Tuesday morning, November 20, 1984, Frank Clark went in to work.[849] Lucas wasn't there. (RTT 3807.) Lucas called Clark at work that morning around 7:00 or 7:30 a.m. Lucas told Clark that after he left Clark's house the previous night he had gone to a bar. Lucas said someone hit him from behind with a beer mug and he didn't remember anything after that. Lucas said he needed to take the remainder of the week off. (RTT 3807; 3818-19; 3823-24; 4254-55; 4257.) Clark didn't expect to see Lucas for the rest of the week. (RTT 4257.)

On the morning of November 20, 1984, Rick Adler saw Lucas.[850] Lucas had scratches on his face, forehead and cheeks that weren't there the last time Adler saw him on November 18th. (RTT 3435; 3446.)[851] The

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[849] It was stipulated that November 19, 1984 was a Monday. (RTT 3514-15; 3592.)

[850] Rick Adler was living at Lucas' house at the time. (RTT 3434.) He was granted immunity in order to compel his testimony at trial. (RTT 3458-65; Trial Exhibit 554.)

[851] Adler testified that he didn't believe Lucas was at the house the night of November 19, 1984. (RTT 3520-21.) However, in his prior testimony, which was read into the record, Adler said he was with Lucas on the 19th. (RTT 3522.) Adler testified that this prior testimony was incorrect. He saw Lucas on the night of the 18th, then in the morning hours of the 19th. He did not see Lucas the rest of the 19th. The next time he saw Lucas was on the morning of the 20th and Lucas had scratches on his face. Adler (continued...)

scratches were very fresh, pussy and partially bleeding. (RTT 3597.) Adler told Lucas he looked as if he'd been run over by a truck. (RTT 3447.)[852] Adler asked Lucas how he had gotten the scratches on his face and Lucas told him that he went to a bar, a fight broke out and he was hit in the face with a beer mug or pitcher. (RTT 3453.) Adler noted that the scratches on Lucas' face were heavier on the left side. (RTT 3580-81; 3584.) They also went further down on the left side of his face than the right. (RTT 3582.) Vicky Johnson, who was also living at Lucas' house (RTT 3442; 3447) saw scratches on Lucas' face that morning and commented about them. (RTT 3447; 3452.)

The next time Frank Clark saw Lucas was at work on Friday, November 23, 1984. (RTT 3809-10; 4259-60.) Lucas had deep scratches on the left side of his face. They were four long scratches that started around the eyelid, went down his cheek and off his chin. The scratches seemed fairly

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[851](...continued)
remembered that it was the 20th that he saw the scratches because the following day he and Lucas went fishing and rented a boat. (RTT 3589-92; 3615-16.) Adler also went fishing with Lucas in June 1984. At that time, Lucas had some scratches on his face from falling on some rocks. (RTT 3497.)

In February 1986, Adler talked to Tom Caldwell and told him that he had spent the night of November 19, 1984, at Lucas' house and that Lucas was there when he went to sleep. (RTT 3611-12.) He also testified to those facts in January 1987 at a pretrial hearing. (RTT 3612.)

[852] Adler identified Exhibits 192 and 192A, a photograph depicting Lucas and a plastic overlay on which Adler had drawn some red lines to show the scratches he had seen on Lucas' face on November 20, 1984. (RTT 3435-36.) Adler didn't draw the lines on the exhibit; they were put there at his direction. (RTT 3579; 3583; 3596.) Adler worked with the artist creating the overlays on February 16, 1989. (RTT 3571-72.) Adler never made any attempt to memorialize the scratches prior to February 16, 1989. (RTT 3572.)

fresh and were just beginning to heal. (RTT 3810-11.)[853]/[854] Lucas did not have scratches on his face when he left Clark's house on November 20. (RTT 3817-18.) Lucas didn't have any bandages on his face and made no effort to conceal his face. (RTT 4260.)

On Friday, November 23, 1984, William McCarthy, an advertising sales representative, met with Lucas at the Carpet Maintenance Company. (RTT 7087-88; 7095; 7107-08.) McCarthy noticed scratches on Lucas' face; the scratches were on his forehead, cheeks and left eye. (RTT 7089.)[855] The scratches were superficial and not very deep for the most part, except for the scratch under Lucas' left eye, which almost looked like a cut rather than a scratch. (RTT 7092-93.) The scratches hadn't completely scabbed over, but they weren't fresh or bleeding in any way. (RTT 7092.) The scratches appeared to be two to three days old. (RTT 7094-95.) McCarthy asked Lucas

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[853] Clark identified Exhibit 192B, a plastic overlay, prepared at his direction, which depicted the way the scratches on Lucas' face appeared to him. (RTT 3812-15.)

[854] Clark looked at Exhibit 204, a photo depicting Lucas, taken on July 23, 1984. (4322-23; 4469-71.). The photo accurately depicted the injuries that Lucas received when he fell on the rocks at the jetty in Mission Bay. (RTT 4322-23.) Clark also testified that by November 1984, there were no visual remnants of the injuries Lucas had received at the jetty. (RTT 4345-46.)

[855] There were five scratches which started in the hairline and continued down. (RTT 7109.) Two of the scratches went through Lucas' eyes and all the way down his face, going off the chin. (RTT 7109.) The scratches appeared fairly fresh in that they were bright in color. (RTT 7111.) The scratches had taken off a layer or two of skin. (RTT 7111.) The scratch through the left eye was the most severe. (RTT 7111.)

John Storms, who was with McCarthy, also noticed the scratches on Lucas' face. (RTT 7109.) Storms asked Lucas about the scratches and Lucas told him that he had been in a fight in a bar. (RTT 7117.)

what had happened to him. (RTT 7095; 7106.) Lucas told him he had been in a fight in a bar. (RTT 7106.)

ii. Leyva's Contact With The Police

On the evening of November 20th, 1984, Leyva called the La Mesa Police Department after hearing about the abduction on the news. (RTT 4563.)

Leyva told Officer Drake that he arrived at the intersection of Fletcher Parkway and Jackson at approximately 1:30 a.m. (RTT 4624-25; 4634-35; 4639.)[856] Leyva told Drake what he had seen earlier including the personalized plate of TNC CNC, followed by an unknown number. (RTT 4624-25; 4634.)

iii. Discovery Of Anne Swanke's Body

In the early morning hours of November 24, 1984, James McNelly was taking a walk in the remote hills area near his house. (RTT 4653-54; 4659-60; 4665.) It had been fairly cool for the last several days. (RTT 4697.) Looking over the hills with his binoculars, he saw an object that looked unusual. (RTT 4657; 4665-66.) He walked toward the object, went down a steep rocky hill, and then discovered Anne Swanke's body. (RTT 4658-59; 4664; 4667.)

McNelly went back up the hill to his house and called 911. (RTT 4660.) The officers came to McNelly's house and he led them to the body. (RTT 4664; 4701.)

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[856] Leyva originally told Officer Drake that he left his girlfriend's house shortly after 12:00 a.m. and it took him 20 minutes to get home from there. In the same conversation, Leyva told Drake he arrived at the intersection at 1:30 a.m. There was no explanation for the conflicting times, and Drake didn't recall asking Leyva about it. (RTT 4650-52.)

2. Analysis And Description Of The Crime Scene And Other Physical Evidence

Detectives Henderson and Fullmer arrived at the scene. (RTT 3235; 4701.)[857] The body was cold and nude from the waist down except for white anklet-type socks. (RTT 4705; 4753; 4755.) There was a silver dog chain around her neck. (RTT 3235; 5075.) When the body was rolled over, Henderson observed a severe cut to the throat area of her neck. (RTT 4707; 4731; 4753.) Swanke's shirt and bra had been cut along the midline area of the front. (RTT 4706; 4753-54.)

A pair of blue slacks were found approximately 5 feet away from the body. (RTT 4706; 5079; 5164.) The slacks had a zipper on the front portion of the slacks and a button which was still buttoned. The zipper was zipped to the top and intact. Alongside the zipper and button the trousers had been cut down to the area of the crotch, about 2" to the left of the zipper. (RTT 4706; 5079-80.) A pair of brown loafer type shoes were found scattered further up the hill. (RTT 4706-07.) The left shoe was located approximately 9 feet from the body, and the right shoe was located approximately 47 feet from the body. (RTT 5076; 5165.) A blue comb was found near the pants. (RTT 5080.) They also found a pair of white panties with a moldy stain in the crotch. (RTT 5158.)

Henderson had examined hundreds of dead bodies in varying stages of decomposition. (RTT 4710-11.) Based on his training and experience, the weather conditions and the condition of the body, Henderson believed that the body had been there several days. (RTT 4713; 4732.)

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[857] Henderson testified that it was on November 24, 1984 at 11:40 a.m. (RTT 4745.)

There were tire tread marks at the scene. The tire treads on Lucas' truck did not match these tire tread marks. (RTT 4762-64.)

Swanke's body was bagged and moved to the coroner's office. There, swabs were taken to determine whether or not Swanke had been sexually molested. (RTT 4756-58; 5157.) Detective Fullmer examined Swanke's body at the morgue prior to the autopsy and completed a report detailing the position of the abrasions and wounds on Swanke's body. (RTT 3235-36.)[858] Fullmer's report noted the left side of the neck had a puncture wound and the throat had been cut. (RTT 3237.) The report also noted abrasions on the face (RTT 3239) and bruises on the back of the head. (RTT 3239-40.) There were linear abrasions on the left buttock and a small cut on the ring finger of Swanke's left hand, adjacent to the nail. (RTT 3240-41.) Swanke also had a bruise just below the knee of her left leg. (RTT 3240.) Fullmer noted hair and blood matted on the dog chain. (RTT 3383-84.)[859]

Later that day at the coroner's office, Deputy Frederick Freiberg removed the silver dog chain from around Swanke's neck. (RTT 4998; 5026-27; 5081.) Criminalist Charles Merritt assisted. (RTT 4999.) There was staining that appeared to be blood and hair or other foreign material in the grooves in the links of the chain. (RTT 5000; 5027.)[860] Freiberg also

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[858] Fullmer identified Exhibit 188 as the report he completed at the examination. (RTT 3236.)

[859] Fullmer had the chain at his office at some point, but he hadn't signed it out of evidence. (RTT 3385.) Henderson signed it out and gave it to Fullmer. (RTT 3385-86.) Fullmer kept the chain from about December 17, 1984 until approximately January 9, 1985. He made no effort to freeze or refrigerate the chain. (RTT 3386.)

[860] Exhibit 244 was a photo of the dog chain with hairs attached to it.
(continued...)

collected fingernail clippings from Swanke. (RTT 5001.) There was some foreign debris on the nails which appeared to be blood and possibly skin, which they wanted to preserve for further testing. (RTT 5085.) Each hand was clipped separately and the nail placed into a separate box. Each nail was clipped as close to the finger as possible. Merritt held the boxes under Swanke's hands while they were clipped and collected the clippings as they fell into the box. (RTT 5001-02; 5030; 5084.) They clipped and collected five nails from each hand. (RTT 5003-04.) Two pieces of nail clippings from one hand were also included in the clippings which resulted when Freiberg did not cut all the way from one edge of a nail to the other and he clipped off the remaining pieces. (RTT 5004-05.) The nails were placed between two pieces of foam and impounded by Merritt. (RTT 5004-05.)

Merritt collected Swanke's clothing at the coroner's office. (RTT 5083.) He also collected head hair and pubic hair samples. (RTT 5144-45; 5152; 5154.) There was one loose hair collected from Swanke's upper leg. (RTT 5145; 5152.) There were hairs in Swanke's right hand and on her right breast which were collected and preserved. (RTT 4758; 5154.) There was also a hair found on the left hip area. (RTT 5154.) There was also debris found in Swanke's left hand, and white debris found in Swanke's pubic hair

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[860](...continued)
(RTT 5471.) Merritt removed the hairs from the chain. (RTT 5471; 5478-79.) There were still stains in the grooves of the chain, but it was in slightly different condition at trial than when Merritt saw the chain on November 24, 1984. (RTT 5470; 5381.) The defense had a dog chain, Exhibit 591, marked for identification and received. (RTT 4673; 4699.) Merritt examined Exhibits 591 and 190 (the silver dog chain found around Swanke's neck); the only difference between the two chains was that Exhibit 190 seemed heavier. (RTT 5378-79.) Both chains had "Taiwan" on them and were within about a half an inch of each other in length. (RTT 5379-80.) The width and links appeared to be similar. (RTT 5379-80.)

which was clipped off. (RTT 5154.)

3. Injuries To The Victim And Autopsy Report

On November 25, 1984, Dr. Katsuyama performed the autopsy on Swanke's body at the coroner's office. (RTT 4852-53.) The clothing had been removed and the body washed. (RTT 4854.) The length of the body was approximately five feet five inches. (RTT 4916.)

There was a large gaping opening from one side of the neck across the midline in the upper portion of the neck and extending toward the other side. It extended from behind the right ear downward to the upper portion of the neck and to the other side. (RTT 4866; 4976). There was a separate disruption about one inch in length behind the lower portion of the left ear, which appeared to be consistent with two knife strokes. (RTT 4976.) There was another injury that could either have been caused by a stab in the neck or by the tip of the cutting instrument poking through the neck from within, but Katsuyama did not believe it was a separate stab wound. (RTT 4976-77.) The throat cut went through her wind pipe, the neck muscles, the voice box and the larynx. (RTT 4867-70.) The esophagus was also cut. (RTT 4870-71.) On both sides of the neck the carotid vessels and the jugular veins were cut. (RTT 4870; 4984.) The cutting went through the thyroid cartilage slightly above the vocal cords. (RTT 4871.)

In Katsuyama's opinion there appeared to be more than one stroke. (RTT 4867.) There appeared to be seven separate strokes utilized on the left side and at least four distinct strokes on the right side. (RTT 4867-68.) The strokes left small tags on the margin of the wound. (RTT 4868.) The tags and margin of the skin edge indicated that some change in direction of the blade had occurred. (RTT 4868-69.)

Katsuyama noted cutting of the cartilaginous areas of the cervical

spine. (RTT 4983.) The cutting instrument struck the front portion of the vertebra and the connective tissue that holds the backbone together. (RTT 4873.)[861] There were marks on the backbone in two areas: one very high up and one just behind the cut in the larynx. (RTT 4872.)[862]

In Katsuyama's opinion the cutting instrument had a medium to heavy blade of at least three to four inches in length. (RTT 4867.)

There were some minor discolorations beneath the chin at or just below the center line. (RTT 4854.) There were also peculiar discolorations on the back right side of the neck that were relatively indistinct reddish, somewhat oblong discolorations. (RTT 4854.) There were a group of discolorations behind the left ear which was not as obvious as the oblong discolorations. (RTT 4863-64.) Such discolorations could have been caused by the dog chain found around Swanke's neck. (RTT 4864-65.) Hypothetically, if Swanke was led by the use of the chain, walking down the hill in front of a person holding her by the dog chain and pulling up as they walked down the hill, the force would be consistent with the marks on her neck. (RTT 4865-66.)[863]

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[861] Katsuyama testified that in several locations it appeared to actually cut into portions which anatomically could be considered part of the backbone in the neck. (RTT 4871.)

[862] The cuts were located somewhere between vertebrae C-2 and C-3 and between C-4 and C-5, but Katsuyama did not specify the exact location. (RTT 4872; 4974.) He just noted that one was in the very high posterior portion of the hypopharanyx near C-1 or C-2 and the other was just behind the larynx, in the C-4, C-5 area. (RTT 4974.) Katsuyama's report did not specifically identify which cervical vertebrae were impacted, nor did he diagram the impacts. (RTT 4974-75; 4978-80.)

[863] Katsuyama testified that Defense Exhibit 591, a dog chain, was very similar to the chain found around Swanke's neck (Exhibit 190). (RTT 4963.)
(continued...)

Certain portions of the body showed some brush marks or line-like scrapes as if the body had either brushed against something by either falling or being dragged across a surface from a previous location to the location where the body was found. (RTT 4854; 4983.) The scratches were primarily located on the buttocks and thighs; there were quite a number of them. (RTT 4857-58.) Katsuyama believed that the scratches were made close to the time of death; either very shortly prior to or very shortly after. (RTT 4859.) The marks could have been caused by dragging or falling. (RTT 4859; 4862-63; 4929.)

Katsuyama noted a bite mark or bruise on the tip of Swanke's tongue that showed a small amount of seepage of blood, indicating that the bite marked occurred very shortly prior to her death. (RTT 4905; 4910.) The bite on the tongue could have been caused by the dog chain acting as a ligature around the neck, pushing up the back portion of the throat, causing the person to gasp for air. (RTT 4910-11.) Katsuyama had noted this same injury in a number of strangulation cases. (RTT 4973-74.) Katsuyama did not note any obvious petechial hemorrhaging in the head area. (RTT 4910; 4974.)

There was a superficial cut on the left ring finger which occurred shortly prior to her death. (RTT 4913-14; 4924-25.) However, Katsuyama did not see any injuries which he described as defensive. (RTT 4917-18.)[864]

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[863](...continued)
He further testified that Exhibit 591 could have been utilized to cause the neck discolorations he saw. (RTT 4964.) NOTE: The record does not explicitly explain the origin of Exhibit 591. (See RTT 4673; 4699; 4802.) However, it had a price tag on it suggesting that it had been purchased by the defense. (RTT 4801-02.)

[864] He noted a discoloration on the palmar aspects of both hands, at the (continued...)

Katsuyama noted very little urine in the bladder; there wasn't enough of a sample to submit to the lab. (RTT 4943-44.)

The eyes were shriveled and starting to dry out; they were beginning to drop back but were not completely dehydrated. The corneas were clouded. (RTT 4854; 4973.) Certain portions of her eyelashes were easily removed from their attachments. (RTT 4854.)

There were small insect larva on the surface of the trachea. (RTT 4903.) The larva were beyond the egg stage and were moving, indicating a period of time had passed for this process to occur. (RTT 4904.) There was some evidence of decomposition, especially on the right side. (RTT 4909.) From the presence of the maggots and the dehydration of the eyes, Katsuyama estimated that Swanke had probably been dead for at least the greater part of 48 hours and probably longer. However, he could not pinpoint the exact date and hour of Swanke's death. (RTT 4890; 4962; 4987-88)[865]

Katsuyama officially described the cause of death as a result of hemorrhage due to the lacerations of her neck of extensive nature. (RTT 4867; 4915.) Swanke would have died within a very few minutes after her throat was cut. (RTT 4905.)

A sample of Swanke's blood was drawn for analysis at the lab. (RTT 4911; 5013.) There were no drugs or alcohol present in Swanke's blood. (RTT 4969.) Katsuyama also took oral, anal and vaginal swabs for analysis. (RTT 4970.)

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[864](...continued)
base of the thumb, of unknown cause. (RTT 4922-23.)

[865] The cool weather would have slowed the decomposition process. (RTT 4893; 4908.)

4. Lucas' Arrest, Search Of His Person And House

After Jodie Santiago chose Lucas' photo from a photo spread (see Volume 3, § 3.2(A)(13), pp. 777-79, incorporated herein), Detective Gary Fisher obtained a search warrant for Lucas' home and pickup truck. An arrest warrant for Lucas was also issued. (RTT 5399; 6874-75; 6877.)[866] On Sunday morning, December 16, 1984, Lucas was arrested and his home searched. (RTT 6875-80.) Lucas' truck was searched the next day on December 17, 1984. (See Volume 3, § 3.2(A)(16), pp. 784, incorporated herein.)

Criminalist Charles Merritt, who participated in the search of Lucas' house on December 16th, seized a brown knit cord, about three feet long. (RTT 5085-88.) Merritt also seized a knife case for a folding knife from the closet in the northwest bedroom. (RTT 5089-90; 5387.)[867] Merritt later split open the knife case to check the inside for blood but found none. (RTT 5090.) Merritt also seized a piece of white rope approximately four or five feet long which he found in the same closet. (RTT 5092.)[868] Also found in the closet was a box labeled "Buck Knife, Special Model Number 119."

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[866] Lucas' home was approximately two miles from where Swanke's body was found. (RTT 4833-34.)

[867] The knife case was Trial Exhibit 219. (RTT 5089.) Gene Press, the general manager of American Leather Crafters, examined Exhibit 219 and identified it as a sheath for a Buck Model 112 folding knife which would have been manufactured prior to June, 1981. (RTT 6968.) The Model 112 was Buck's third highest selling knife. It was a common folding knife that always came with a sheath. (RTT 6965; 6975.) In 1980 and 1981, Buck was selling about 18,000 Model 112 knives a month. (RTT 6966.) (See also Volume 5, § 5.1.2(A)(4)(d), pp. 1265-66, incorporated herein [Garcia].)

[868] Exhibit 220. (RTT 5091-92.) Merritt did not observe any blood, hair or other trace evidence on it. (RTT 5391-92.)

(RTT 5093.)[869] In a tackle box located in a closet, Merritt found a very sharp fixed-blade Buck knife in a sheath. (RTT 5094-96.)[870] Merritt saw no blood on either the knife or the inside of the sheath. (RTT 5096; 5397.) Other knives, including a Buck fillet knife, were found in a drawer in the kitchen. (RTT 5096-97.) Merritt later tested the fillet knife for the presence of blood and found none. (RTT 5398.) Merritt did not find any dog chains during the search. (RTT 5097.)

Detective Henderson had a photograph taken of Lucas at the time of his arrest because he saw scratches on Lucas' face. The scratches had been there for some time and had healed. (RTT 4739.)[871] Detective Fullmer had a nurse at the jail collect a blood sample from Lucas. (RTT 3243-44.) Merritt collected hair samples from Lucas' head, pubic area and mustache. (RTT 5406-07.) He then took the samples to the crime lab. (RTT 3244.)

5. Shannon Lucas Interview

After the arrest and search, Detective Henderson interviewed Shannon Lucas at the Sheriff's Homicide Office. (RTT 4732-33; 4830.)[872] During the

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[869] Exhibit 221. (RTT 5093.) The box was not dusted for fingerprints. (RTT 5393; 5395-96.)

[870] Exhibit 222. (RTT 5094.) Lucas had a big hunting or fishing knife that he often left laying around on a table. On numerous occasions, Rick Adler saw Lucas sharpening the knife. It was very sharp. (RTT 3595.) It was a fixed blade Buck knife. (RTT 3596.)

[871] Henderson identified Exhibit 192 as the photograph of Lucas. (RTT 4739.) Edwin Masters also took a photograph of Lucas on December 18, 1984 at the jail. (RTT 7310.)

[872] Henderson met with Shannon Lucas on December 16, 1984. (RTT 4828.) Henderson had never met Shannon Lucas before. (RTT 4831-32.) She did not appear to be intoxicated but he did not subject her to a sobriety (continued...)

interview Henderson removed from a bag the dog chain found on Swanke.[873] Shannon Lucas let out a gasp and stared at the chain for ten or twelve seconds. (RTT 4733-34; 4738.) She appeared to be visibly shaken and almost speechless. (RTT 4734; 4738-39.)[874] She stated that the chain was "one of Duke's." (RTT 4737.)[875]

6. Search Of Lucas' Truck

On December 17, 1984, Criminalist Charles Merritt helped search Lucas' truck, which had been impounded at the Sheriffs' "property and evidence" garage. (RTT 5097.) A lab deputy and Detective Fisher assisted Merritt in the search. (RTT 5097.) Merritt seized a Buck fillet knife which was found in a tool box in the bed of the truck. (RTT 5098-99; 5391-92;

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[872](...continued)
test. (RTT 4840.) Henderson also had telephone conversations with Shannon Lucas over a period of months. (RTT 4831.) Shannon Lucas died in May of 1987. (RTT 4832-33.)

[873] Shannon was only shown one chain, Exhibit 190. (RTT 4832.)

[874] The conversation was tape recorded, and the tape, Exhibit 213, was played for the jury. (RTT 4734-35; 4737.) A transcript was also provided to the jury, Exhibit 212. (RTT 4734-35.) It was noted in the record that the transcription of the tape recording was not a certified portion of the Reporter's Transcript and was not an accurate or verbatim transcript of the tape recording, as some portions were unintelligible. (RTT 4737.)

[875] Prior to moving to Casa de Oro, David Lucas had lived in another area of San Diego. (RTT 6956-57.) In 1985 or 1986, Patricia Rutan, who was 14 or 15 years old at the time, was a neighbor who took care of Lucas' dog Duke while Lucas was away during the summer. (RTT 6955-57.) Rutan would feed and water the dog, walk him, and occasionally untangle his chain from around a tree in the yard. (RTT 6956; 6960.) At trial, Rutan, then 18, examined Exhibit 190. The chain seemed familiar to her, but appeared longer than Duke's chain. (RTT 6957-58; 6959-60; 6963.) The chain did have lines ("scrolling") in each link like Duke's chain. (RTT 6959.)

5399-5400.)[876] Merritt also found fishing equipment and two pieces of cord which were between three feet and four feet long. (RTT 5099-5100.)[877] Merritt visually examined the cords for the presence of blood but observed none. (RTT 5403.) The truck was also dusted for fingerprints. (RTT 5367.) Merritt placed the sheepskin seat covers in brown paper bags and took them to the lab. (RTT 5363-66.)

7. Search Of The Carpet Maintenance Business

On December 20, 1984, Henderson interviewed Frank Clark and executed a search warrant at Lucas' and Clark's business, Carpet Maintenance Company. (RTT 4765-66; 4825; 10954; 11224-25; 11235.)

8. Serological Evidence

a. ABO Testing By San Diego Sheriff's Department

Criminalist Charles Merritt conducted ABO testing of Swanke's blood. (RTT 5104.)[878] Merritt concluded that Swanke was Type O and that both David and Shannon Lucas had type A blood. (RTT 5108; 5112-14.)

On December 17, 1984, Merritt removed both the sheepskin seat

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[876] The fillet knife was Exhibit 223. (RTT 5098; 5398-5400.) This was a different Buck fillet knife from the one found in the kitchen. (See RTT 5096-97.)

[877] Exhibit 224 was described as a bag containing two pieces of cord. (RTT 5099.) Yet when Merritt removed them from the bag there were three pieces of cord. (RTT 5100.) On cross-examination Merritt acknowledged that the bed of the truck was a "pretty big mess." (RTT 5404.)

[878] Swanke's blood vial was Exhibit 235. (RTT 5104.) Merritt also had a vial of Lucas' blood. (RTT 5105.) The vials were prepared to be sent to SERI. (RTT 5105.)

covers and passenger seat from Lucas' truck. (RTT 5101-03; 5353.)[879] He placed the covers in brown paper bags. (RTT 5353.)[880] Merritt took the seat covers to the crime lab where he performed bloodstain analysis on a stain on the driver's seat cover. (RTT 5103-04; 5114.)[881] He did a presumptive test for blood on the stain and got a positive result. Merritt then tried to do a species determination on the stain but got no result and there was an insufficient amount to conduct further testing. (RTT 5114.)[882]

Merritt also located a stained area on the vertical portion of the seat area on the passenger side. (RTT 5116-17.) Merritt did a presumptive test for blood and got positive results. (RTT 5118-19.) He cut off the stained area, the wool hairs which the blood was adhering to, and placed them in a container in a freezer. (RTT 5119-20; 5343.)[883] Merritt also removed an

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[879] Exhibit 225 was the seat and Exhibit 226 was the sheepskin cover. (RTT 5101-03.)

[880] At the time he removed the seat cover Merritt was aware that Lucas was a suspect in the case. (RTT 5459.)

[881] No effort was made to refrigerate or otherwise protect the blood on the sheepskin from breaking down before it was collected. However, heat, moisture and bacteria can cause blood to break down. (RTT 5341.) Also, antigens and antibodies are subject to breakdown when exposed to moisture. (RTT 5355-56; 5482-84.) If a car window is left down the air could potentially create moisture in which bacteria could grow resulting in the breakdown of antigens or antibodies. (RTT 5356.) Hot, moist conditions will also cause antibodies to break down. (RTT 5484.) Lucas' vehicle was stored in the Sheriff's Department property and evidence garage. (RTT 5356.)

[882] Substances other than blood can give a positive result in a presumptive test such as apples, cabbage, horse radish. (RTT 5114-15.)

[883] Exhibit 233. (RTT 5121.)

unstained portion of the fibers for a control sample. (RTT 5121-23.)[884]

On December 27, 1984, Merritt performed ABO testing on the stain and concluded that the blood on the sheepskin was human type O blood. (RTT 5104-05; 5108; 5122-23.)[885] However, there was no protocol for Merritt's testing.[886/887]

b. Electrophoretic Testing By San Diego County Sheriff's Department

On December 28, Marilyn Fink of the San Diego County Sheriff's Department performed electrophoretic testing on samples in the Lucas case in the Group I and II systems. (RTT 6757; 6764-65; 6769.) Fink also did testing on the stained sheepskin fibers. (RTT 6765.)[888/889] Fink obtained the

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[884] Exhibit 234. (RTT 5121.)

[885] Merritt testified that since he was able to get a Lattes result on the sheepskin fibers it demonstrated that the antibodies hadn't broken down and that the stain was fairly fresh. (RTT 5467-68.) Antibodies break down in a relatively short period of time, a matter of months. (RTT 5468.) Based on his ability to obtain the Lattes and absorption-elution results, it was possible that the stain had been deposited on the sheepskin on November 20, 1984. (RTT 5468.)

[886] Exhibit 705 merely stated the conclusions of the testing without providing the protocol. Therefore, according to the defense expert, this testing was not scientifically reliable. (RTT 9654-55; 11979-80; see also Exhibit 705.)

[887] However, Merritt failed to state which protocols, if any, were used for the testing. (Trial Exhibit 705.) According to defense expert Schmitter, this failure invalidated Merritt's results. (See § 4.2(B)(2)(e)(i)(2), pp. 1118-20 below, incorporated herein.)

[888] As standard procedure Fink's lab always did double-reads. (RTT 6774-79.) Fink testified that double-reads weren't necessarily mandatory, but (continued...)

following results:

SWANKE BLOOD EVIDENCE - SAN DIEGO SHERIFF'S OFFICE

The San Diego County Sheriff's Office did serology tests on blood samples from Jodie Santiago, Anne Swanke, David Lucas, Shannon Lucas and the sheepskin seat cover from Lucas' vehicle. The results of this testing were listed on a chart labeled "Swanke Blood Evidence - SDSO." (Trial Exhibit 251; RTT 6817.) Charles Merritt did the ABO testing. (RTT 5104-08.) Marilyn Fink did the electrophoretic testing. (RTT 6757-69.)

		GROUP I			GROUP II		
	ABO	GLO	ESD	PGM	ADA	EAP	AK
JODIE SANTIAGO	O	2	1	1	1	BA	1
SHANNON LUCAS	A	1	1	2-1	2-1	B	1
DAVID LUCAS	A	2-1	1	2-1	1	B	1
ANNE SWANKE	O	2-1	1	2-1	1	B	1
SHEEPSKIN	O			2-1	1	B	1

[888](...continued)
"good scientific practice." (RTT 6780.) Fink testified that if there was only one control on a plate and it failed to work she would not report the results. (RTT 6782.) Depending on the situation, if she got results that were unreadable she would retest. (RTT 6783.) Fink also testified that the use of photography was suggested by the FBI. (RTT 6783.) Fink used a 35 mm camera to record her results in the Lucas work. (RTT 6783.) Most of the samples in the Lucas case were tested more than once. (RTT 6786; 6788-91.)

[889] Fink did not perform any Group III testing because the lab did not have the necessary equipment at the time. (RTT 6769.)

c. *Testing By Serological Research Institute (SERI)*

i. Evidence Sent To SERI

Both the bloody fibers from the passenger side stain and the unstained control fiber sample were sent to Serological Research Institute (SERI). (RTT 5121-22.) Eventually the whole sheepskin cover, as well as bloodstains and samples from David Lucas, Shannon Lucas and Swanke, were sent to SERI. (RTT 5134.)

Merritt also prepared vials and dried bloodstains of David Lucas, Shannon Lucas and Swanke's blood to send to the SERI for additional testing. (RTT 5105-14.)

Swanke's fingernails were sent to SERI on February 7, 1985. Merritt saw some foreign debris on the nails and didn't feel his lab had the facilities to test them. (RTT 5126-27; 5430.)

Brian Wraxall, a forensic serologist from SERI, received some of the evidence in the Lucas case, including fingernails from both of Anne Swanke's hands, the sheepskin seat cover, stained and control fibers from the sheepskin, as well as blood vials and dried stains for Lucas, Swanke, Shannon Lucas and Jodie Santiago. (RTT 5527; 5530-32.)

When Wraxall received Swanke's blood it was in poor condition. (RTT 6101.) There were no available blood cells for ABO typing. (RTT 6101.) In a degraded sample, the cells rupture and it is not possible to separate cells from the serum. (RTT 6101.) Degraded blood presented special problems when testing. (RTT 6102.)[890]

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[890] Wraxall testified that the ABO marker in bloodstains can last for some lengthy period of time even when exposed to the elements. (RTT 5505-07; 5516.) Wraxall had been able to routinely group ABO types in stains over 10 years old. (RTT 5516.)

ii. The Extra Fingernail

When Merritt sent the fingernails to SERI there were two boxes with five intact nails in each box. (RTT 5129; 5426-28 .) The nails were off-white and dirty and were all similar in appearance to one another. (RTT 5130.) Merritt did not separately mark the fingernails prior to sending them to SERI. (RTT 5460-61.) Merritt learned after the nails left his lab that an additional fingernail was found by SERI. (RTT 5428.) At trial, when Merritt opened the box containing the right hand clippings, all five nail clippings were present. (RTT 5131-32.) When he opened the left hand box, there were six fingernail clippings in the box. (RTT 5132.) One of the six appeared dissimilar to the others; it was whiter in color and narrower in width than the other nails. (RTT 5132.) It was also flatter than the other five and not as curved. (RTT 5133.) It was Merritt's opinion that the sixth nail did not come from Swanke. (RTT 5133.)

iii. Brian Wraxall's Qualifications

Brian Wraxall received a higher National Certificate in Applied Biology from Borough Polytechnic school in England, without "distinction." (RTT 5754.) However, he never graduated from college. (RTT 5751.) The classes that Wraxall attended at the polytechnic were pursuant to a part-time program geared toward people working in the food industry. (RTT 5754.)

Wraxall, a member of California Association of Criminalists ("CAC"), admitted that, at the time he applied to CAC, he had falsely stated that he had attended college. (RTT 5756-58.) As a result of that application, Wraxall became the subject of an ethics investigation. (RTT 5758-59; 5767-68.) The CAC committee found that Wraxall did not have a B.S. or the equivalent. (RTT 5879-80.) Wraxall testified that he thought he had the equivalent of a bachelor of science degree. (RTT 5769.) Wraxall admitted that he had also

applied to the American Association of Forensic Scientists and was rejected because he didn't have a college degree. (RTT 5775.)

iv. Standards And Procedures At SERI

There were no government standards for serological labs and, by and large, the labs defined their own policies. (RTT 5779.) Nor were there any governmental licensing or certification standards. (RTT 5775-76.) The interpretations of results was subjective. There were no uniform standards, or "match criteria" for deciding which conclusion to draw from the electrophoretic results. The results returned by SERI were subjective evaluations by Wraxall and others. (RTT 5799.)

At the time of his trial testimony in 1989, Wraxall's laboratory had a policy of double-reading electrophoretic test results and contemporaneously recording the results. (RTT 5781; 5782; 5900.)[891] However, SERI did not

[891] Wraxall defined double-reading as it was performed in his lab. The original analyst will: (1) look at the plate at the time he is ready to make the reading, (2) record the result in the notebook, (3) ask another analyst to read the plate without any reference to what the samples are, and (4) check the second reader's results against the first results. (RTT 5779-80.) Both readers have to agree with the results. (RTT 5994.)

have a double-read policy in place in December of 1984. (RTT 6508.) [892/893]

Wraxall saved the data from the tests he performed but didn't save the gels. (RTT 5795.) All of the gels are thrown away except for those where the GC and transferrin were recorded. (RTT 5796.) Wraxall did not photograph ABO and Gm results because it was impractical to do so. (RTT 5797; 5900.)

v. Testing Procedures Used By SERI In The Present Case

In Wraxall's view, the stained sample from the sheepskin was limited. (RTT 5786.) But he did run approximately nine different tests on the sheepskin fibers. (RTT 5786-87.) He also ran Swanke's blood approximately 15 times. (RTT 5788-90.)

Wraxall tested Swanke's blood approximately ten times before he arrived at the 2-1 results in the Haptoglobin system. (RTT 5855.)[894] A 2-1

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[892] Duplicate testing was not a requirement for reporting results at SERI. (RTT 6716-17.) Nor did the CAC guidelines require duplicate testing. (RTT 6718.)

On re-cross examination, Wraxall was shown a copy of a paper written by Bruce Budowle and Randall Murch titled "Electrophoresis Reliability." Wraxall admitted that the policy at the FBI was that if controls could not be read, all samples were to be considered inconclusive and that the FBI had a requirement of readings of all samples by two analysts. (RTT 7260; 7262; 7297-99.)

[893] Double-reading was also required by the FBI (RTT 7260-62; 7297-99.) In the event the readers disagree, they would not report the results. (RTT 4097.) Hermann Schmitter's lab also utilized double-readers. (9792.) The readers must agree or the results would not be reported. (RTT 9794.)

[894] Wraxall made six separate runs on Swanke in the haptoglobin system but the typing was not successful. (RTT 6185.) Wraxall did not note any unsuccessful runs in his reports unless they were relevant to the interpretation. (RTT 6188.)

and a 2-1M are very close and either Swanke's blood and/or the sheepskin could have been 2-1M because the bands were very similar. (RTT 5874-75.) Wraxall tested Swanke's blood in a number of different runs in the Gm system and all of them were consistent with the reported result indicated on a chart introduced as Trial Exhibit 245. (RTT 6712.)[895] The only difference was that in the later runs he used different allotypes, particularly the 3 and 23. (RTT 6712.) The sheepskin was tested in the Gm system on two occasions. (RTT 6712.) Both tests established that the sheepskin was missing the 2 allotype. (RTT 6713.) A person who was a Haptoglobin 2-1 or a 2-1M on further analysis could be excluded even though they might match in every other system tested. Exclusion in any system would result in exclusion of that individual as a potential donor of the sample. (RTT 5881.) If he had found a 2-1M in either Swanke's whole blood or on the sheepskin, it would have excluded Swanke as the donor of the stain on the sheepskin. (RTT 6170.)[896]

Wraxall did not do duplicate testing of the sheepskin in ABO beyond the absorption-elution 333 run. (RTT 5966.)[897] Anti-A, Anti-B, and Anti-H cells were applied, but there was no reaction as indicated by a straight line on the log notes, which indicated a negative reaction or none at all. (RTT 5981;

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[895] Exhibit 245 is reproduced below at § 4.2(A)(8)(C)(x), pp. 1101-06, below.

[896] There were blobs that could have been artifacts in the center of run 901, on the Swanke blood group. Wraxall admitted that these could have been rare variants. (RTT 6341-43.)

[897] Laurie DeHaan conducted the run on the sheepskin on 1/30/85. (RTT 5980.)

5982; 5991.)[898] Sometime later, someone wrote in what might have been a 2 that was later changed to a 3; there also appeared to be what looked like a plus sign. (RTT 5982-84.)[899] Wraxall admitted that he may have been the person who made the change to the log sheet. (RTT 5988.)[900]

At the time they did the ABO testing on the sheepskin, Wraxall already knew Merritt had concluded that Swanke was type O blood. (RTT 5989.) He also knew that Merritt concluded that David Lucas was type A. (RTT 5990.) Wraxall testified that he never did any other confirmatory testing of his ABO results on the sheepskin fibers. (RTT 5990-91.) Also, Wraxall omitted any reference in his final report to the fact that the analyst had obtained a contradictory result. (RTT 6002.)

Wraxall testified that a person's genetic markers never change. (RTT 6215.) However, his lab concluded in separate tests conducted about 18 days apart, each with triple concurrences, that Amber Fisher was both a 2-1 and a

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[898] See Exhibit 611. (RTT 5961; 5969.)

[899] When scoring agglutination on the log sheets, a 1 would indicate 20 to 25% agglutination; a 2 would represent 50% agglutination; a 3 would represent about 75% agglutination and a 4 would be 100%. A 3+ would represent large clumps with a few unagglutinated cells. (RTT 5973-74.) Wraxall testified that changes and strike-overs were common in his laboratory notebook. (RTT 6721.)

[900] Wraxall testified that the test was not an instantaneous reaction – it went on during a period of time. When the first readings are made, they are recorded. (RTT 5992.) But it did not necessarily mean that that was going to be the final result or the final conclusion that is drawn. (RTT 6019.) However, it was Wraxall's policy not to write anything in the lab book until sufficient time for agglutination has elapsed. (RTT 6019.) Normally the person who conducted the test writes on the log sheet. (RTT 5975.)

2 in the GC system, a result that was impossible. (RTT 6215-16.)[901] In his final report Wraxall reported Fisher as a 2-1 GC. (RTT 6216; 6264.)[902] But he failed to mention in his final report the results of the earlier tests indicating that Fisher was a 2. (RTT 6216; 6264.)

Run 899, 1/28/85, was the Swanke haptoglobin which was a "weak" 2-1. (RTT 6301-02.) Wraxall testified that he didn't report Swanke's haptoglobin as a result of the runs in Group III 898 on 1/24/85 in which he tested Swanke three times. (RTT 6231.)[903] The results of those runs consisted of results of "1??", "1??" and "?". (RTT 6231.)

Wraxall's final report also failed to report that his lab had originally gotten a possible 1 call in the haptoglobin system for the sheepskin. (RTT 6231; 6233-34.)[904] A 1 in the haptoglobin system would have excluded Swanke as a donor of the sheepskin stain. (RTT 6234.)

Wraxall testified that there was no evidence at all that the material tested from fingernail L2 was contaminated, and if the blood in L2 had been contaminated it would have appeared in the PGM subtyping run. (RTT 7242.)

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[901] Group III Run 891 on Amber Fisher was done by Hartel on 1/3/85 and co-read by Harmor and DeHann; it resulted in a 2-1 in GC. (RTT 6188-89.) Harmor performed the run (Group III run 894, 1/21/85) which was co-read by Hartel and checked by Wraxall. (RTT 6213-14.) Wraxall concurred with the results of the run which indicated that Fisher was a 2 in GC. (RTT 6215.)

[902] This was the same run in which Wraxall concluded the sheepskin was a 2-1 in haptoglobin. (RTT 6264-65.)

[903] Wraxall didn't participate in any of the testing in Group III 898. (RTT 6231.)

[904] With regard to Swanke's blood in run 898, he did not report that the same blood was behaving differently on the same run. (RTT 6235.)

Wraxall testified that contaminants wouldn't change one marker to appear to be another marker. (RTT 6703.)

Wraxall testified that he had no doubt that his conclusions, as set forth in Exhibit 245, were accurate. (RTT 7246.) There was also no doubt in his mind that the sheepskin stain could have come from Swanke, or that the blood on fingernails L2, L4, L1 and R4 could have come from David Lucas. (RTT 7247.)

vi. SERI's Testing Of Swanke's, Santiago's, Shannon's and Lucas' Blood

Wraxall's lab ("SERI") performed ABO testing on David Lucas' and Santiago's blood on December 28, 1984. (RTT 5576; 5581.)[905] They concluded that Santiago's blood was type O and that David Lucas' was type A. (RTT 5582.) SERI also concluded that Shannon Lucas' blood was type A (RTT 5583-84)[906] and Anne Swanke's blood was type O. (RTT 5584-86.)[907/908]

SERI did not do a confirming Lattes test on the sheepskin because Wraxall didn't think it was appropriate. (RTT 5966.)

The Santiago, Lucas and Swanke blood samples were tested for Group

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[905] SERI serologist Laurie DeHann performed this test. (RTT 5576.)

[906] SERI serologist Nancy Hartel performed the test. (RTT 5583.)

[907] DeHann performed the test on January 2, 1985. (RTT 5584-85.) It was absorption-elution Run 325. (RTT 5586.)

[908] Wraxall testified that 48.2 percent of Caucasians are type O, 56.5% of Hispanics are O, 47.7 % of blacks and 32.5% of Asians are type O. (RTT 6585-86.)

I enzymes GLO, ESD and PGM,[909] as was Shannon Lucas' blood. (RTT 5586; 5590-91.)[910] PGM subtyping was conducted on Lucas', Santiago's, Swanke's and Shannon Lucas' blood. (RTT 5593; 5595-96.)

Tests were run to determine the Group II enzymes for Santiago, David Lucas, Swanke and Shannon Lucas. (RTT 5596-98; 5600.) Tests for Group III serum proteins were also run for the same persons.[911] Analysis was also done to determine the Gm and Km allotypes. (RTT 5609-10.)

vii. SERI's ABO Testing Of The Sheepskin

SERI did ABO testing on the stained sheepskin fibers. (RTT 5602.)[912] SERI concluded that the blood on the sheepskin fibers was type O, which excluded both David and Shannon Lucas as being donors of the blood. (RTT

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[909] Run I 1024 by DeHann on December 31, 1984. (RTT 5587.) Wraxall co-read the results. (RTT 5590.) They were unable to determine GLO results for Swanke. (RTT 5591.)

[910] Run 1027 and 1028 done by Hartel and co-read by Wraxall on January 17 and 18, 1985. (RTT 5591.) The serologist was unable to obtain GLO results on the first test and ran it again. (RTT 5592-93.)

[911] Run III 890 on 12/31/84 by DeHann and co-read by Harmor. (RTT 5597-98.) Swanke's transferrin was determined on run 898 on 1/24/85 by Hartel and co-read by Harmor. (RTT 5598-99.) There was no result obtained on GC on Swanke's blood. (RTT 5599.) Swanke's haptoglobin was determined on Run 3901 on 1/29/85 by Wraxall and Hartel and co-read by DeHaan. (RTT 5600.) Shannon Lucas' Group III results were determined on run 894 1/21/85 by Harmor and co-read by Hartel. The results obtained were for GC and transferrin only. Haptoglobin gave no result and was run later on run 899, 1/28/85 by Hartel and co-read by Wraxall (RTT 5600.)

[912] Wraxall agreed that distortion of blood group reactions is sometimes found on leather and that new sheepskin coats present the greatest difficulty in this respect. (RTT 5968.) He also agreed that unless stains are in the form of a thick crust it was advisable to make control stains of known groups on the actual garment. (RTT 5968.)

5602.)[913]

viii. SERI's Genetic Marker Testing Of The Sheepskin

The sheepskin fibers[914] were subjected to PGM subtyping. (RTT 5603.)[915] The fibers were also tested in the Group II enzymes[916] and Group III enzymes,[917] as well as Gm analysis. (RTT 5604; 5617-18.)[918]/[919] Based on the results, Wraxall excluded David Lucas, Shannon Lucas and Santiago as donors of the blood on the sheepskin and included Swanke as a possible donor of the blood on the sheepskin fibers. (RTT 5606; 5619.) Wraxall concluded that the bloodstain on the sheepskin fibers could not have originated from Santiago, Shannon Lucas, or David Lucas but could have originated from

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[913] But see § 4.2(B)(2)(e)(i)(2), pp. 1118-20 below, incorporated herein, where the defense expert questioned the reliability of SERI's Type O result.

[914] The fibers were tested on 1/30/85, absorption-elution 333 by DeHaan and co-read by Wraxall. (RTT 5602.) The sheepskin fibers were also tested in the Group I enzymes, but there were no results. (RTT 5603.)

[915] The PGM subtyping was done on 1/4/85 by DeHaan and co-read by Wraxall, Run 516. (RTT 5603-04.)

[916] Run on Group II 849, 1/17/85 by Hartel and co-read by Wraxall. (RTT 5604.)

[917] Run 894, 1/21/85 by Harmor. The haptoglobin was co-read by Wraxall and GC and transferrin results co-read by Hartel. (RTT 5604.) There was no result in GC. (RTT 5606.)

[918] Gm 141 6/18/85 for allotypes 1, 2, and 11; Gm 312 6/27/86 for allotypes 1, 2, 3, 11 and 23. (RTT 5618.)

[919] The sheepskin fibers were subjected to Km analysis (Run 68) with inconclusive results. (RTT 5619-20.)

Anne Swanke. (RTT 5727-28; 5730.)[920]

Wraxall calculated the relative population frequencies of the markers found on the sheepskin. (RTT 5733.)[921] The markers found on the sheepskin that matched Swanke's were found in one person out of 4,794 Caucasian people, one in 5,875 Blacks and one in 444 Hispanics/Native Americans. (RTT 5735-36; 6502; 6580.)[922]

ix. SERI's Testing Of The Fingernails

Swanke's fingernails were not inventoried immediately upon receipt by SERI on February 7, 1985; they were checked into evidence and then inventoried some time later. (RTT 5126-27; 5430; 5537; 6009; 6039.)[923] When Wraxall first took inventory there were five nails plus a few little chips in the left-hand box and there were five intact nails in the right-hand box. (RTT 5538; 6040-41.) He numbered each of the nails one through five, designated by an L for left hand and R for right hand. (RTT 5538; 5542.) When he came back to do some further work he discovered a sixth nail in the

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[920] If there had been even one difference in markers between Swanke's blood and the sheepskin, she would have been excluded. (RTT 5729.)

[921] Wraxall created a chart labeled "Sheepskin" to calculate the population frequencies in Exhibit 247. (RTT 5733.) Since there were more extensive population data available in the Gm system, Wraxall used that system to arrive at the figures. (RTT 7239-40.)

[922] Wraxall didn't use population frequencies data for Asians in the comparison because he did not have complete population data for the Asian population and did not have a complete data-base for Gm and PGM subtypes for that group. (RTT 5734-35; 6580-81; 6590-91.)

[923] At trial, Wraxall didn't believe that he opened the fingernail boxes when they were first received. He thought they were checked in by one of his serologists. (RTT 6009.) However, in previous testimony he said that he opened the boxes when they were received. (RTT 6010.)

left hand box. (RTT 5537-39; 6009; 6039.)[924]/[925] On the undersides of the nails there was material that looked like blood and/or tissue. (RTT 5539-5540.) The sixth nail looked different from the other nails because there was no staining and it looked clean. (RTT 5540.)[926]

There were blood spots and stains on most of the nails of the left hand. (RTT 5542.) On fingernail L-2, Wraxall noted an accordion shaped piece of tissue-like material which, when stretched out, was about a half and inch to three quarters of an inch long. (RTT 5542-43; 5549-50.)[927]

The limited amount of material under fingernails L2, L4 and R1 was subjected to ABO testing. (RTT 5606-07; 5711.)[928]/[929] Wraxall concluded

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[924] The sixth nail wasn't between the two layers of foam padding in the nail box with the other nails but rather was stuck down the side of the small side of the box, between the box and the foam. (RTT 5539.)

[925] Wraxall did not tell anyone about the sixth nail after he discovered it. (RTT 6037; 6065.) (Exhibit 617, Wraxall's Exhibit Sheet, dated 3/14/85, for fingernails.)

[926] Wraxall did not perform any testing on the sixth nail. (RTT 5540; 6074-75.)

[927] The piece of tissue was used up in Wraxall's testing. (RTT 5550.) Wraxall did not conduct species tests on the tissue he found under the nails. (RTT 6077.)

[928] Absorption-elution Run 350 conducted on 6/27/85 performed by Wraxall. (RTT 5606-07.) Because of the limited amount of material under the nails Wraxall selectively chose to test for some markers and not others. (RTT 5608.) He also did not perform a Lattes crust test on the evidence samples in the Lucas case. (RTT 5890.) James Stam testified that he does absorption-elution tests and Lattes tests and if the test results agree, he will report a result on a bloodstain. (RTT 1193; 1195; 1197.) Stam testified that he might even perform three absorption-elution tests on the same sample to be certain of the results. (RTT 1198.) As to the results memorialized in Trial

(continued...)

that nails L2 and L4 were stained with type A blood and nail R1 with type O. (RTT 5607.)

The nails were also subjected to PGM subtyping as well as Gm and Km analysis. (RTT 5608-09.)[930] Wraxall concluded that Swanke could have donated the blood under nail R1, but not nail L2 or L4. (RTT 5609; 5737.) David Lucas could have donated the blood under nails L2 and L4, because the blood under both was type A with 2+1+ PGM subtyping markers. (RTT 5609; 5738.)

The nails were also subjected to GM analysis. Based on this testing Wraxall concluded that the blood on nails R4 and L1 could have been David Lucas'. (RTT 5622; 5742.)[931] Wraxall concluded that some of the blood

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[928](...continued)
Exhibit 522, Stam performed a Lattes test and a confirming absorption-elution test. If he did not have two tests which agreed he would not report the results. (RTT 1199-1200.) All of the results reported on the exhibit required at least two tests which agreed. (RTT 1200.) Every reported blood result was made only after obtaining a confirmatory result. (RTT 1256.) Charles Merritt testified that he performed absorption-elution and Lattes tests if there was enough of a sample. (RTT 5228-29; 5254) Where there was enough sample he would run two tests before reporting a result. (RTT 5254-55.)

[929] Schmitter testified that there was no requirement in Germany that a Lattes confirmatory test be performed before results could be reported in court. (RTT 9780.) However, when performing absorption-elution tests, the samples are incubated for two hours and then read. After another two hours, there is a second reading. All of the readings have to be consistent. (RTT 9645.)

[930] PGM subtyping was performed by Wraxall and co-read by Harmor on 4/10/85, Run F550. (RTT 5608.)

[931] Run 312, 6/27/86, by Wraxall. (RTT 5622.) Wraxall also subjected the nails to Km analysis but the results were inconclusive (Run 68). (RTT (continued...)

under the nails could have been Swanke's and that there was possibly a mixture with another person's blood. (RTT 5738.) Anything in the stain that was Gm 1, 3, 11, 23 could have originated from Swanke. (RTT 5738-39.) But the GM 2 was foreign to Swanke and would have come from someone who was either a GM 1, 2 or 1, 2, 3, 11, or 1, 2, 3, 11, 23. (RTT 5739.)[932] As to the blood on fingernails R4, L1, L2 and L4, Wraxall was unable to exclude David Lucas as the donor. (RTT 5745.)[933] As to nails R4 and L1, this was based on the Gm results. (See Trial Exhibit 245.) As to nails L2 and L4, this was based on ABO and PGM subtyping. (*Ibid.*)

Putting the results of the fingernails together, Wraxall could eliminate everyone else he compared except David Lucas. (RTT 5742.) Wraxall concluded that the markers found on the fingernails which were consistent with David Lucas were found in one person in 69 Caucasian people, 1 in 547 Blacks and 1 in 197 Hispanics/Native Americans. (RTT 5743; 6582.)[934]/[935]

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[931](...continued)
5622-23.) The only Gm test conducted on the nails was Gm 312 due to the limited material. (RTT 6497; see also RTT 6539 [PGM on nails not repeated due to limited sample].)

[932] Wraxall testified that the Gm 2 is not inherited independently; it's always inherited with Gm 1. (RTT 5740.)

[933] Wraxall ran fingernail L2 in the Group I GLO ESD and PGM in run 1061 on 4/18/85 (RTT 6597.) In each of the systems the L2 sample was streaked which was possibly consistent with contamination or degradation. (RTT 6598-6600; 6603.) In Wraxall's opinion, the sample was overloaded with tissue and the enzyme activity was very high. He disagreed that the sample was contaminated. (RTT 6602.)

Wraxall did Km tests on nails R4, L1 and L2 without results. (RTT 6545.)

[934] Wraxall created a chart labeled "Fingernails" to list the frequencies
(continued...)

x. Summary Of SERI's Conclusions

Wraxall outlined his serological testing results of the various items of evidence submitted on Exhibit 245, a Chart Labeled "Swanke Blood Evidence, SERI Results." (RTT 5550; 5591; 5594-98; 5600-10; 5613; 5616-19; 5622.)[936/937]

Wraxall reported the following serological testing results (Trial Exhibit 245):

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[934](...continued)
of the markers, Exhibit 248. (RTT 5742.) The types he took into consideration for the calculation on Chart 248 were ABO type A, PGM subtype 2+1+ and added them together. He then took all the people that were a 1, 2, a 1, 2, 3, 11 and 1, 2, 3, 11, 23 and added them together, then multiplied them by the two figures he got for the ABO A, PGM and PGM subtype. (RTT 5743.)

[935] Wraxall wrote a report dated July 7, 1986. In the report, the Caucasian population number was 1 in 4,794, and with regard to the fingernails the number was 1 in 65. (RTT 6583-84.) Wraxall testified that the numbers changed because he made new calculations based on other information. (RTT 6584.)

[936] The blood samples and other evidentiary items were received at SERI between the end of December 1984 and February 1985. The testing was done between February and July 1985. (RTT 5564.)

[937] Wraxall indicated that the blanks on Exhibit 245 were because the tests on those items were not conducted at all or were inconclusive and no activity was detected for that particular enzyme system. (RTT 5704-05.)

SWANKE BLOOD EVIDENCE - SERI (GROUP I-III)

	GROUP I					GROUP II			GROUP III		
	ABO	GLO	ESD	PGM	PGM ST	ADA	EAP	AK	GC	TF	HP
Jodie Santiago	O	2	1	1	1+	1	BA	1	2-1	C	2
Shannon Lucas	A	1	1	2-1	2+1+	2-1	B	1	2	CB	1
David Lucas	A	2-1	1	2-1	2+1+	1	B	1	2-1	C	2
Anne Swanke	O		1	2-1	2-1-	1	B	1		C	2-1
Sheepskin	O				2-1-	1	B	1		C	2-1
Fingernails R1	O				2-1-						
R4											
L1											
L2	A				2+1+						
L4	A				2+1+						

Notes to SERI Blood Chart:

a. There were no Group III GC results on either the sheepskin or the nails. (RTT 6592.) In the transferrin (TF) both David Lucas and Swanke were type C but the population data was that 100% of Caucasians have it. (RTT 6592-93.)

b. The two tests in Gm were taken from different areas of the sheepskin. (RTT 6653.) Wraxall couldn't say whether all of the results came from exactly the same portion of the sheepskin or whether the results all sourced from the same individual. (RTT 6651-52.) There were samples removed from two different locations on the sheepskin. (RTT 6648.) There were also cuttings taken from the sheepskin by the Sheriff's Department and Wraxall didn't know exactly where on the sheepskin they were from. (RTT 6648-49.) Wraxall did not do a confirming test in Gm on the sheepskin for the 23 allotype. (RTT 6610.)

c. Group II Run 844, tested the blood of Santiago, Swanke and David Lucas. In the ADA result note there appeared to be a 1 but something was crossed out which appeared to be "DEG" which stood for degraded. (RTT 6668-69.) This was the only Group II run done on Swanke. (RTT 6670.)

d. The EAP showed Swanke as a B but there were writings on the log notes which appeared to have been crossed out and stricken over. (RTT 6671.) Wraxall admitted that if Swanke were a CB she would have been excluded as being the donor of the stain on the sheepskin. (RTT 6671.)

Notes to SERI Blood Chart (continued):

e. A rough note of the Group III system run 890 performed on 12/31/84 (890-4176 in GC system) indicated there was no result. (RTT 6106.) In this Group III run there were two haptoglobin standards. (RTT 6108.) Wraxall's lab had policies that required standards to develop. In this instance a known standard did not work. (RTT 6109.) One of the standards worked and one failed to develop. (RTT 6113.) On the same run, Wraxall reported David Lucas as a 2. (RTT 6114.)

f. As to PGM subtyping, the method Wraxall used had not been published in any scientific journal. (RTT 6519-20.) Wraxall testified that he did not subject the Swanke blood sample to more than one test in PGM subtyping, even though it was not a limited sample. (*Ibid.*) He also did not run duplicate tests in PGM subtyping on the sheepskin (Run F516). (RTT 6524.) Wraxall did not repeat the test in PGM subtyping on the fingernails because of the limited sample. (RTT 6539.)

g. Wraxall tested stains for Km from David Lucas, Swanke, the sheepskin and fingernails R3, R4, L1 and L2. (RTT 6556.) However, the entire plate suffered from the Km controls breaking up; the agglutination was not holding together. (RTT 6557-58.)

h. On L1 in Gm 312, Wraxall did not get the same results on the same plate due to the limited amount of material that was available for testing. (RTT 6561-63.)

SWANKE BLOOD EVIDENCE - SERI (Gm and Km)

	Gm	Km
	1, 2, 3, 11, 23	1, 3
Jodie Santiago	(1, 2, 11) 11	
Shannon Lucas	3, 11, 23	3
David Lucas	1, 2, 3, 11, 23	3
Anne Swanke	1, 3, 11, 23	3
Sheepskin	1, 3, 11, 23	
Fingernails R1		
R4	1, 2, 3, 11, 23	
L1	1, 2, 3, 11, 23	
L2		
L4		

Wraxall admitted that the statistical conclusions he arrived at were only as reliable as the underlying test results. (RTT 5746.) If the test results were wrong then the numbers would be meaningless. (RTT 5746.)

xi. Wraxall's Civil Suit

Wraxall admitted that he had been involved in a civil lawsuit which alleged that he failed to reveal results obtained by his lab in a capital case. (RTT 7302.) The defense read into the record relevant portions of the findings of the superior court order in the civil action, *Williams vs. Wraxall*, Exhibit 652:

"Defendants Brian Wraxall's and Serological Research Institute's failure to report and provide the complete results of their re-analysis of the

evidence to plaintiff or his criminal defense attorneys in *People vs. Kenneth Darrel Williams*, Placer County Superior Court, Case Number 57519, constitutes a continuing breach of defendant's duty to plaintiff.

"Accordingly, it is ordered that the issue specified by this order to be without substantial controversy is deemed established in favor of plaintiff Kenneth Darrel Williams and against defendants Brian Wraxall and Serological Research Institute at the trial of this action or on final disposition of this action by this court." Don B. Girard, Judge of the Superior Court. (RTT 7306.)

The defense read into the record the following facts from the earlier summary adjudication order:

"Number one, on November 14, 1980, defendant's Brian Wraxall and Serological Research Institute became the defense expert for plaintiff Kenneth Darrel Williams for the purpose of conducting reanalysis of certain evidence in *People vs. Kenneth Darrel Williams*, Placer County Superior Court Case Number 57519.

"Two, at all times thereafter, defendants Brian Wraxall and Serological Research Institute knew that the results of the re-analysis of the evidence were to be made available to plaintiff and his criminal defense attorneys in *People vs. Kenneth Darrel Williams*, Placer County Superior Court Case Number 57519.

"Three, at all times thereafter defendants Brian Wraxall and Serological Research Institute had a duty to report the results of the re-analysis of the evidence to plaintiff and his criminal defense attorneys in *People vs. Kenneth Darrel Williams*, Placer County Superior Court Case Number 57519.

"The court further determines that as to the following issue raised in his motion for summary adjudication of issues, plaintiff has failed to carry the

burden as a matter of law.

"Four, defendant's failure to report the result of the reanalysis of the evidence to plaintiff and his criminal defense attorneys in *People vs. Kenneth Darrel Williams*, Placer County Superior Court Case Number 57519, constitutes a breach of defendant's duty to plaintiff. And, as a result, defendant [sic] are liable to plaintiff for all damages proximately caused thereby.

"Accordingly, it is ordered that the issues specified by this order to be without substantial controversy; i.e., issues one, two, and three are deemed established in favor of plaintiff Kenneth Darrel Williams, and against Brian Wraxall and Serological Research Institute at the trial of this action or on final disposition of the action by this court." Demetrius P. Agretelis, Judge of the Superior Court. (RTT 7307-09.)

B. Defense Evidence

1. Background

a. Drug And Alcohol Use By Frank And Cecelia Clark

Sometime between 11:00 p.m. on November 19, 1984 and 1:00 a.m. November 20, 1984, Frank and Cecilia Clark came over to Loren Linker's house to visit. (RTT 9925-28; 9932-33; 9988-89; 9993-94.) The Linkers weren't used to having people come to their house at that hour. The Clarks knocked very loudly and woke them up. (RTT 9936.) Loren Linker concluded that the Clarks were intoxicated. They smelled of alcohol and their speech was slurred. (RTT 9933; 9936.) They stayed at the Linker's for 2 or 3 hours. (RTT 9933.)[938]

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[938] Ken Nolte, who was also present at the Linker's that night, was (continued...)

Loren Linker remembered this incident because the next morning, Lucas gave Linker permission to sign a check using Lucas' name to buy supplies for CMC. (RTT 9992-93.) That was the only time Linker ever signed a check at CMC. (RTT 9990-93; 9998.) The date on the check, November 20, 1984, helped Linker remember what had happened the night before. (RTT 9993.)

Frank Clark testified that he had only "freebased" cocaine on one occasion. (RTT 3923; 3958.) However, Richard Southorn, a Carpet Maintenance Company ("CMC") employee, observed Frank Clark freebase cocaine more than once, and as late as January of 1985. (RTT 9920-22.)[939]

b. Scratches On Lucas' Face

Vicky Johnson saw Lucas on a regular basis while living at Lucas' house. (RTT 9206.) On Tuesday, November 20, 1984, Johnson saw Lucas and did not see any scratches on his face. (RTT 9208.) On the morning of the Wednesday before Thanksgiving (November 21, 1984), Vicky Johnson noticed scratches on Lucas' face. (RTT 9206-07.) The scratches were fresh. (RTT 9210.) Vicky asked Lucas what had happened to him and he told her that he went to a bar to have a few drinks. He had been sitting there minding his own business and someone hit him. (RTT 9226.)

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[938](...continued)
awoken by the Clarks. Nolte had seen intoxicated people before, and based on that experience the Clarks appeared intoxicated to him. (RTT 9936.) He observed them for 2 or 3 hours and in his opinion, they were intoxicated. (RTT 9933-34; 9936.)

[939] Southorn was asked, "During the period of November, December, and January 1984 and into January of '85, did you see Frank Clark freebase cocaine?" to which he replied, "Yes, I did." (RTT 9921.)

c. Other Persons In The Vicinity Of Where The Body Was Found

Robert Martin testified that on November 22, 1984, he was employed by Strategic Security as a security guard at the U.S. Elevator Company plant in Spring Valley. (RTT 10671-72.)[940] His shift hours were midnight to 7:00 a.m. (RTT 10671-72.) He made his rounds through the yards and buildings at U.S. Elevator. (RTT 10674 .) He was aware that there were dogs in the neighborhood and once in a while they would bark. (RTT 10673.) That evening, he was making his rounds and heard the dogs barking; they were howling and barking more than they usually did. (RTT 10672-73.) He looked up at the top of the hill behind U.S. Elevator and saw the lights of an automobile. (RTT 10673-74.)

2. Defense Testimony Regarding The Physical Evidence

a. Vehicle Description At The Kidnap Site

Richard Leyva testified that the vehicles he saw were approximately the same size. (RTT 4557; 4561; 4598; 4614-15.) Lucas' truck, however, was over a foot taller and 16" longer than Swanke's vehicle. (RTT 10653-58.)[941]

b. Fingerprint Evidence

Frederick Freiberg was provided with the latent print cards of fingerprints recovered from Swanke's vehicle. (RTT 10784.) The prints were found on the driver's side window, passenger side window, gas tank flap and

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[940] The U.S. Elevator plant was located below the area where Swanke's body was found. (RTT 10674; 12057-58 [Defense Argument].)

[941] James Strickland, a traffic accident reconstructionist, prepared Exhibit 720 which depicted front and rear views of the truck and Dodge Colt drawn to scale, as well as two plastic overlays that permitted placement of the two vehicles on top of each other. (RTT 10655-56.)

gas can. (RTT 10787-88.) He compared the prints against the known prints of Swanke and Lucas. (RTT 10785.) Lucas was not identified as the donor of any of the usable prints. (RTT 10785.)[942]

c. Dog Chain

Peggy Fisher, D.V.M. testified that on April 20, 1984, Shannon Lucas brought a dog named Duke to her office for hospitalization. Fisher put the dog to sleep on April 21, 1984. (RTT 10401-03.) If the owner requested the collar or leash back, they always give them back. (RTT 10403.) Fisher testified that they sometimes make an effort to return the items, but sometimes they do not. (RTT 10403.)

Kevin Chess, a private investigator, was asked to go around San Diego County and see if he could find a silver dog chain similar to the one found around Swanke's neck, Exhibit 190. (RTT 10795-96.) Chess went to various stores around the county and all the major supermarket chains. (RTT 10796.) He found chains similar to Trial Exhibit 190, and purchased a few of them. (Trial Exhibits 716, 717, 731, 732.) (RTT 10796-99.)

James Boyd, general manager for Hartz Mountain pet supplies for the western part of the United States, testified that Hartz distributed dog chains to both pet stores and supermarkets. (RTT 10570; 10589.) Boyd testified that there were several different lengths and weights of chain they distributed. (RTT 10573.) Boyd examined Trial Exhibit 591 and testified that it was a chain that Hartz would distribute. (RTT 10570-71.) Boyd also examined Trial Exhibit 190, the chain taken from around Swanke's neck, and testified that it was consistent in style with the type of chain Hartz distributes. (RTT

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[942] Some of the prints were identified as being Anne Swanke's. (RTT 10785; 10788.)

10571; 10588.)

Boyd referred to Hartz Mountain business records for the years 1982 through 1984 which represented the total amount of corporate business done within the state of California and the total number of units of the particular type of dog collar sold within the state. (RTT 10585-86.) In 1982, 34,468 scrolled type dog chains were sold in California in three lengths. In 1983, 36,870 were sold and in 1984, 33,833. (RTT 10587.)[943]

Boyd testified that several other companies also sold chains similar to Trial Exhibit 190. (RTT 10588-89; 10593.)

d. Hair Evidence

Criminalist Charles Merritt had expertise in hair comparison in sexual assault cases. (RTT 10718.) He obtained pubic hair standards from Swanke at the morgue. (RTT 10719.)[944] Merritt found one dark brown hair among the hairs in the pubic combing (Item 9) which didn't appear to have come from Swanke. (RTT 10724-25.) Merritt compared Lucas' pubic hair standards with the pubic combings from Swanke. (RTT 10725-26.) The one brown hair was visually and microscopically different from the hairs of Swanke and Lucas. (RTT 10726; 10731-32.)[945]

Merritt also analyzed a pubic hair found on Swanke's left hip. (RTT

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[943] Boyd couldn't provide a breakdown as to how many of each length was represented in the total sold. (RTT 10591-92.)

[944] Exhibit 726 was the pubic hair standard from Swanke. (RTT 10719.) Exhibit 729 were pubic combings collected from Swanke at the morgue. (RTT 10720.)

[945] On cross-examination Merritt was asked if Lucas was excluded as a donor of the hair. He responded that it did not look like Lucas' hair, but he could not make a hundred percent exclusion of either Lucas or Swanke. (RTT 10727-29.) Merritt did not examine Oberle's hair. (RTT 10729.)

10720.)[946] This hair was visually and microscopically different from the pubic hair standards of Swanke. (RTT 10725-26.)[947] Merritt also collected pubic hair standards from Lucas and from Gregory Oberle, Swanke's boyfriend. (RTT 10720; 10722.) According to Merritt's analysis, the hair removed from Swanke's left hip did not come from either Lucas or Swanke. (RTT 10727; 10730; 10732.)[948]/[949] Merritt did not render an opinion as to whether or not this hair was consistent with Oberle's. (RTT 10729.) However, John Simms, a forensic criminalist and hair comparison expert, concluded that the hair found on Swanke's left hip was inconsistent with the hair of Swanke, Lucas and Oberle. (RTT 2125-26; RTT 10738-44.)[950]

Simms also concluded that the foreign hair found in Swanke's pubic combings was "markedly different" from the hair of Swanke, Lucas and Oberle. (RTT 10738; 10745.)[951]

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[946] Trial Exhibit 727. (RTT 10720.)

[947] Swanke's hair was basically a reddish color. (RTT 10725.)

[948] Head hairs are harder to compare than pubic hairs because head hairs are subjected to the elements and can fade making the colors very inconsistent. Pubic hairs, on the other hand, are usually fairly consistent within themselves. (RTT 10728.)

[949] Merritt also performed a presumptive test for the presence of seminal fluid (acid phosphatase) on the genital swabs obtained from Swanke. The result was a weak positive. (RTT 10723.) However, the result was too weak to confirm that semen was present. (RTT 10730.)

[950] Simms' exclusion wasn't one hundred percent certain due to the size and nature of the hair. (RTT 10742-44.)

[951] Simms thought these results were "even more significant" than the comparison of the hair found on Swanke's hip because the hair from the combings was an intact, standard pubic hair, whereas the hair found on her hip

(continued...)

e. Serological Evidence

i. ABO Testing Of Sheepskin Stain On Passenger Seat

1. San Diego County Lab

Hermann Schmitter, an expert in serology,[952] concluded that the ABO testing conducted by Charles Merritt was not scientifically reliable because he failed to include what protocols (technical procedures), if any, he used. (RTT 9654-55; 11979-80; see also Exhibit 705.) In Schmitter's opinion, absorption-elution tests for ABO on evidence stains must be done with two sets of antisera and the results must be consistent. (RTT 9629; 9632; 9645.)

2. ABO Testing By SERI

Schmitter also disagreed with SERI's group O result on the sheepskin sample, because there were no reactions with A, anti-B or anti-H and the agglutination strength was scored at three. (RTT 9645-46; 9712) Schmitter thought that test should have been repeated to be sure that it was a group O. (RTT 9646.)[953] As to the San Diego Sheriff's Department ABO analysis on the sheepskin, Schmitter would not have relied on Merritt's test results that the stain was type O as there was no protocol, only a conclusion. (RTT 9654-55; 11979-80; see also Exhibit 705.) Schmitter would not have accepted any of

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[951](...continued)
was a shorter, finer "transitional type" hair. (RTT 10743-44; 10746.)

[952] Schmitter was employed in the Bundeskriminalamt, the federal police organization of Bundes Republic, which was the German equivalent of the FBI. (RTT 9630.)

[953] See also § 4.2(B)(2)(e)(ii), pp. 1117-19, incorporated herein [stipulation of Eubanks that FBI requires confirming Lattes test before reporting ABO results].

the results obtained on the fingernails because there was no simultaneous duplicate testing. (RTT 9713.)

The procedure for examination of bloodstains is a phenophthalein swab test, followed by the conclusive identification of hemochromogen crystals utilizing a Takayama reagent. Then an ouchterlony or an anti-human test is performed.

The methodology for ABO grouping of bloodstain involves an absorption-elution, as well as a Lattes crust test. If the two results, the antibody and antigen, do not correspond, the result is considered inconclusive.

These testing procedures utilize controls. The controls for the absorption-elution test are O, A, B, and AB controls.

The Lattes crust test involves ABO slides from A and B individuals. (RTT 10788-90.)[954]

ii. Electrophoretic Testing By SERI

Schmitter reviewed the protocols and photographs of SERI's electrophoretic work. He read the photos blindly without knowing what was analyzed. (RTT 9672.) Afterwards, he compared the protocols to his results. (RTT 9629; 9672.)

Schmitter was shown Exhibit 636, the protocol of F515. (RTT 9668.) He was unable to read the Swanke PGM subtyping result of 2-1- as the sample was overdeveloped and unreadable. (RTT 9674; 9676; 9716; 9794-95; 9798.)[955] With regard to the PGM subtyping run F515, Schmitter disagreed

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[954] The prosecution accepted the stipulation that the testimony offered would be Eubanks' testimony and would be correct as of April 22, 1987. (RTT 10790.)

[955] On cross examination, Schmitter testified that the bands on Trial (continued...)

with the results reported on David Lucas' blood, in that it was not a definite "callable" 2+1+. (RTT 9715; 9720.)[956] There was a weak 1+ and a clearly visible 2+ and Schmitter had doubts that it was a 2+1+. (RTT 9720.)[957] Schmitter felt it might just be a 2+. (RTT 9720; 9849.)

Schmitter then examined photograph Exhibit 638C and the protocol (Exhibit 638A) of run F516. (RTT 9676.) Schmitter agreed on the sheepskin result of 2-1-as it was the only run that was readable on the gel. (RTT 9677.) In the Group II EAP, Schmitter disagreed with the B results in that it was impossible to distinguish the B from the BC. (RTT 9682-83; 9858.) The B that was reported could have been a BC, or vice versa. (RTT 9684.) Schmitter was shown the Group III 901 haptoglobin run photograph, Exhibit 627C, involving Swanke. (RTT 9687.) He did not agree with all the results Wraxall reported on that run. (RTT 9687.) To Schmitter the three Swanke samples did not look like a 2-1. (RTT 9688; 9826.)[958]

Schmitter reviewed photographs and notes concerning run 849 and 844 in the AK system. (RTT 9713.) To Schmitter there were some shadows

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[955](...continued)
Exhibit 636C were clearer and could probably be read as a 2-1-. (RTT 9798-99.)

[956] Schmitter stated that 636D looked "similar" to a PGM 2+1+ but that he would have repeated the test to make sure that the 1+ wasn't an "artifact." (RTT 9799-9800.)

[957] However, if there was a weak 1+ band present it could not be a PGM 2. (RTT 9850.)

[958] The reason Schmitter was concerned with the results was the presence of an extra band that appeared in all three samples which he hadn't seen before. (RTT 9827-29.) He admitted that the band could occur in a 2-1. (RTT 9830.) Schmitter acknowledged that a 2-1M was extremely rare. (RTT 9831.)

visible but not "callable" bands. He would not have accepted any of the reported AK results on Exhibit 245. (RTT 9713-14.)[959]

Schmitter also reviewed a photograph of Group I 1024 regarding David Lucas' PGM. He disagreed with the call of 2-1. (RTT 9721) Schmitter would have called David Lucas' PGM a 2, not a 2-1. (RTT 9721.) With regard to the haptoglobin results done in Group III 901, not all of the samples matched the bands in the reference samples. (RTT 9721-22.) Schmitter also disagreed with the Shannon Lucas' 1 haptoglobin result in Group II 899 in that there was no 1 reference on the gel. (RTT 9723)[960]

The defense offered the following stipulation which was accepted by the prosecution:

> If the defense were to call William Eubanks he would testify that he is a special agent with the FBI field lab in Washington, D.C. and head of the serology unit of that laboratory.
>
> The minimum education qualifications for all FBI serology examiners is a bachelors degree from a 4 year college with a major in chemistry or biochemistry.
>
> The use of proper controls on all electrophoretic plates is absolutely mandatory. All electrophoretic plates used at the serology unit of the FBI contain at least 3 controls.
>
> Electrophoretic results at the serology unit are deemed inconclusive if the bands cannot be properly read, do not conform with the controls, or the controls do not run properly. If the controls used on the electrophoretic plate did not run properly, the entire plate is deemed to be inconclusive.
>
> The serology unit of the FBI uses a "double-reader system" which the serology unit believes is necessary. The

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[959] Schmitter testified on cross-examination that he agreed with the majority of results on Exhibit 245. (RTT 9846; 9849.)

[960] Schmitter had blindly read the sample as a 1; his objection was that only 2-1 standards were used and not a 1 standard. (RTT 9832-33.)

> serology examiner assigned to the case reads the electrophoretic plate and a second reader reads the plate to confirm the results. If there is a disagreement between the examiner and the second reader or one reader calls it inconclusive, the test is considered inconclusive and is recorded as inconclusive. (RTT 10789-90.)

SERI, on the other hand, did not require a double-reader agreement. Wraxall was allowed to make a specific call even if it didn't coincide with the other reader's call. (See RTT 6508; see also § 4.3(F), pp.1132-34 below, incorporated herein.)

iii. Gm/Km Testing By SERI

According to Schmitter, reliable testing of Gm requires two different sets of antisera in parallel runs. (RTT 9659.) Schmitter looked at Exhibit 616 and did not agree with all of the results. (RTT 9651; 9660-61; 9803-04.) Based on what he saw on the protocol, the results of fingernail L1 were 1, 2, 3, 23, not 1, 2, 3, 11, 23 as Wraxall had reported them. (RTT 9662; 9807-08.) Using the antiserum Gm 11, there was an agglutination meaning that the 11 marker was not present. (RTT 9663.) In most cases if there is a 3 there is also an 11, although there are individuals who have the combination 1, 2, 3, 23, lacking the 11. (RTT 9663.)[961] Schmitter testified that none of the tests on Exhibit 616 were performed correctly and, therefore, none of the results should have been reported. (RTT 9665; 9807; 9825-26.)

Schmitter would not have reported any of Gm results obtained in the

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[961] On cross-examination, Schmitter admitted that the Gm 11 allotype is the weakest in terms of concentration in the blood, and that in a weak stain the 11 allotype may not be detected even though it's present because of the lack of concentration. (RTT 9810-11.) Schmitter also admitted that people who have a 3 allotype and no 11 allotype are rare; that approximately 99.84 percent of the Caucasian population have both the 3 and 11 allotype. (RTT 9814-15.)

Lucas, Santiago, and Swanke blood, as the testing was not duplicated. (RTT 9711-12.)

iv. Wraxall's Character

Douglas Greer, a criminal defense attorney from Sacramento, testified that between 1981 and 1986 he had had occasion to consult with Brian Wraxall on two cases, and had spent approximately 15 hours with Wraxall. (RTT 10408-09; 10411; 10423)[962] In his opinion, Wraxall was not honest. (RTT 10410.)

Attorney Loretta Hellen, Greer's co-counsel in both Williams' trial and appeal, testified that she had utilized Wraxall's services on a case and had spent between 15 and 20 hours consulting with him. (RTT 10427-10428; 10429.) In her opinion, Wraxall was not always honest. (RTT 10428.)

C. Other Offenses Evidence

For testimony regarding wound comparison see Jacobs case Statement of Facts, Volume 2, § 2.2(Q), pp. 122-27, incorporated herein.

For a comparison of Swanke to Jacobs see Volume 2, Chart 2.2(R)(4), pp. 134-36, incorporated herein. For a comparison of Swanke to Garcia see Volume 5, Chart 5.1.2(C)(3), pp. 1275-76, incorporated herein. For a comparison of Swanke to Santiago see Volume 3, Chart 3.2(C)(2), pp. 809-10, incorporated herein. For a comparison of Swanke to Strang see Volume 5, Chart 5.2.2(C)(1), pp. 1308, incorporated herein.

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[962] The cases were *People v. Kenneth Darrel Williams*, a death penalty case, and *Williams v. Wraxall.* (RTT 10411.) (See footnote 137, *supra.*) Greer was the trial attorney for Williams, who was currently on death row. (RTT 10411.) Greer was also appointed to represent Williams on his appeal and was seeking to have his conviction reversed. (RTT 10412-13.)

4 SWANKE CASE

ARGUMENT 4.3

THE PROSECUTION FAILED TO MEET ITS *KELLY* BURDEN TO PROVE THE ADMISSIBILITY OF THE BLOOD ANALYSIS EVIDENCE

A. Introduction

The prosecution sought to present blood analysis evidence of the material found under Anne Swanke's fingernails and the stain found on the passenger side sheepskin seat cover of Lucas' pickup truck.[963] As the proponent of this evidence, the prosecution had the burden of demonstrating that the scientific evidence met all three prongs required by *People v. Kelly* (1976) 17 Cal.3d 24, 30. (See *People v. Shirley* (1982) 31 Cal.3d 18, 54.)

As to absorption-elution analysis, the prosecution failed to demonstrate that the testing utilized procedures which were accepted by a consensus in the scientific community. (Prong 3 of *Kelly*.)

As to the electrophoresis, the prosecution failed to prove compliance with Prong 3, because the lab reached its conclusions without requiring the agreement of at least two readers. A consensus of the scientific community requires double-reader agreement due to the subjective nature of the technique and the potential for reader bias.

Furthermore, the analysis was performed without employment of

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[963] Through this evidence the prosecution offered expert testimony that Lucas' blood was consistent with the blood found under Swanke's fingernails and that 1 in 69 Caucasian persons had blood with those characteristics. (See § 4.2(A)(8)(c)(vi), pp. 1099-00 above, incorporated herein.) The prosecution also offered expert testimony that Swanke's blood was consistent with the stain found on the sheepskin seat cover and that 1 in 4,794 Caucasian persons had blood characteristics consistent with that stain. (See § 4.2(A)(8)(c)(vii), p. 1100 above, incorporated herein.)

uniform "match criteria," which is used to avoid the subjective and/or biased calling of matches. In light of other decisions of this Court, which require that scientific evidence be objectively reliable, the electrophoretic method used in the present case was too subjective to be admissible.

The Prong 3 evidence was also deficient because the lab failed to utilize a uniform protocol for accurately reporting and preserving the testing results.

Finally, the prosecution failed to establish that the lab's failure to follow its own protocol was scientifically acceptable under Prong 3.

The trial judge found correctly that the electrophoretic analysis actually utilized in the present case was deficient in several respects. However, the judge found that these Prong 3 deficiencies were cured as to any tests which were photographed. This ruling, which relied entirely on the photographs, was erroneous because:

1. The evidence did not establish that a consensus of the scientific community accepted photographs as a cure for deficient testing procedures.

2. Even if there had been a consensus that scientifically accurate photographs can cure methodological deficiencies, the photography methodology used in the present case was not shown to be scientifically accurate and reliable.

The judge also erroneously ruled that the agglutination technique for testing the Gm and Km markers satisfied Prongs 1 and 3 of *Kelly*. The evidence did not establish community acceptance of either the Gm/Km technique in general or the specific procedures which were used in the present case.

In sum, admission of the blood comparison evidence was error.

B. Proceedings Below

The defense made a *Kelly/Frye*[964] motion to exclude expert testimony regarding the blood analysis of the material found under Anne Swanke's fingernails and the stain found on the sheepskin seat cover in Lucas' truck. (CT 10446-61.)

After a lengthy hearing Judge Hammes made the following rulings:

1. ABO typing by absorption-elution on aged blood evidence is not subject to *Kelly/Frye* and "the correctness of the scientific procedures employed is therefore a jury question." (CT 13842.)

2. Electrophoresis analysis of blood is accepted by a consensus of the scientific community and satisfies Prong 1 of *Kelly*. (CT 13824.)

3. The BAS Multisystem used by Brian Wraxall is accepted by a consensus of the scientific community and satisfies Prong 1 of *Kelly*. (CT 13825.)

4. Any deficiencies in the electrophoretic methodology actually used in the Lucas case (*Kelly* Prong 3) were cured by only allowing into evidence results which were photographed. (RTH 4006-11; CT 13832-41.)

5. The absorption-inhibition testing for the genetic markers Gm and Km in the Lucas case satisfied both Prong 1 and Prong 3 of *Kelly*. (CT 13844-46.)[965]

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[964] At the time such motions were styled as *Kelly/Frye* motions. Subsequently, with the advent of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, which overruled *Frye*, such motions are now described as "*Kelly*" motions. (See *People v. Venegas* (1998) 18 Cal.4th 47, 76, n. 30.)

[965] The judge originally excluded the Gm/Km evidence under Prong 1 of *Kelly*. (RTH 15437-38.) However, the prosecution was allowed to reopen (continued...)

C. Factual Overview

1. Introduction

Two different labs conducted the blood analysis: the San Diego Sheriff's Office lab (hereinafter, "SDSO") did ABO grouping for blood type (e.g, A, B, O, etc.) and electrophoresis for Group I and II enzymes. Brian Wraxall's Serological Research Institute (hereinafter, "SERI") did ABO blood typing, electrophoresis for Group I, II and III enzymes and agglutination for the genetic markers Gm and Km.

2. SDSO Testing

Charles Merritt of the SDSO lab performed ABO testing. His notes indicated that he performed both absorption-elution and a confirming Lattes test but there were no notes as to which testing protocol, if any, Merritt used. (RTH 13984-87; In Limine Exhibit 690.)

Marilyn Fink of the SDSO performed electrophoretic testing for Group I and II. (RTH 111780-82.) However, her results were only offered at the *Kelly* hearing to corroborate the SERI testing. (RTH 11814-18.)

3. SERI Testing

SERI conducted ABO testing using absorption-elution but did not do a confirming Lattes test. (RTH 8346-47.) SERI used a "mixed standard" with some of the absorption-elution testing. (RTH 8832-36.)

SERI used an electrophoretic technique, the BAS multisystem, which was tested for more than one marker on a single electrophoretic plate or run. Numerous expert witnesses testified on the question of whether or not the BAS multisystem was an accepted electrophoretic method. All of the

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[965](...continued)
and present the testimony of Dr. Moses Schanfield. (RTH 25544-57.) The judge relied on Schanfield testimony to admit the evidence. (CT 13844-46.)

witnesses agreed that electrophoresis – which identifies genetic markers from microscopic banding patterns which appear after the blood has been given an electrical charge – is a generally accepted testing method. (CT 13824.)[966] And, while Dr. Benjamin Grunbaum testified that the multisystem was not reliable, the prosecution experts testified that it was accepted. (Wraxall [RTH 7301-9250; 9898-10488]; Stolorow [RTH 10633-11445].)

SERI also reported results for the Gm marker, concluding that two of the fingernails were consistent with David Lucas' Gm and the sheepskin stain Gm was consistent with Anne Swanke and inconsistent with David Lucas, Shannon Lucas, and Jodie Santiago. (See Trial Exhibit 245.)

D. Legal Principles

1. *Kelly* Prong 1

People v. Kelly, *supra*, 17 Cal.3d at 30 held that admissibility of expert opinion based on "a new scientific technique" requires proof that its technique

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[966] Although the validity of electrophoresis was "not the issue" (RTH 19504-05), electrophoresis itself was shown to be a very complex process. In Limine Exhibit 641 summarized many of the variables which must be considered including:

- Strength of the charge.
- Size of the molecule.
- Shape of the molecule.
- Ph factor.
- Temperature.
- Medium.
- Field intensity.
- Voltage.
- Time.
- Evaporation.
- Contamination.

(RTH 19504-35.)

is "sufficiently established to have gained general acceptance in the field to which it belongs." [Citing *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014]; see also *People v. Venegas*, *supra*, 18 Cal.4th at 76.] "The scientific technique on which evidence is being offered must have gained general acceptance in the particular field to which it belongs. [Citations.] However, '*Kelly* does not demand that the court decide whether the procedure is reliable as a matter of scientific fact: the court merely determines from the professional literature and expert testimony whether or not the new scientific technique is accepted as reliable in the relevant scientific community and whether' scientists significant in either number or expertise publicly oppose [a technique] as unreliable. [Citations.] General acceptance under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community." [Internal citations and quotation marks omitted.] (*People v. Soto* (1999) 21 Cal.4th 512, 519.)

2. <u>*Kelly* Prong 3</u>

"The *Kelly* third-prong inquiry involves further scrutiny of a methodology or technique that has already passed muster under the central first prong of the *Kelly* test, in that general acceptance of its validity by the relevant scientific community has been established. The issue of the inquiry is whether the procedures utilized in the case at hand complied with that technique. Proof of that compliance does not necessitate expert testimony anew from a member of the relevant scientific community directed at evaluating the technique's validity or acceptance in that community. It does, however, require that the testifying expert understand the technique and its underlying theory, and be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique." [Citations.]

(*People v. Venegas*, *supra*, 18 Cal.4th at 81.)[967]

E. The ABO Testing Evidence Failed To Satisfy Prong 3 Of *Kelly*

1. Applicability of Prong 3

The judge found that the reliability of ABO testing could not be challenged under *Kelly*:

> Considerable evidence was presented in this hearing on the correctness of scientific procedures employed during Absorption-Elution tests on aged blood evidence. After careful review of this evidence, this Court concludes that Absorption-Elution testing on aged blood evidence is not the proper subject of a *Kelly-Frye* hearing, and the correctness of the scientific procedures employed is therefore a jury question. Such testing is not a "new scientific technique," nor is it an old scientific technique under new consideration in the relevant scientific community. (CT 13842:7-16.)

However, even assuming that the judge was correct as to Prong 1 of *Kelly*, the procedures actually utilized in this case were subject to *Kelly* scrutiny. (See *People v. Venegas*, *supra*, 18 Cal.4th at 81.)

Because the record is clear that the prosecution would not be able to meet its Prong 3 burden under *Kelly*, this Court should hold that the trial court erred in not excluding the ABO testing evidence.

Alternatively, because the judge failed to conduct the required Prong 3 analysis, the matter should be remanded for a determination of this issue before a different judge. (*People v. Leahy* (1994) 8 Cal.4th 587, 610-11.)

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[967] The second prong of the *Kelly* test "requires that any witness testifying on general acceptance be properly qualified as an expert on the subject." (*People v. Venegas*, *supra*, 18 Cal4th at 78.)

2. SDSO Testing For ABO

Judge Hammes correctly found that:

> "Correct scientific procedures" include both the completion of each step in the protocol for the performance of the particular test, AND every control measure that must be taken by a qualified analyst in a properly equipped laboratory as a check against each source of error in the production AND reporting of a result. (CT 13834:15-20.)

Hence, to satisfy Prong 3 of *Kelly*, the lab must maintain "proper protocols for testing" (CT 13834:6), follow those protocols during testing (RTH 15956-57; 17293; 17361; 18052-60) and accurately record the testing protocol in the bench notes and run data. (RTH 20553-58; CT 13834:24.)

Based on these requirements the SDSO ABO testing did not meet Prong 3 because their lab notes did not state which protocols, if any, were used for the ABO testing. (In Limine Exhibit 690; Trial Exhibit 705.)

3. SERI Testing For ABO

SERI's ABO results were based on absorption-elution testing that was not confirmed by any other tests such as the Lattes test. (RTH 8346-47; 12324-36.) The prosecution failed to meet its burden of proving that SERI's ABO testing procedures complied with the procedures deemed acceptable by a consensus of the scientific community. To the contrary, several witnesses testified that confirming testing is required. (RTH 13663-36 [FBI]; 15943-45 [Colman]; 18195-98 [Zajac]; 20610; 22662; 22711 [Grunbaum].) While there was evidence that at least one lab did not require Lattes testing at least at the time (RTH 23622 [Wraxall]; but see RTH 23062), there was no substantial evidence of a consensus in favor of SERI's single test procedure.

Furthermore, SERI used a mixed standard in conducting ABO testing. (RTH 8832-36.) Again, the prosecution failed to prove that such a procedure

was acceptable by a consensus in the scientific community. In fact, numerous experts testified that mixed standards should not be used because they may produce a "false positive." (RTH 9415-16; 9425-26; 11086-93; 11454; 14025; 16648; but see 13515-26.) The evidence was decidedly insufficient to establish a consensus in favor of SERI's mixed standard procedure.

F. The SERI Electrophoresis Testing Failed Prong 3 Of *Kelly* Because It Reported Matches When The Readers Disagreed

A crucial part of the Prong 3 analysis is the procedure by which matches are called. (See e.g., *People v. Venegas*, *supra*, 18 Cal.4th at 79 [DNA "match criteria which that laboratory applied" are properly considered under Prong 3].) This procedure is especially crucial with electrophoresis because the calls are not always clear cut and the methodology is inevitably subjective. (See § 4.2(A)(8)(c)(iv), pp. 1094-95 above, incorporated herein.) Because of this subjectivity, double-reader agreement was needed to limit the opportunity for reader bias to affect the call. (RTH 16186-91 [double-blind agreement vital to avoid bias].)

For the foregoing reasons much of the scientific community adopted a requirement of double-blind reading and agreement wherein the call of one reader is not reported unless a second reader, without knowing the call of the first, reads the plate and independently reaches a conclusion which agrees with the first reader. (See e.g., RTH 11656-60; 12986; 15570-72; 16186-91; 16474-76; 22990.)

In the present case, the SERI procedure deviated from the community standard because it did not require both readers to agree before reporting a call. (RTH 9030-42; 14453.) In particular, if Brian Wraxall disagreed with the other reader's call, Wraxall could overrule that reader. (RTH 8904.) In fact, the other SERI reader's call was not really part of the calling process

except to the extent that Wraxall concurred with the call. Hence, there was no check on the possibility of subjective misjudgment or bias by Wraxall. (Compare e.g., *People v. Reilly* (1987) 196 Cal. App.3d 1127, 1155 [Prong 3 satisfied where reader/supervisor disagreement reported as "inconclusive"]; cf. *GE v. Joiner* (1997) 522 U.S. 136, 146 [trial judge should not be required "to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert"]; see also *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 157.) As observed by the Florida Supreme Court in the context of DNA testing:

> If the purpose of the second review is to assure the reliability of the testing, this is hardly accomplished when the analyst conducting the initial testing and his supervisor conducting the "independent review" reach opposing conclusions. The results from the DNA testing become more uncertain, rather than more conclusive. This defeats the entire purpose of a second independent review and renders the initial review meaningless. Accordingly, as the defense experts explained, one of the elements of a second independent review is to ensure that the results of the initial review were reliable, and should the two analysts disagree, the tests should be deemed inconclusive in the absence of further analysis. (*Murray v. State* (Fla. 2002) 838 So.2d 1073, 1080-81.)

The prosecution failed to demonstrate that SERI's version of the double-read requirement was endorsed by a consensus of the scientific community. To the contrary, the vast majority of the experts at the hearing testified that without agreement between both readers, the result should not be reported.[968] Accordingly, the prosecution failed to meet its burden as to Prong

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[968] Wraxall's former partner, Mark Stolorow, thought that overruling of one reader by another would be acceptable if written justification was given. (RTH 11055-56.) However, Stolorow couldn't speak for the entire (continued...)

3 of *Kelly* and SERI's electrophoretic results should have been excluded.

G. The Failure To Comply With The Double-Reader Agreement Requirement Was Not Excused By Photographing The Results

1. Introduction

Judge Hammes concluded SERI's failure to require double-reader concurrence did not violate Prong 3 of *Kelly* where a photograph of the test results was available. (CT 13837.) However, the evidence did not establish that a consensus of the scientific community agreed with the judge's conclusion that a photograph was an adequate substitute for double-reader concurrence. And, even if there were such a consensus, the prosecution failed to establish that the photography procedures used by SERI in the present case were reliable and in compliance with accepted scientific requirements.

2. There Was No Substantial Evidence Of A Community Consensus That Photography Eliminated The Double Agreement Requirement

Judge Hammes found that:

> "In the absence of two-read confirmance, a photograph must be available to support the reported call." (CT 13837.)

In support of this finding the judge relied on the testimony of Dr. Sammons, Dr. Colman and Cecil Hider. (CT 13837-38.) However, none of these witnesses testified that the scientific community accepted a photograph as a substitute for the agreement of at least two readers.[969]

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[968](...continued)
forensic serology community on this issue. (RTH 11056.)

[969] Judge Hammes also mentioned Daniel Winter, a technical photographer, who testified that accurate photos of electrophoretic testing (continued...)

Neville Colman, director of the V.A. Blood Bank and Hematology Laboratory in New York testified that there must be double agreement on the call (between the technician and supervisor) and documentation by a photo and/or the original plate. (CT 18838; RTH 15785; 15935.) While Colman testified that photographs could accurately record results (RTH 16014-18), he never suggested that a photograph could substitute for actual reading of the plate.

Dr. David Sammons testified that the results should be preserved by saving the gel or taking a photograph and that the double-reader agreement was required. (RTH 17827-29; 18093.) He never stated that photographs could completely supplant the double-reading requirement.

Cecil Hider provided no testimony or evidence that a consensus of the scientific community accepted photographs as a substitute for double-reader agreement.

In sum, none of the three witnesses upon which Judge Hammes relied provided substantial evidence upon which to reasonably conclude that the scientific community considered photography to be an adequate substitute for the double-reader agreement requirement.

Moreover, other witnesses not mentioned by Judge Hammes further suggested that double-reader agreement was still a requirement even if photography was used. For example, Bruce Budowle of the FBI, despite suggesting that photos were useful, testified that the FBI protocol still required double agreement. (RTH 11656-60; 12986; 14752.) And German

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[969](...continued)
results could be taken. However, Winter did not testify that there was a community consensus accepting the use of photographs as a substitute for double-reader agreement.

labs required both photography and double agreement. (RTH 15570-72.)

In sum, SERI's electrophoretic results should have been excluded for failure to comply with Prong 3 of *Kelly*.

3. Even If Photos Could Supplant Double-Reader Agreement, It Was Not Proven That SERI Used A Reliable Scientific Procedure To Obtain The Photos

As discussed above, the failure of SERI to require double-reader agreement violated Prong 3 of *Kelly* even though photographs were taken of the results. However, even if there was scientific acceptance in theory that photographs were an adequate substitute for double-reader agreement, the procedures for the taking of such photographs would also have to comply with Prong 3. However, there is no substantial evidence that SERI's photography procedures were scientifically accepted. To the contrary, the circumstances strongly suggest that SERI's photographic procedures were not accurate and reliable.

The evidence identified several prerequisites for accurate and reliable photographing of electrophoretic testing results:

First, the correct equipment must be used. (See RTH 16740.)

Second, the timing of the photos is critical. (RTH 14965; 16721.)

Third, special photographic procedures must be utilized to obtain reliable and accurate photos of dark or weak bands. (RTH 16735-39.)

In SERI's case, there was no evidence that the required equipment was utilized. The only specific evidence in this regard indicated that SERI used a Polaroid, even though it had a 35 mm. (RTH 15660.)

As to the timing of the photos, one of Wraxall's readers testified that photos were taken when the call was made. (RTH 15495.) However, on at least one occasion the photo was taken much later. As described by Judge

Hammes:

> . . . [A]ll the scientists who looked at [Exhibit MMM] said, "Absolutely, that's not all callable." And then Mr. Wraxall says, "Well, but I took the photograph at the wrong time." God, I mean that's incredible. He knows how important that is . . . and he takes the photograph at the wrong time. It didn't make sense. . . . I mean, it was just amazing. (RTT 4007-08.)

Finally, the record failed to establish that any special procedures were utilized by SERI in photographing dark or weak bands. In fact, a number of Wraxall's photos were inadequate[970] which strongly suggested that his procedures were also inadequate.

In sum, there was no substantial evidence that SERI's photographic techniques comported with procedures accepted by a consensus of the scientific community. For this reason, as well, the SERI electrophoretic testing failed to comply with Prong 3 of *Kelly* and should have been excluded.

H. Failure Of SERI To Follow Its Own Electrophoresis Protocol Violated Prong 3

Judge Hammes excused SERI's failure to strictly follow its own protocols because it was not shown that the procedures actually followed were outside "permissible parameters of variation." (RTH 13840-41.)

However, the evidence does not demonstrate a scientific consensus that deviating from the protocol is an acceptable scientific procedure. To the contrary, witnesses such as Dr. Sammons testified that deviation from the protocol is improper. (RTH 18052-60; see also 17281-82; 17293; 17827;17301.)

Hence, because protocol deviation was not shown to be an acceptable

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[970] See e.g., RTH 22592; 22611-12; 22621-24; 23688-720; 23812-18.

procedure, Prong 3 of *Kelly* was not satisfied, even if the procedures actually used may have been reliable.

I. The SERI Electrophoretic Testing Should Have Been Excluded Under *Kelly*, Prong 3, As Subjective And Unreliable Due To Lack Of "Match Criteria" And Other Objectively Verifiable Scientific Standards

1. The Legal And Scientific Community Has Rejected Expert Conclusions Which Are Based On The Subjective Experience Of The Expert Rather Than Objective Standards And Criteria

Electrophoresis first passed *Kelly* muster in *People v. Reilly* (1987) 196 Cal. App.3d 1127, 1150 where the court candidly admitted that the multisystem had been accepted by the scientific community even "without" guidelines for quality assurance. In addition, in 1991, this Court, thrice held that electrophoretic testing of dried bloodstains is admissible under Prong 1 of *Kelly*. (*People v. Fierro* (1991) 1 Cal.4th 173; *People v. Morris* (1991) 53 Cal.3d 152 [BAS Multisystem approved]; *People v. Cooper* (1991) 53 Cal.3d 771.)

However, since this Court last considered the merits of the issue,[971] the legal and scientific community has rejected, as unreliable, standardless identification techniques which rely primarily upon the "expertise" of the examiner to decide whether or not to call a match. Recent cases emphasize that quantifiable "match criteria" are an essential prerequisite to reliability and proof of Prong 3 under *Kelly*. (See *People v. Venegas* (1998) 18 Cal.4th 47, 79.)

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[971] Subsequent cases have simply affirmed based on the earlier cases. (See e.g., *People v. Bolden* (2002) 29 Cal.4th 515, 546; *People v. Hart* (1999) 20 Cal.4th 546, 561; *People v. Wash* (1993) 6 Cal.4th 215, 242.)

2. The Conclusions In The Present Case Were Substantially Founded On The Subjective Experience Of Brian Wraxall Rather Then Objective Criteria

In the present case, unreliable subjectivity and examiner discretion were indisputably established. Virtually every witness agreed that the calling process involved subjective discretion by the reader. (See e.g., RTH 8894-8904; 10123-24.) This is because each analyst sets up his or her own criteria. (RTH 9646; 9663; 12972; 14926.) In particular, when the band was faint or weak, the calls varied from reader to reader and from expert to expert without any quantifiable criteria to determine which call was the correct one. (*Ibid.*; see also e.g., RTH 15742-48; 1594; 15934 [different readers get different results].)[972] Indeed, this subjectivity found its way into the jury room where the jurors were required to decide between different subjective opinions about the same electrophoretic evidence by two different experts. (Compare § 4.2(A)(8)(c), pp. 1092-1112 above, [Wraxall], incorporated herein vs. § 4.2(B)(2)(e)(ii), pp. 1119-22 above, [Schmitter] incorporated herein.)

Of course, it is the jury's role to decide between conflicting experts when the evidence presents such a conflict. But, here there were no objectively quantifiable criteria by which the jury could evaluate which expert to believe. Both experts analyzed the same results. Yet each expert gave a different opinion, which in the final analysis, was based primarily on that expert's experience.

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[972] For example, in the GC system (a Group III system) Amber Fisher's blood was tested in four different runs with six different tests. On the first run on December 31, 1984, the result was a 2-1. However, a run conducted on January 21, 1985 indicated a result of 2. In theory, a person cannot be a type 2-1 and type 2 in the genetic marker system involving GC. (RTH 10173-78.)

Hence, the jury resolution of this conflict was necessarily speculative and unreliable since the jury could do little more than guess which expert was correct.

3. Subjective Expert Opinions Should Be Excluded Under *Kelly*

People v. Kelly, *supra*, should not be read so as to allow the admission of subjective, unreliable scientific evidence. Any scientific method that is so subjective as to leave the jury guessing should not be admissible as a matter of state law. To be relevant and admissible under the California Evidence Code an expert opinion must be objectively reliable. (See Volume 2, § 2.5.5(B), pp. 411-13, incorporated herein.) Moreover, such evidence would be inadmissible under the *Daubert/Kumho* test, which excludes evidence based on the *ipse dixit* of the expert. (See *GE v. Joiner*, *supra,* 522 U.S. at 146.)

J. The Wraxall Gm and Km Electrophoresis Results Should Have Been Excluded Under Prong 1 And Prong 3 Of *Kelly*

1. The Wraxall Method Was Not Being Used By Any Other Lab And Therefore Failed To Satisfy Prong 1 Of *Kelly*

Judge Hammes originally found the prosecution failed to meet its *Kelly* burden as to the admissibility of Wraxall's testing method for the markers Gm and Km. (RTH 15437-38.) However, the judge allowed the prosecution to reopen and present the testimony of Moses Schanfield.

Schanfield testified that he used an agglutination process to test for Gm and Km. (RTH 25544-57.) He required double-reading and photography of the result. (RTH 25558-59; 25570-71.) According to Schanfield, other labs, including the FBI, were using Schanfield's methodology. (RTH 25585-86; 13418; 14245.)

However, only one other lab was using SERI's Gm/Km methodology,

which was different from Schanfield's. (RTH 25544-57; 22593-95.)[973]

Further, SERI's method was deficient because the control could not be read and because the agglutination came apart and could not be reconstructed. (RTH 25595; 25602.)

In sum, Schanfield's testimony was clearly insufficient to meet the prosecution's Prong 1 burden. To the contrary, according to Schanfield, SERI's methodology was not used by the vast majority of labs. Nevertheless, Judge Hammes expressly declined to apply the required *Kelly* Prong 3 test to this evidence:

> [Dr. Schanfield] was aware of Mr. Wraxall's variation on the technique and knew of no reason why it should not be reliable, unless one judged the reliability by the number of other laboratories that used exactly the same variation. In this regard, he testified that other laboratories were not employing the same variation. (CT 13845:6-11.)

Yet the number of labs which use the technique is the very thing that *Kelly* requires the judge to consider.

2. SERI's Gm/Km Methodology Failed Prong 3 Of *Kelly* Because Unstained Controls Were Not Used For The Fingernails

Despite the fact that unstained controls should be used in Km/Gm testing, SERI did not do so when testing the fingernails. (RTH 14227-28.) The prosecution failed to establish that such uncontrolled testing is accepted by a consensus of the scientific community. Therefore, Prong 3 of *Kelly* was not established and the Gm results as to the fingernails should have been excluded.

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[973] The one lab which was using Wraxall's method was switching to Schanfield's. (RTH 25586-87.)

3. The SERI Gm/Km Testing Failed To Satisfy Prong 3 Of *Kelly* Because Confirming Photos Were Not Taken

Schanfield testified that photographing the Gm/Km results was a part of his standard procedure. (RTH 25571.) Nevertheless, Judge Hammes concluded that Gm/Km testing without photography was accepted by a consensus of the scientific community because photography was not necessary for ABO agglutination typing. (CT 13845-46.) This conclusion was not supported by the record because Schanfield was the only expert on Km/Gm who testified on the issue.

Moreover, Judge Hammes' decision was internally inconsistent. She relied on Schanfield to satisfy Prong 1 of *Kelly* and rejected Schanfield to satisfy Prong 3. Yet, there was no evidentiary basis for accepting one part of Schanfield's testimony and not the other. Such an illogical, result-oriented skewing of the evidence was an abuse of discretion.[974]

Hence, Judge Hammes ruled that *Kelly* was satisfied simply because a single witness testified that it was reliable even though it was not generally accepted in the scientific community. However, *Kelly* does not permit this. *Kelly* requires general acceptance. (*Ibid.*) Accordingly, admission of SERI's Gm/Km results was error.

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[974] ". . . [J]udicial discretion is by no means a power without rational bounds . . . The term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason." [Internal quotation marks and citations omitted.] (*People v. Rist* (1976) 16 Cal.3d 211, 219.)

K. The *Kelly* Errors Violated The Federal Constitution

1. Subjective Expert Opinions Should Be Excluded Under The Federal Constitution

Juror speculation about the evidence spawns unreliable verdicts in violation of the verdict reliability requirements of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution. An unreliable verdict of conviction for any criminal offense violates the federal constitution. 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.)

Moreover, 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 determination of guilt, death eligibility and sentence in a capital case. (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.)

Accordingly, the admission of the San Diego Sheriff's Office and SERI blood analysis evidence deprived Lucas of a fair and reliable trial proceeding and violated his rights under the Sixth, Eighth and Fourteenth Amendments.

2. The Erroneous Failure To Exclude Expert Opinion Testimony Under *Kelly* Arbitrarily Denied Lucas' State Created Rights

Further, because the error arbitrarily denied Lucas his state created rights under Evidence Code § 350 through § 352 and the California Constitution (Art I., sections 1, 7, 15, 16, 17 and 28(d)), it violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991)

930 F.2d 714, 716.)

L. The Error Was Prejudicial And, Therefore, Lucas' Convictions And Sentence Of Death Should Be Reversed

The serology evidence, even though of questionable reliability, likely had a substantial impact on the jurors. Although the prosecution presented other circumstantial evidence such as Leyva's observations of a license plate similar to Lucas' at the scene of the kidnapping and the scratches on Lucas' face, this evidence was subject to dispute. For example, Leyva described the vehicles he saw as approximately the same size when, in fact, Lucas' was substantially bigger. (See § 4.2(B)(2)(a), p. 1114 above, incorporated herein.) And, Lucas gave an explanation for the scratches. (RTT 3453; 3960.) Most importantly, the forensic evidence raised a reasonable doubt as to Lucas' guilt because the pubic hairs found on Swanke, and presumably left by the attacker, did not belong to Lucas. (See § 4.2(B)(2)(d), pp. 1116-17 above, incorporated herein.)

In this context, the serology evidence would likely have been viewed as determinative by the jurors since it provided apparently reliable scientific evidence to counter the expert forensic testimony regarding the pubic hair. Thus, absent the erroneous admission of the serology evidence under its false aura of reliability, it is reasonably probable that a verdict more favorable to the defense would have been returned. (*People v. Watson* (1956) 46 Cal.2d 818.)

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 foreign pubic hair, which excluded Lucas as the attacker, and the substantial impact of the error, the prosecution cannot meet its burden of proving the error harmless beyond a reasonable doubt. Therefore, the judgment should be reversed under the federal harmless-error standard.

Further, because any or all of the jurors could have relied on Swanke to convict in Santiago and/or Jacobs, the error was also prejudicial as to those counts. In fact, even if the error was not sufficiently prejudicial to require reversal of the Swanke charges it was still prejudicial as to Santiago and Jacobs. This is so because, without the serology evidence, the probative value and weight of the evidence would have been reduced thus limiting its ability to tip the balance in favor of conviction in the Santiago and Jacobs cases.

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.)

ARGUMENT 4.4

KELLY VIOLATES THE FEDERAL CONSTITUTION TO THE EXTENT THAT THE JUDGE HAS NO DISCRETION TO CONSIDER IMPORTANT FACTORS RELEVANT TO RELIABILITY

A. Introduction

For decades, the federal courts followed *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013. *Frye* made the admissibility of scientific expert opinion testimony entirely dependent on whether or not the technique used by the expert was "generally accepted" as reliable in the relevant scientific community. However, in *Daubert v. Merrell Dow* (1993) 509 U.S. 579 the United States Supreme Court held that the reliability of expert testimony cannot be accurately evaluated unless the trial judge has the duty and power to independently assess reliability. Under *Daubert* the judge is an evidentiary gatekeeper who has discretion to consider all the relevant considerations, including acceptance in the scientific community, to fulfill the judge's gatekeeper responsibility.

As a matter of state law the California Supreme Court has held that the *Frye* (*Kelly*) test should be retained in California. (*People v. Leahy* (1994) 8 Cal.4th 587.) However, the *Kelly* procedures employed in California violate the Due Process Clause of the federal constitution because the defense is precluded from presenting, and the judge from considering, any in limine evidence of unreliability other than general acceptance in the scientific community. This violates due process by:

1) denying the accused a full and fair hearing on the admissibility of the evidence;

2) precluding the trial judge from independently evaluating the reliability of the evidence by making community acceptance, rather than judicial discretion, the sole and exclusive measure of reliability, and;

3) allowing the jurors to consider objectively unreliable expert opinion testimony.

B. The *Frye* Test Is Unconstitutional Because It Undermines The Trial Judge's Gate Keeping Authority And Bars Relevant Evidence At The In Limine Hearing

As this Court has explained, the question of reliability, in real terms, is not at issue in a *Kelly* hearing:

> Under the *Kelly* test, the admissibility of evidence obtained by use of a scientific technique does not depend upon proof to the satisfaction of a court that the technique is scientifically reliable or valid. (*People v. Bolden* (2002) 29 Cal.4th 515, 546; see also *People v. Soto* (1999) 21 Cal.4th 512, 519.)

Hence, the trial judge has neither the duty nor the power to consider any evidence that does not bear on the community acceptance issue. In other words, the determination of "community acceptance" conclusively resolves all reliability issues both as to the technique itself (Prong 1 of *Kelly*). Unlike most other evidentiary determinations – which enable and require the judge to make the prerequisite preliminary findings for admission of evidence (see generally Evidence Code sections 403, 405) – in the case of expert opinion evidence on novel scientific matters, it is the scientific community that makes the required preliminary findings.

Because absolute reliance on the scientific community removes the judge from his or her traditional gatekeeper role, and precludes consideration of other factors which are indisputably relevant to the reliability of the

evidence, the United States Supreme Court has rejected the *Frye* test as inadequate. (*Daubert v. Merrell Dow*, *supra,* 509 U.S. 579*; Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137.) Under the federal rules of evidence the "overarching subject is the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." (*Daubert*, *supra*, 509 U.S. at 594-95.) *Daubert* held that the *Frye* test fails to adequately implement this "overarching" objective of reliability because, due to its inflexibility, *Frye* is both underinclusive and overinclusive. It is under-inclusive because a technique which is decidedly reliable may be excluded simply because it is so new that there has not been enough time for it to become generally accepted by the relevant scientific community. On the other hand, the *Frye* test is over-inclusive because a technique which is decidedly unreliable may be admitted simply because the evidence of its unreliability is too new to have overcome the inertia of consensus acceptance. It is a fundamental truth that human knowledge is in a continual state of evolution. "Scientific conclusions are subject to perpetual revision." (*Daubert*, *supra*, 509 U.S. at 597.)

Hence, the high court has concluded that exclusive reliance on "community acceptance" is an impediment to an accurate assessment of reliability:

> It might not be surprising in a particular case, for example, that a claim made by a scientific witness has never been the subject of peer review, for the particular application at issue may never previously have interested any scientist. Nor, on the other hand, does the presence of *Daubert*'s general acceptance factor help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy. (*Kumho*, *supra*, 526 U.S. at 151.)

Thus, the premise of *Daubert* and *Kumho* is that the trial judge "must have considerable leeway" to consider any and all factors including, but not limited to, "community acceptance." (*Kumho*, *supra*, 526 U.S. at 152.) "Too much depends upon the particular circumstances of the particular case at issue." (*Id.* at 150.) "[W]idespread acceptance can be an important factor. . . ." (*Daubert*, *supra*, 509 U.S. at 594.) But, the inquiry should be "a flexible one" if the objective of ensuring reliability is to be met. (*Ibid.*)

Nor can it be reasonably disputed that the *Daubert* factors, such as testability, peer review and error rates, are in fact material and relevant to the issue of reliability.

Thus, evidence that directly bears on the reliability of the evidence may simply be inadmissible at a *Kelly* hearing. For example, recent research using DNA demonstrated that microscopic hair comparison matches made at the FBI were wrong in 9 out of 80 cases.[975] This evidence could be considered by a federal judge under the *Daubert* "error rate" factor, yet it would not even be relevant to a California judge under *Kelly*.

Hence, the *Kelly* test undermines the trial judge by allowing the admissibility determination to be conclusively controlled by the scientific community.

C. Admission Of Unreliable Evidence Violates The Federal Constitution

California's *Kelly* procedure violates the federal constitution for several

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[975] See Houck, M.M., Budowle, B., *Correlation of Microscopic and Mitochondrial DNA Hair Comparisons*, 47 Journal of Forensic Sciences 964, No. 5 (2002). Human hairs submitted to the FBI Laboratory for analysis between 1996 and 2000 were reviewed. Of 170 hair examinations, there were 80 microscopic associations; of these, nine were excluded by DNA.

reasons.

First, removal of the trial judge's traditional gate keeping function prescribed by the rules of evidence violates the fundamental due process underpinnings of the Fourteenth Amendment which require compliance with "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) A criminal defendant, or any other litigant for that matter, should have a due process right to adjudication of the reliability and admissibility of evidence under the full panoply of relevant evidentiary rules. By suspending those rules as to one particular kind of evidence, *Kelly* violates the Due Process Clause of the Fourteenth Amendment.

Second, by removing the judge as the gate keeper, in favor of the "scientific community," *Kelly* denies a criminal defendant his federal constitutional right (6th and 14th Amendments) to the active participation of a trial judge at all critical stages of the proceedings. (*Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117.)

Third, an unreliable verdict of conviction for any criminal offense violates the Sixth and Fourteenth Amendments of the federal constitution. 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; *Stovall v. Denno* (1967) 388 U.S. 293.)

Fourth, precluding the defense from challenging the actual reliability of the serology evidence, the *Kelly* rule violated Lucas' federal constitutional right to present a defense. The United States Supreme Court has again and again noted the "fundamental" or "essential" character of a defendant's right

both to present a defense, (*Crane v. Kentucky* (1986) 476 U.S. 683, 687; *California v. Trombetta* (1984) 467 U.S. 479, 485; *Webb v. Texas* (1972) 409 U.S. 95, 98; *Washington v. Texas* (1967) 388 U.S. 14, 19), and present witnesses as a part of that defense. (*Taylor v. Illinois* (1988) 484 U.S. 400, 408; *Rock v. Arkansas* (1987) 483 U.S. 44, 55; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294, 302; *Webb*, *supra*, 409 U.S. at 98; *Washington*, *supra*, 388 U.S. at 19.) The Court has variously stated that an accused's right to a defense and a right to present witnesses emanate from the Sixth Amendment (*Taylor*, *supra*, 484 U.S. at 409; *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 867) the Due Process Clause of the Fourteenth Amendment (*Rock*, *supra*, 483 U.S. at 51; *Trombetta*, *supra*, 467 U.S. at 485; *Chambers*, *supra*, 410 U.S. at 294; *Webb*, *supra*, 409 U.S. at 97; *In re Oliver* (1948) 333 U.S. 257), or both. (*Crane*, *supra*, 476 U.S. at 690; *Strickland v. Washington* (1984) 466 U.S. 668, 684-85; *Washington*, *supra*, 388 U.S. at 17-18.)

Finally, 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 determination of guilt, death eligibility and sentence in a capital case. (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.)

In this case, the application of the *Kelly* test and the resulting admission of the unreliable expert testimony based on the San Diego Sheriff's Office and SERI blood analysis testing deprived Lucas of a fair and reliable trial proceeding and violated his rights under the Sixth, Eighth and Fourteenth Amendments.

D. The Error Was Prejudicial

The serology evidence was erroneously admitted under a false aura of reliability in an evidentiary context where the jurors likely relied on it to convict Lucas in the Swanke case. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly*, *supra*, 17 Cal.3d at 31; see also *United States v. Hanna* (9th Cir. 2002) 293 F.3d 1080, 1087.)

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.)

Accordingly, the judgment should be reversed.

4 SWANKE CASE

ARGUMENT 4.5

CONDUCTING ELECTROPHORETIC TESTING WITHOUT NOTIFICATION OF DEFENSE COUNSEL VIOLATED LUCAS' CONSTITUTIONAL RIGHTS

A. Proceedings Below

1. Overview

On Sunday, December 16, 1984, Lucas was arrested on capital murder charges for the murder of Anne Swanke, Rhonda Strang, Amber Fisher, and the attempted murder of Jodie Santiago. Lucas was arraigned on December 19, 1984. (CR 73093.) Attorney G. Anthony Gilham represented Lucas on the charges.

Following Lucas' arrest extensive blood testing was conducted without notice to Lucas or his counsel.

The defense sought exclusion of all electrophoretic results conducted after December 16, 1984, based on the Sixth Amendment rights to counsel and confrontation. (RTH 11014; CT 12369-86.) Judge Hammes denied the request to exclude the evidence stating, "I do not find under the applicable case law that that stage is a critical stage in the proceedings requiring counsel as a lineup would require counsel." (RTH 26433; CT 5234.)

2. Electrophoretic Blood Testing Was Conducted

Marilyn Fink, a technician for the San Diego County Sheriff's Department, ran electrophoretic tests on bloodstains related to the crimes charged in CR 73093. Fink conducted electrophoretic tests on December 17, 1984 (RTH 11976; 11930), December 18 (RTH 11936), December 19 (RTH 11961), December 20, 21 (RTH 11972), December 26 (RTH 11976),

December 27 (RTH 11984-85), and January 9, 1985. (RTH 11897.)

Brian Wraxall, a forensic serologist who owned the Serological Research Institute (SERI), was hired by the San Diego County District Attorney's office to conduct further electrophoretic analysis of evidentiary bloodstain materials. Mr. Wraxall stated that the first time he received any evidence was on December 28, 1984. (RTH 7553.) Those items included whole blood samples and dried stains from Jodie Santiago (RTH 7553), Anne Swanke (RTH 7554), and David Lucas. (RTH 7554.) In addition, Mr. Wraxall received "a stain from a sheepskin seat cover together with a control from the sheepskin seat cover." (RTH 7554.)

SERI conducted testing on December 31, 1984, January 2, 1985 (RTH 7650-51), January 3 (RTH 10086), January 4 (RTH 10086), January 24 (RTH 9049-50), January 25 (RTH 10091), January 28 (RTH 9069-71), January 29 (RTH 9090-93), and January 30, 1985. (RTH 8387-8401; 8816.) Additional testing took place on February 1, 1985. (RTH 8978-79.)

3. The Electrophoretic Analysis Was Subjective

See § 4.2(A)(8)(c)(iv), pp. 1094-95 above, incorporated herein.

4. The Electrophoretic Gels Were Not Preserved

The starch gels used by SERI could have been preserved but it was very inconvenient to do so. (RTH 9735-38.)[976] Therefore, although some gels were preserved (see e.g., RTH 10093; 10106), it was not SERI's policy to preserve the gels. (See RTH 9946-50; 16270-71.)

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[976] For this reason these starch gels were characterized as archaic by Dr. Grunbaum. (RTH 19880; 19884; 19911.) At the time other gel materials were available which could have been easily preserved. (RTH 9225-29; 10079-80.)

5. Photography Did Not Adequately Preserve The Results

The prosecution was willing to stipulate that, "photographs don't always get exactly what's on the gel. They aren't the perfect answer to preservation." (RTH 10784.)

Marilyn Fink, who was trained at the SERI and the FBI labs, testified that she would not call an electrophoretic run from a photograph. (RTH 12084.) Any calls she made were from her own observations of the actual plate. (RTH 12084.) She consistently testified that she would not make a call strictly from a photograph. (RTH 11983-84.) Fink further testified that within the group of individuals with whom she was familiar, and who engaged in electrophoretic evaluation of dried evidentiary bloodstains, there was a consensus that one should not make electrophoretic calls from photographs. (RTH 11984.)

According to Mark Stolorow, an electrophoresis expert, the FBI laboratory does not photograph electrophoretic gels. (RTH 10796.) While Stolorow could not give names of other laboratories which do not photograph electrophoretic gels, he did state that based on discussions with other forensic scientists at regional meetings or conferences involving a discussion of this issue, he became aware that other laboratories do not photograph. (RTH 10797.) According to Stolorow, "there will be things that you can see with the naked eye that are not depicted in . . . a photograph." (RTH 10790-95.) For this reason, photographs cannot replace the actual gel. (RTH 10769.) While photographs may be helpful, they cannot act as a substitute for the eyes of the analyst in terms of looking at a result on a gel. (RTH 10769-70.)

Brian Wraxall, the founder of SERI, testified that while use of photography is accepted in the forensic serology community, photography is "mainly just a record of the run, for refreshing my memory in terms of later

testimony, later review, if necessary." (RTH 12680.) All the calls that Wraxall made were from the gel itself, as opposed to photographs. (RTH 12680.)

If a defense expert was present when SERI was conducting electrophoretic tests, he or she would be given an opportunity to read the electrophoretic plate and make his or her own observations of the results. The defense expert would be handed the plate with the protocol and they would make their observations of the results. (RTH 7496-97.)

According to another expert, Dr. Sensabaugh, a majority of labs photographed their electrophoretic runs, although there were some notable exceptions. (RTH 9741.) The FBI laboratory did not photograph its electrophoretic plates. (RTH 9742.)

According to Dr. Sensabaugh, the role of photographs was for "quality assurance" and teaching. (RTH 9356-57.)

Neither Lucas nor his counsel were notified of the electrophoretic or blood testing. Accordingly, the defense neither had its own experts present nor waived such presence. (CT 12374.)

B. The Constitutional Rights To Counsel And Confrontation Require The Prosecution To Notify Defense Counsel Before Conducting Blood Testing Which Cannot Be Preserved

The right to counsel under the Sixth Amendment to the United States Constitution encompasses counsel's assistance whenever necessary to assure a meaningful defense. (*United States v. Wade* (1967) 388 U.S. 218, 224-25.) The Sixth Amendment mandates that "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (*Id.* at 226; see also *Coleman v. Alabama*

(1970) 399 U.S. 1.) A defendant requires the guiding hand of counsel at every step in the proceedings against him and this constitutional principle is not limited to the presence of counsel at trial. (*Id.* at 7.) Article I, § 15 of the California Constitution, which also guarantees the right to counsel, may provide greater protection for the accused than the federal constitution. (*People v. Bustamonte* (1981) 30 Cal.3d 88, 99-100, 102; *People v. Rodriguez* (1981) 115 Cal.App.3d 1018, 1021-22.)

The question of whether electrophoretic testing is a "critical stage" to which the right to counsel applies depends on an analysis of "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." (*Coleman v. Alabama*, *supra*, 399 U.S. at 9; *United States v. Ash* (1973) 413 U.S. 300, 313 [whether defendant requires aid in coping with legal problems or assistance in meeting his adversary]; *Escobedo v. Illinois* (1964) 378 U.S. 478, 486 [stage where legal aid and advice is critical to individual].) For example, the Sixth Amendment requires that defense counsel receive notice of any intended live lineup identification process contemplated by the prosecution. (See *Gilbert v. California* (1967) 388 U.S. 263, 272; see also *People v. Bustamonte*, *supra*.)

The same considerations which require the presence of counsel at a pretrial lineup also required counsel to be present during the electrophoretic testing in the present case. Due to the nature of the techniques used, the defense could not adequately confront electrophoretic results after the testing has been completed because:

1. The initial reading and interpretation of the results was subjective.
2. The gels which showed the testing results were not preserved.
3. Photography was insufficient to fully preserve the testing results.

Accordingly, because a defense expert was not present during the testing, the defense could not adequately confront the evidence at the *Kelly* hearing and at trial.

Further, because Lucas was arbitrarily denied his state created right to assistance of counsel under Article I, § 15 of the California Constitution, 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.)

C. The Judgment Should Be Reversed

Denial of counsel at a crucial stage of the proceedings is reversible error per se. (See *Johnson v. United States* (1997) 520 U.S. 461, 469; see also *United States v. Cronic* (1984) 466 U.S. 648, 659; *Mempa v. Rhay* (1967) 389 U.S. 128, 134.) Therefore, the Swanke judgment should be reversed. Moreover, because the Swanke charge was used to convict in the Santiago and Jacobs cases those convictions, as well as the death judgment, should also be reversed.

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.)

4 SWANKE CASE

4.6 SWANKE: NON-*KELLY* EVIDENTIARY ISSUES

ARGUMENT 4.6.1

THE JUDGE UNDERMINED THE DEFENSE THEORY OF THIRD PARTY GUILT BY EXCLUDING EVIDENCE THAT ANNE SWANKE WAS AFRAID OF HER FORMER BOYFRIEND, JIM CAPASSO, AND THAT CAPASSO ACTED SUSPICIOUSLY AND FURTIVELY AFTER SWANKE'S DISAPPEARANCE

A. Proceedings Below

The defense theory in Swanke was third party guilt based on the unexplained presence of pubic hairs which did not match Lucas, Swanke or her current boyfriend, Greg Oberle. (See § 4.2(B)(2)(d), pp. 1116-17 above, incorporated herein.)

In support of this theory the defense sought to present evidence that:

1. After Swanke broke up with her former boyfriend, Jim Capasso, he made constant attempts to contact her and she was afraid of him. (RTT 4436.)

2. At 7:00 a.m. on the morning after Swanke's disappearance (November 20, 1984), Capasso arrived unannounced at the Swanke family's home. Capasso was wearing dark sunglasses and appeared very "nervous" and "fidgety." (RTT 4436.)

3. He appeared at the Swanke house again at 7:00 p.m. that evening. His demeanor was very unusual and he wouldn't "look anyone in the eye." (RTT 4436.)

4. Anne Swanke was receiving crank phone calls at the time of the murder. (RTT 4436; 4446.)

The judge erroneously excluded all of the above evidence under Evidence Code § 352 and because "Mr. Capasso would not qualify as a third

party suspect." (RTT 4437; 4468.)

B. The Error Violated State Law And The Federal Constitution

It is well established that the defendant may rely on the theory that a third party committed the charged offense, also known as "third party culpability evidence." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1017; *People v. Hall* (1986) 41 Cal.3d 826, 833.) Therefore, the exclusion of the Capasso evidence was error under California law (see e.g., California Constitution, Art. I, § 28(d)); *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1442) and the federal constitution.

"The fundamental standards of relevancy . . . require the admission of testimony which tends to prove that a person other than the defendant committed the crime that is charged." (*U.S. v. Crosby* (9th Cir. 1996) 75 F.3d 1343, 1347; see also *U.S. v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1023.)

"Even if the defense theory is purely speculative . . . the evidence would be relevant. In the past, our decisions have been guided by the words of Professor Wigmore: [I]f the evidence [that someone else committed the crime] is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt.' [Citations.]" (*U.S. v. Vallejo* (9th Cir. 2001) 237 F.3d 1008, 1023.)

"Whether rooted directly in the Due Process Clause of The Fourteenth Amendment, (*Chambers v. Mississippi* [(1973) 410 U.S. 284], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, (*Washington v. Texas*, 388 U.S. 14, 23 (1967) *Davis v. Alaska*, 415 U.S. 308 (1974)), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' (*California v. Trombetta* (1984) 467 U.S. 479 at 485; cf. *Strickland v. Washington*, 466 U.S. 668, 684-685

(1984) ['The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.'] We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. [Citations.]" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.)

"As we noted just last Term, '[o]ur cases establish, *at a minimum,* that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the *right to put before a jury evidence that might influence the determination of guilt.*' *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, e.g., *Chambers v. Mississippi*, *supra*, 410 U.S. 284, 302. Indeed, this right is an essential attribute of the adversary system itself.

"'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.' (*United States v. Nixon* 418 U.S. 683, 709 (1974).)

"The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact." (*Taylor v. Illinois*

(1988) 485 U.S. 983, 408-409 [emphasis added].)

"The right of the defendant to present evidence 'stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States.' (*Washington v. Texas*, *supra*, 388 U.S. 14), at 18." (*Id.*, at 409.)

Moreover, this Court has interpreted *Crane v. Kentucky*, *supra*, 476 U.S. 683, 690, to find a Due Process or Sixth Amendment violation when the trial court erroneously excludes evidence "central to the defendant's claim of innocence."' (*People v. Roberts* (1992) 2 Cal.4th 271, 302.)

Further, because exclusion of the evidence arbitrarily violated Lucas' state created rights, 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.)

Finally, even if the evidence was correctly excluded under California law, it was nonetheless admissible under the federal constitution. The United States Supreme Court has consistently held that domestic rules of evidence may not be arbitrarily and unjustifiably invoked to preclude a criminal defendant's right to present a 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; see also Volume 3, § 3.6.2, pp. 951-56, incorporated herein.)

C. The Error Was Prejudicial

In the Swanke charge the jury was required to balance conflicting evidence. The prosecution sought to connect Lucas to the crime with the testimony of Leyva, who saw a vehicle with a license plate similar to Lucas'

at the scene of the abduction, the scratches on Lucas' face and serological testimony. However, none of this evidence was conclusive. For example, while Leyva was not certain whether it was a car or a truck, he thought the two vehicles were approximately the same size – which doesn't match up with Lucas' vehicle, which was substantially larger than Swanke's car. Moreover, the presence on the body of foreign pubic hairs not belonging to Swanke, Lucas or Swanke's boyfriend tended to exclude Lucas as the attacker.

Hence, the erroneous exclusion of the third party guilt evidence was prejudicial and the judgement should be reversed under both the *Watson* and *Chapman* standard.

Moreover, because the Swanke charge was used to convict in the Santiago and Jacobs cases those convictions, as well as the death judgment, should also be reversed.

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. (See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein.) Therefore, any substantial error at the guilt trial should be considered prejudicial as to the penalty because the primary defense mitigating theory at penalty was lingering doubt. (See Volume 1, § 1.4.2(H), p. 48, incorporated herein.)

4 SWANKE CASE

4.6 SWANKE: NON-*KELLY* EVIDENTIARY ISSUES

ARGUMENT 4.6.2

ADMISSION OF PROSECUTION EVIDENCE: SHANNON LUCAS STATEMENTS TO THE POLICE IDENTIFYING A DOG CHAIN

A. Proceedings Below

On December 16, 1984, following David Lucas' arrest that morning, Lucas' wife, Shannon Lucas, underwent a lengthy, taped interrogation by San Diego County Detectives Robert Fullmer and Craig Henderson.[977] After intensive questioning regarding Shannon's relationship with David, the detectives questioned her about her pets. The detectives showed her the dog chain which had been found around the neck of Anne Swanke. (See Court's Exhibit 6, p. 18-19.)[978] Shannon responded the chain was "one of Duke's." (RTT 4737.) David and Shannon had a dog named "Duke." (RTT 6955-57.) However, later in the interview she said the dog chain belonged to her dog, "Amber," and that she had seen similar chains at a store. (See Court's Exhibit 6, p. 19; 29.)

The prosecution attempted to call Shannon as a witness at an in limine

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[977] The interview was transcribed. (See Court's Exhibit 6.)

[978] There were actually two different transcripts of the Shannon Lucas interview prepared. Court's Exhibit 6 was transcribed by staff at the District Attorney's office and bore the discovery numbers 000429-000467. The second transcript, In Limine Exhibit 103, was transcribed by staff at the Sheriff's Office and bore the discover numbers 001029-111074. (RTH 5801-02.) Henderson authenticated Exhibit 103 and it was the transcript later compared to the audio tape of the interview, and corrected. (RTH 5807-08; 6157-58.)

hearing but she asserted her marital privilege. (PHT (73093, 2/20/85) 1203-04; RTH 35222.)[979]

Prior to trial, Shannon died unexpectedly.[980] The prosecution sought to bring in Shannon's statement to the police regarding the chain, but the judge ruled that it should be excluded. (RTH 6759-60.) However, the judge later reversed her ruling and allowed the statements into evidence. (RTH 35222; 35224.)[981]

This ruling allowing the prosecution to introduce Shannon Lucas' statements to the police was erroneous. First, the statements did not qualify under the "spontaneous declaration" exception to the hearsay rule under *Catlin v. Union Oil Co.* (1916) 31 Cal.App. 597, because the identification of the dog chain was only Shannon's opinion. Second, admission of the statements violated the Confrontation Clause of the Sixth Amendment since appellant was denied opportunity to cross-examine and confront the reliability

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[979] During her initial interview Shannon told the police she would testify. (Court's Exhibit 6, p. 35.)

[980] Detective Henderson testified that Shannon Lucas died in May, 1987. (RTT 4832-33.)

[981] A one-page transcript of the allowed portion of Shannon Lucas' statement was also provided to the jury in Trial Exhibit 212. (RTT 4734-35.) It read as follows:

> (Background noise) That's um one of Duke's, we had the kids used ta, my son and my sister's, Dotty used ta play with that and then half choked uh, Duke to death.

However, the judge admonished the jury that the transcription of the tape recording was not a certified portion of the reporter's transcript and was not an accurate or verbatim transcript of the tape recording, as some portions were unintelligible. (RTT 4737.)

of Shannon's testimony at trial. Third, admission of the statement violated the marital privilege under *People v. Chadwick* (1906) 4 Cal.App. 63, 72. Fourth, the statements should have been excluded under Evidence Code § 352.

B. The Judge's Original Ruling Denied Admission Of Shannon's Statements

The prosecution moved to admit Shannon's hearsay statement regarding the dog chain on the basis that it was an "excited utterance" under the "spontaneous declaration" exception to the hearsay rule per Evidence Code § 1240. (CT 10273; RTH 5785; 6739-43.)

The defense opposed admission of the statements because they reflected Shannon's deliberate opinion and, therefore, did not fall under the "spontaneous declaration" exception to the hearsay rule. (CT 25960; 25968.) It was also argued that the statements should be barred under the marital privilege (Evidence Code § 970), and because their probative value was outweighed by the prejudicial impact. (Evidence Code § 352.) (RTH 5788-90; 6745.)

On April 30, 1987, the judge ruled Shannon Lucas' statement concerning the dog chain was inadmissible hearsay. (RTH 6759-6760.) The court found her statements were not "spontaneous declarations" since they were a mere "description of an opinion . . . the event or condition that's being described is the internal opinion of Mrs. [Shannon] Lucas." (RTH 6759.) The judge further found, pursuant to Evidence Code § 352, that the probative value of the opinion testimony outweighed its "prejudicial effect" and the testimony was of "misleading quality" because it "implies a certainty and the ability to recognize something unique that is not there." (RTH 6760.)

The court reasoned:

> It is not the kind of description of seeing someone running across the street, for instance, that is contemplated by the spontaneous declaration exception . . . So, for those reasons the statement would be inadmissible since the probative value would be outweighed under 352. (RTH 6760.)

C. The Judge Reversed Her Decision And Ruled The Statements Admissible

On December 1, 1988, the judge reversed her original decision and ruled that Shannon's statements fell under the "spontaneous declaration" exception to the hearsay rule asserting that the statements were a spontaneous reaction to an "exciting event." The judge stated:

> The fact that there is a chain, the fact that it's a dog's chain, the fact that it's Duke's chain, the fact that there is a chain on the table, none of that is an exciting event. What we know about this that causes the excitement is the connection between the arrest, the murder, and the chain being something that she and Mr. Lucas possessed for their dog, Duke.
>
> So that is the implied statement. Now, once I look at that implied statement, now I have, in fact, a description of an act, occurrence, or an event. So now I am away from a simple flat identification of something. (RTH 35219.)

Hence, the judge concluded that the statements were probative and admissible:

> Because, really, the probative value lies in 'This is Duke's. I see Duke's chain,' as opposed to being 'There is Duke's chain, which is now in your possession,' which is the description of the exciting event.
>
> . . .
>
> The factor that makes the spontaneous declaration admissible is the fact that there is an exciting event which prompts the lack of reflection and spontaneity of the declaring. The declarant then makes a declaration that describes or talks about, explains the event itself, and then it doesn't matter

whether nothing among that statement is probative except for one little portion which, in itself, is something like an identification; that also will come in. (RTH 35220-21.)

The judge further stated she had been "overly concerned" about the inability of defendant to cross-examine his wife at trial, and ruled: (1) the marital privilege did not preclude admission of the hearsay statements, citing *First National Bank v. De Moulin* (1922) 56 Cal.App. 313; and (2) the spontaneous declarations were admissible even though appellant was unable to confront and cross-examine his wife about them, citing *People v. Hughey* (1987) 194 Cal.App.3d 1383.

D. Shannon Lucas' Statements Were Not An Excited Utterance Under The Hearsay Rule

1. The Judge Erroneously Ruled That Seeing The Dog Chain Was An "Exciting Event"

The judge ruled that Shannon's statements were spontaneous reactions to seeing the dog chain, an event the court characterized as "exciting" from an "implied" connection Shannon allegedly made in her mind between the dog chain and appellant's arrest for murder. (RTH 35219.) This ruling was erroneous. The record does not support the judge's conclusion that Shannon made the "connection of the chain, the arrest, the murder" as an "exciting event." When making the statement, Shannon was unaware the chain was allegedly used in the murder. (See Court's Exhibit 6, p. 1; CT 25973-74.)

2. Shannon's Statement About The Dog Chain Was An Inadmissible Hearsay Opinion

Even if the trial court correctly characterized Shannon's viewing of the dog chain as an "exciting event," her statements were still inadmissible hearsay because the statements were an expression of her belief or opinion. (See *Catlin*

v. Union Oil Co., *supra*, 31 Cal.App. 597.)[982]

In *Catlin*, defendant Union Oil Co. sold oil consisting of gasoline or lamp oil, or a mixture of the two, to a buyer to burn in his lamp. The buyer's lamp exploded while he was lighting it and he caught fire. He stated to others extinguishing the fire that gasoline oil caused the explosion. (*Id.* at 597-602.) The buyer died and his family sued defendant for wrongful death.

The trial judge admitted the deceased's statements that the gasoline caused the explosion and fire. However, the Court of Appeal held that the statement was "purely the opinion and conclusion of the deceased" and, therefore, was inadmissible hearsay. (*Id.*, at 610.)

Hence, *Catlin* should control the present case. In *Catlin*, the Court of Appeal excluded statements made under life-and-death circumstances on the ground that they were only declarant's "belief or opinion" that the explosion was caused by gasoline. Likewise, the statements Shannon Lucas made when the detectives showed her the dog chain should have been excluded since they were her belief and opinion that the dog chain belonged to their dog.[983]

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[982] The fact that her statements were an opinion is supported by her confusion about which dog wore the chain: she first stated it belonged to her dog, "Duke" but later on, she questioned if the chain belonged to "Amber." (Court's Exhibit 6, p. 19.) She also appeared confused as to whether she had seen similar chains: she stated she was positive the chain was "Amber's" but also stated she had seen the same type of chains "in stores." (Court's Exhibit 6, p. 29.)

[983] Evidence Code §1238, defining prior identification hearsay exception, supports appellant's argument that identification constitutes "an opinion." Section 1238 applies to a hearsay statement a declarant makes identifying a party or another as participating in a crime. Under §1238, the hearsay declarant must testify at trial "that he made the identification and that it was a true reflection of his opinion at that time." [Emphasis added.]

(continued...)

3. Admission Of Shannon's Hearsay Statements Violated David Lucas' Confrontation Rights

The "primary object" of the Confrontation Clause of the Sixth Amendment is the right of the accused to compel the witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." (*Mattox v. United States* (1895) 156 U.S. 237, 242-243; see also *California v. Green* (1970) 399 U.S. 149, 174-83.)[984]

In the present case the judge's admission of Shannon Lucas' statements with no opportunity to confront and cross-examine those statements in front of the jury violated appellant's rights under the Sixth Amendment Confrontation Clause. David Lucas was denied the right to have the jury judge Shannon Lucas' demeanor so as to reliably evaluate what weight, if any, should be given to her opinion.

Judge Hammes' reliance on *People v. Hughey, supra,* 194 Cal.App.3d

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[983](...continued)

David Lucas is entitled to the same protection under §1238 and *Catlin*. Shannon Lucas' alleged identification of the dog chain was merely her opinion. Moreover, the reliability of her opinion was highly questionable in that she changed her opinion as to which dog the chain allegedly belonged, stated she had seen similar chains "in stores" and was unable to give unique identifying characteristics of the chain to prove the chain belonged to her dog. (See Court Exhibit 6, p. 19; 29.)

[984] The court in *United States v. Owens* (1988) 484 U.S. 554, 557, relying on *Mattox*, reaffirmed the Sixth Amendment "has long been read as securing an adequate opportunity to cross-examine adverse witnesses," and the Confrontation Clause guarantees the accused "the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination [citation omitted]) the very fact that he has a bad memory." (*Id.*, at 559.)

1383 to admit Shannon Lucas' statements was erroneous because *Hughey* did not consider the confrontation issue raised in the present case. (See *People v. Dillon* (1983) 34 Cal.3d 441 [cases are not authority for propositions not considered].)[985]

Additionally, *Hughey* is clearly distinguishable from the present case. In *Hughey*, the defendant did not call his wife at trial even though she was available. (*Hughey*, *supra*, 194 Cal.App.3d at 1393-94.) Therefore, the *Hughey* defendant was not denied the right to confront the hearsay declarant.[986] In the present case, by contrast, David Lucas never had an opportunity to examine his wife in court.

In sum, admission of Shannon Lucas' statements violated the

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[985] The Confrontation Clause issue was actually never raised during the *Hughey* trial. Therefore, the issue was waived on appeal. (*People v. Hughey*, *supra* 194 Cal.App.3d at 1388-1389.) Appellant tried to force the appellate to address the issue by arguing ineffective assistance of counsel. The appellate court refused to hear the argument since a petition for habeas corpus petition had not been filed, but found the failure to object to be a reasonable tactical decision. Therefore, any discussion of the merits of the Confrontation Clause issue in *Hughey* was dictum. (*Id.*, at 1389.)

[986] Evidence Code §1203 states an unavailable hearsay declarant is a witness against the accused when the prosecution seeks to introduce the declarant's statements: "The policy in favor of cross-examination that underlies the hearsay rule, therefore, indicates that the adverse party should be accorded the right to call the declarant of a statement received in evidence and to cross-examine him concerning the statement." (*Id.*, Law Revision Commission Comments.)

"Because a hearsay declarant is in practical effect a witness against the party against whom his hearsay statement is admitted, Section 1203 gives that party the right to call and cross-examination the hearsay declarant concerning the subject matter of the hearsay statement just as he has the right to cross-examine the witnesses who appear personally and testify against him at trial." (*Id.*, emphasis added.)

Confrontation Clause of the federal constitution. (6th and 14th Amendments; see also generally *Davis v. Alaska* (1974) 415 U.S. 308.)

4. Shannon's Statements Should Have Been Excluded Under The Marital Privilege

At the preliminary hearing, Shannon Lucas claimed her marital privilege not to testify against her husband, David Lucas. (PHT (73093, 2/20/85) 1203-04; RTH 35222.) However, Judge Hammes ruled the martial privilege inapplicable to admission of Shannon Lucas' hearsay statements. (RTH 35222.)

The judge cited *First National Bank v. De Moulin* (1922) 56 Cal.App. 313, 323 to support her interpretation of the marital privilege issue. (RTH 35217-19.)[987]

In *De Moulin*, both spouses were present at trial. By not objecting to

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[987] In *De Moulin*, plaintiff filed suit for stockholder liability against the De Moulins, husband and wife shareholders, to recover a debt incurred by the corporation. The spouses defended on the ground that the majority shareholder wife transferred the stock to a third party before the debt was incurred. Plaintiff argued the husband altered the books and that the transfer was fraudulent. (*First National Bank v. De Moulin*, *supra*, 56 Cal.App. at 315-317.) At trial, plaintiff called the husband as a witness who testified without objection. (*Id.*, at 318.) A letter written by the husband stating the wife did own the stock was admitted to impeach his testimony over objection on grounds of the marital privilege under Code of Civil Procedure §1881. (*Id.*, at 318-320.)

The Court of Appeal found the husband's statements in the letter "not admissible against [the wife] as evidence that she did in fact own 1,089 shares, or any number of shares, at the date when the letter was written; for, as to her, it would, if received to prove her ownership, be rank hearsay." (*Id.*, at 320.) The statement was admissible solely to impeach the husband's testimony and not as substantive evidence for the truth of the matter asserted in the letters. (*Id.*, at 321-322.)

the husband's competency, the wife was presumed to have given implied consent to the husband's testimony. (*Id.*, 322.)

Accordingly, *De Moulin* is distinguishable from the present case where David Lucas' wife was deceased and not present at trial. David Lucas did not consent, impliedly or otherwise, to admission of her extrajudicial hearsay statements.

People v. Chadwick (1906) 4 Cal.App. 63, upon which *De Moulin* relied, is similarly distinguishable from the present case. In *Chadwick* the husband was charged with perjury committed at his former trial for forgery. (*Id.* at 65.) The defense maintained the trial court "erred in permitting [the defendant's wife] to testify in behalf of the People without first obtaining the consent of the defendant." The Court of Appeal rejected the defense argument, concluding:

> The provisions of the code (Code Civ. Proc., § 1881(1); Penal Code § 1322) prohibiting a husband or a wife from being examined as a witness for or against the other, except with the consent of both, does not preclude the people, in a criminal proceeding against either of the spouses, from proving the statements or declarations of the other (if otherwise admissible) by the testimony of a witness who heard them. The code merely makes either spouse incompetent as a witness in an action or proceeding against the other, but does not render their statements elsewhere given privileged against being shown by competent testimony. (*Id.*, at 72.)

However, *Chadwick*, like *De Moulin*, did not discuss the confrontation principles set forth above. Moreover, unlike the present case, the *Chadwick* defendant had an opportunity to confront and cross-examine the hearsay declarant at trial.

In sum, neither *De Moulin* or *Chadwick* support the judge's ruling in the present case. On the other hand, Wigmore supports appellant's argument

the marital privilege was violated in its discussion of the admissibility of hearsay statements of one spouse against the other spouse:

> It can be argued that which is privileged is the testimonial utterance in any form, by the wife or husband, offered against the other. Hearsay statements - oral or documentary - are testimonial utterances. Hence, it would follow that they are equally privileged with testimony on the stand.
>
> The same result, to be sure, may be reached by another principle. For since the wife or husband is not ordinarily an agent for the other [citation omitted] the extrajudicial statements are mere hearsay assertions and therefore inadmissible.
>
> Whichever theory the judicial rulings may have in mind, it is usually held that the statements are inadmissible either when the spouse making them is a third person as to the litigation or when he or she is a party to the case. In the latter case they are receivable against the maker alone. (Wigmore, *Evidence In Trials at Common Law* (Vol. 6), revised Charborn, § 2232.)[988]

5. Admission Of The Entire Tape Under Evidence Code § 356 Did Not Justify The Confrontation Violation

The judge suggested that Shannon Lucas' statements were admissible because the defense would be allowed to present other portions of the tape under Evidence Code § 356. (RTH 35224.) However, § 356 did not remedy the confrontation violation that occurred in the present case.

The taped interrogation of Shannon Lucas revealed that she talked to the detectives before the taping began, and this pre-tape conversation was not recorded. These statements would have been directly relevant to satisfying the conditions of § 356, yet the defense had no opportunity to hear them. And,

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[988] But see 18 Hastings Law Journal 222 (1966) [arguing that revision of Evidence Code § 970 eliminated applicability of marital privilege to third party communications].)

if the detectives gave their version of the pre-taped statements, the defense would be precluded from impeaching their testimony since the hearsay declarant was dead. Therefore, § 356 did not justify denying Lucas his confrontation rights.

6. The Statements Should Have Been Excluded Under Evidence Code § 352

Even assuming Shannon Lucas' statements were technically admissible, they should have been excluded under Evidence Code § 352 because any probative value was outweighed by the prejudicial impact. (See generally *People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

A party is entitled to have evidence excluded under § 352:

> . . . [I]f the nature of the evidence is such that despite a cautionary instruction its limited probative value is substantially outweighed by the danger of undue prejudice from the jury's misuse thereof for an inadmissible purpose. (*People v. Green* (1980) 27 Cal.3d 1, 26.)[989]

In the present case, the statements were only minimally probative because of Shannon's confusion about the chain and the inability of Shannon or anyone else to positively identify the chain due to its generic nature. (See § 4.2(B)(2)(c), pp. 1115-16 above, incorporated herein.)

On the other hand, the statements were highly prejudicial due to the danger that the jury would accept Shannon's statements at face value and use them to connect appellant with the murder of Anne Swanke.

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[989] The trial judge's balancing ruling under § 352 should be on the record. (See *People v. Frank* (1985) 38 Cal.3d 711, 732; but see *People v. Triplett* (1993) 16 Cal.App.4th 624, 626-29 [ruling need not be expressly stated so long as the record establishes the court "understood and undertook" its weighing responsibilities].)

7. The Error Violated Lucas' Federal Constitutional Rights

As noted, admission of the evidence violated Lucas' right to confrontation. Also, given its unreliability and inflammatory nature, the evidence deprived Lucas of his Eighth and Fourteenth Amendment rights to fair and reliable guilt, death eligibility and sentencing determinations. (See *Beck v. Alabama* (1980) 447 U.S. 625, 627-46; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 422; *Burger v. Kemp* (1987) 483 U.S. 776, 785; *Gilmore v. Taylor* (1993) 508 U.S. 333, 342; *White v. Illinois* (1992) 502 U.S. 346, 363-64; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.)

Further, because Lucas was arbitrarily denied his state created right to exclusion of evidence under California law, including Evidence Code sections 352, 356, 970, 1203, Civil Code of Procedure § 1881 and Penal Code § 1322, 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.)

8. The Error Was Prejudicial

In the Swanke charge the jury was required to balance conflicting evidence. The prosecution sought to connect Lucas to the crime with the testimony of Leyva, who saw a vehicle with a license plate similar to Lucas' at the scene of the abduction, the scratches on Lucas' face and serological testimony. However, none of this evidence was conclusive. For example, while Leyva was not certain whether it was a car or a truck, he thought the two vehicles were approximately the same size – which doesn't match up with Lucas' vehicle, which was substantially larger than Swanke's car. Moreover, the presence on the body of foreign pubic hairs not belonging to Lucas or Swanke's boyfriend tended to exclude Lucas as the attacker. (See §

4.2(B)(2)(d), pp. 1116-17 above, incorporated herein.)

Hence, the erroneous admission of Shannon's unreliable opinion about the dog chain, which the jury could improperly have accepted as face value, was prejudicial. For this reason, the judgement should be reversed under both the *Watson* and *Chapman* standard, either independently of cumulatively with any and all of the other errors which occurred in the trial.

Moreover, because the Swanke charge was used to convict in the Santiago and Jacobs cases those convictions, as well as the death judgment, should also be reversed.

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. (See Volume 7, § 7.5.1(J)(3)(a), pp. 1619-22, incorporated herein.) Therefore, any substantial error at the guilt trial should be considered prejudicial as to the penalty because the primary defense mitigating theory at penalty was lingering doubt. (See *People v. Robertson* (1982) 33 Cal.3d 21, 54.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

ARGUMENT 4.7.1

THE JACOBS CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SWANKE, 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 SWANKE MURDER

[The legal basis for this claim has already been briefed in Volume 2, § 2.3.2, pp. 213-23, incorporated herein. Here, in Volume 4, that claim is renewed as to the Swanke case and the previous briefing is fully incorporated herein by reference.]

A. Jacobs Should Not Have Been Cross-Admissible With Swanke

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 Swanke 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, § 2.3.2(F), pp. 217-19, incorporated herein.)

B. The Error Was Prejudicial As To Swanke

Joining the counts for trial and allowing the jurors to consider the Jacobs case on the issue of identity in Swanke 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. 293-300, incorporated herein, for a summary of the prosecutor's extensive closing argument reliance on the other crimes evidence.)

The error was prejudicial because a key piece of forensic evidence in the Swanke case excluded Lucas as the attacker. (See § 4.2(B)(2)(d), pp. 1116-17 above, incorporated herein.) Therefore, the error in allowing the jurors to consider the Jacobs evidence on the issue of identity in Swanke was prejudicial 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 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 Santiago

The error was prejudicial as to the Jacobs and Santiago cases because the jurors were permitted and encouraged to consider each charge to corroborate and bolster the other charges. (See Volume 2, § 2.3.5.1(H), pp. 293-300, incorporated herein.) Hence, because the error improperly permitted the jurors to convict on the Swanke charges, it was also prejudicial as to the Jacobs and Santiago charges because the jurors could have relied on Swanke to convict in Santiago and/or Jacobs.

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.[990] 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.[991] The error was particularly prejudicial as to the penalty trial since the Swanke 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 "of which the defendant was convicted in the present proceeding. . . ." (CT 14373.)

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[990] 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.].

[991] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing state and federal standards of prejudice at penalty].

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

ARGUMENT 4.7.2

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

[The legal basis for this claim has already been briefed in Volume 3, § 3.8.2, pp. 1013-02, incorporated herein. Here, in Volume 4, that claim is renewed as to the Swanke case and the previous briefing is fully incorporated herein by reference.]

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 Swanke and Santiago 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.

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.

This error violated state law and the federal constitution. (See Volume 2, § 2.3.1(H), pp. 207-08, incorporated herein.)

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

ARGUMENT 4.7.3

THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN SWANKE, 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 SWANKE MURDER

[The legal basis for this claim has already been briefed in Volume 2, § 2.3.3, pp. 224-29, incorporated herein. Here, in Volume 4, that claim is renewed as to the Swanke case 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 was potentially prejudicial as to the charges for which Lucas was convicted. 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 Swanke 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 Swanke 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.)

This error violated state law and the federal constitution. (See Volume 2, § 2.3.1(H), pp. 207-08, incorporated herein.)

The error in joining the counts and allowing the jurors to consider the Strang/Fisher cases as to identity in Swanke was highly prejudicial. Therefore, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 4.7.4.1

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. 231-36, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, the claim is renewed as to the Swanke case 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 Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 4.7.4.2

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 4, the claim is renewed as to the Swanke case 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.

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the

Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 4.7.4.3

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 4 the claim is renewed as to the Swanke case 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 erroneous other crimes instruction was a substantial error because it improperly allowed the jurors to rely on the other charges to convict Lucas of the Swanke charges. Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.)

Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 4.7.4.4

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 4, the claim is renewed as to the Swanke case 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 Swanke charges without conveying the relevance of that evidence as a potential basis for acquittal. Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges

those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 4.7.4.5

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 4, the claim is renewed as to the Swanke case 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 Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke

charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.4 THE CROSS-ADMISSIBILITY INSTRUCTIONS WERE ERRONEOUS AND PREJUDICIAL

ARGUMENT 4.7.4.6

THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT[992]

[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 4, the claim is renewed as to the Swanke case 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 Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the

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[992] *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 Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 4.7.5.1

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

[This claim is fully briefed in Volume 2, § 2.3.5.1, pp. 277-301, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, the claim is renewed as to the Swanke case 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 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.[993]

In support of its motion for cross-admissibility and consolidation the prosecution presented much of its case-in-chief evidence. (See Volume 2, §

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[993] Even though the jurors rejected the prosecution's theory that the same person committed all of the charged offenses, they still likely relied on the other charges to convict Lucas of the Jacobs, Swanke and Santiago charges. (See Volume 2, § 2.3.5.1(H), pp. 293-300, incorporated herein.)

2.3.5.1(C), pp. 279-80, incorporated herein.) However, Judge Hammes erroneously denied the defense request to present evidence in opposition to cross-admissibility.

Because the cross-admissibility ruling severely prejudiced Lucas, the Santiago, Jacobs and Swanke convictions, as well as the death sentence, should be reversed. (See § 4.7.1(B), (C) and (D), pp. 1179-80 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.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 4.7.5.2

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. 301-07, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, the claim is renewed as to the Swanke case 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 § 4.7.1(B), (C) and (D), pp. 1179-80 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.)

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 4.7.5.3

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 4, the claim is renewed as to the Swanke case 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 was prejudicial error.

Because the cross-admissibility ruling severely prejudiced Lucas, the Santiago, Jacobs and Swanke convictions as well as the death sentence should be reversed. (See § 4.7.1(B), (C) and (D), pp. 1179-80 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.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 4.7.5.4

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 4, the claim is renewed as to the Swanke case 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.)

Moreover, because the error was substantial the Santiago, Jacobs and

Swanke convictions, as well as the death sentence, should be reversed under both the state and federal standards of prejudice. (See § 4.7.1(B), (C) and (D), pp. 1179-80 above, incorporated herein.) Alternatively, the matter should be remanded for new hearings before a different judge. (See Volume 2, § 2.3.5.4, pp. 312-20, incorporated herein.)

4 SWANKE CASE

4.7 SWANKE: CROSS-ADMISSIBILITY ISSUES

4.7.5 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION

ARGUMENT 4.7.5.5

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 4, the claim is renewed as to the Swanke case 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. 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 § 4.7.1(B), (C) and (D), pp. 1179-80 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.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.1

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 Swanke case 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 Swanke convictions should be reversed under the state and federal harmless-error standards. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also

prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.2

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. 540-52, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, the claim is renewed as to the Swanke case 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.

This error violated state law and the federal constitution. (See Volume 2, § 2.9.2(C), pp. 539-45, incorporated herein.)

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death

judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.3

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 4, the claim is renewed as to the Swanke case 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.

This error violated state law and the federal constitution. (See Volume 2, § 2.9.5(D), pp. 566-68, incorporated herein.)

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.4

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 4, the claim is renewed as to the Swanke case 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 Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.5

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 4, the claim is renewed as to the Swanke case and the previous briefing in Volume 2 is fully incorporated herein by reference.]

This error violated state law and the federal constitution. (See Volume 2, § 2.9.7(E), pp. 576-78, incorporated herein.)

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.6

THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO 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 4, the claim is renewed as to the Swanke case and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Swanke charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.7

THE JUDGE ERRONEOUSLY DENIED THE DEFENSE REQUEST TO SPECIFY WHICH OPINION TESTIMONY WAS CIRCUMSTANTIAL EVIDENCE

[This claim is fully briefed in Volume 2, § 2.9.9, pp. 585-89, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, the claim is renewed as to the Swanke case and the previous briefing in Volume 2 is fully incorporated herein by reference.]

The crucial principles set forth in the circumstantial evidence instructions did not apply to direct evidence. (But see § 2.10.9, pp. 691-97 below, incorporated herein.) Hence, it was critical that the jurors correctly understand to which evidence the circumstantial evidence principles applied. With regard to opinion testimony this determination was particularly difficult and, therefore, the judge erred in refusing to instruct the jury on this point.

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.8

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. 590-99, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, the claim is renewed as to the Swanke case 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.

This error violated state law and the federal constitution. (See Volume 2, § 2.9.10(D), pp. 596-98, incorporated herein.)

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See

§ 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.9

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 4, the claim is renewed as to the Swanke case and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.10

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 4, the claim is renewed as to the Swanke case 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 under state law and the federal constitution.

Accordingly, the Swanke convictions should be reversed. (See 4, § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 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.

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.11

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 4, the claim is renewed as to the Swanke case 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 Swanke convictions should be reversed under both the state and federal harmless-error standards. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.8 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION

ARGUMENT 4.8.12

THE JUDGE FAILED TO FULLY AND CORRECTLY INSTRUCT ON THE DEFENSE THEORY OF THIRD PARTY GUILT

[The legal basis for this claim has already been briefed in Volume 2, § 2.8.3, pp. 514-24, incorporated herein. Here, in Volume 4, that claim is renewed and the briefing in Volume 2 is fully incorporated herein by reference.]

A. Introduction

The defense relied on third party guilt evidence in the Swanke case.[994]

Accordingly, the third party guilt instructions were critical. Special instruction was required both to adequately explain the defense theory and to relate that theory to the prosecution burden of proof. Without accurate and complete instruction the jurors' natural inclination would have been to improperly view the issue in terms of whether or not the defense had proven that someone else committed the Swanke murder. However, the third party guilt instruction given in the present case was insufficient to assure that the jury understood and properly applied the burden of proof to the third party guilt defense theory.

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[994]That a third party may have been responsible for Anne Swanke's murder was evidenced by the location and collection of foreign pubic hairs which were inconsistent with the hair of Swanke, her boyfriend and Lucas. (RTT 5154; 10720-32; see also § 4.6.1, pp. 1160-64 above [exclusion of victim's fear of former boyfriend and his suspicious behavior].)

B. Procedural Background

See Volume 2, § 2.8.3(B), pp. 514-15, incorporated herein.

C. Legal Necessity To Correctly Relate The Third Party Guilt Theory To The Presumption Of Innocence

See Volume 2, § 2.8.3(C), pp. 516-17, incorporated herein.

D. The Third Party Suspect Instruction Improperly Imposed The Burden On The Defense To "Raise" A Reasonable Doubt

See Volume 2, § 2.8.3(D), pp. 517-20, incorporated herein.

E. The Error Violated Lucas' Federal Constitutional Rights

See Volume 2, § 2.8.3(E), pp. 520-22, incorporated herein.

F. The Errors Were Prejudicial

The deficiencies in the third party guilt instructions were especially prejudicial in the present case because the other two defense theory instructions, alibi (CT 14312) and eyewitness identification (CT 14286) did not require Lucas to "raise" a reasonable doubt.[995]

Hence, the jurors would have reasonably inferred that a different standard applied to the third party guilt theory which required Lucas to "raise" a reasonable doubt.[996]

Additionally, other instructions further reinforced the burden shifting misconception by inaccurately suggesting that the jury must decide whether or not Lucas was innocent. (See Volume 2, § 2.10.2, pp. 645-55, incorporated herein.) This in turn implied that the jury must decide whether or not Robert

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[995] These instructions correctly informed the jurors to acquit if they "have a reasonable doubt . . . . " (CT 14312; 14286.)

[996] When a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may prejudicially mislead the jurors. (See § 2.3.4.1(A), p. 231-32, n. 243 above, incorporated herein.)

Strang and/or his associates were guilty, since only by demonstrating Strang's guilt could Lucas prove his innocence.

Furthermore, the general burden of proof instruction, CALJIC 2.90, was itself deficient and misleading (see Volume 2, § 2.10.1, pp. 633-42, incorporated herein) thus compounding the deficiencies of the third party guilt instruction.

And, even if CALJIC 2.90 had not been deficient, it could not have cured the deficiencies in the third party guilt instruction. (See Volume 2, § 2.8.3(F), pp. 522-24, incorporated herein.)

In sum, the third party guilt instruction, especially when considered with the other instructions, unconstitutionally shifted the burden of proof and failed to require the prosecution to prove every essential element of the charge beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.)

Because this deficiency fundamentally misstated the prosecution's burden of proof and undermined the primary defense theory to the charges upon which the death sentence is predicated, structural error was committed. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275 .) Alternatively, the error was prejudicial under the state and federal harmless-error standards. (See § 4.6.1(C), pp. 1160-64 above, incorporated herein.)

4 SWANKE CASE

ARGUMENT 4.9

JURY INSTRUCTIONS: BURDEN OF PROOF

[These claim is fully briefed in Volume 2, § 2.10.1 through 2.10.9, pp. 631-97, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 4, these claim are renewed as to the Swanke case 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 Swanke 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 § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 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[997] that proof 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

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[997] 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.)

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

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.)

4 SWANKE CASE

4.10 DELIBERATION ISSUES

ARGUMENT 4.10.1

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 4, the claim is renewed as to the Swanke case 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. Furthermore, the judge failed to give the jurors any special directions or cautionary instructions regarding their use of the transcripts. (See Volume 3, § 3.11.3, pp. 1052-53, incorporated herein.)

Accordingly, the Swanke convictions should be reversed. (See § 4.7.1(B), (C) and (D), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict

as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.10 DELIBERATION ISSUES

ARGUMENT 4.10.2

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 4, the claim is renewed as to the Swanke case 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.[998]

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 Swanke convictions should be reversed under the state and federal harmless-error standards. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also

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[998] "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.)

be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1179-80 above, incorporated herein.)

4 SWANKE CASE

4.10 DELIBERATION ISSUES

ARGUMENT 4.10.3

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 4, the claim is renewed as to the Swanke case 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

Swanke convictions should be reversed under the state and federal harmless-error standards. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally, because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

4.10 DELIBERATION ISSUES

ARGUMENT 4.10.4

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 4, the claim is renewed as to the Swanke case 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 Swanke convictions should be reversed under the state and federal harmless-error standards. (See § 4.7.1(B), pp. 1179-80 above, incorporated herein.) Moreover, because the jurors were authorized to consider the Swanke charges to convict as to the Jacobs and Santiago charges those convictions should also be reversed. (See § 4.7.1(C), p. 1180 above, incorporated herein.) Finally,

because the Swanke charges were also prejudicial as to the penalty determination, the death judgment should be reversed even if the guilt judgments are not. (See § 4.7.1(D), pp. 1180-81 above, incorporated herein.)

4 SWANKE CASE

ARGUMENT 4.11

CUMULATIVE ERROR: SWANKE

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 Swanke briefing (Volume 4) as well as the errors in the Jacobs (Volume 2), Santiago briefing (Volume 3), and/or Strang/Fisher briefing (Volume 5), all of which could have affected the Swanke 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 Swanke 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 Swanke Errors Were Prejudicial As To The Jacobs And Santiago Convictions

The errors raised in Volume 4 are directly applicable to the Swanke charges. However, the prejudicial impact of those errors also extended to the Jacobs and Santiago charges because of the judge's cross-admissibility ruling which allowed the jurors to rely on Swanke to convict in Jacobs and/or Santiago. (See Volume 2, § 2.3.5.1(H), pp. 293-300, incorporated herein.) Hence, because the Swanke convictions should be reversed, the Jacobs and Santiago 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.[999]

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

Because the Swanke case was closely balanced and the jurors were allowed to consider the Jacobs, Santiago and Strang/Fisher charges to convict

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[999] See Volume 2, § 2.3.1(I)(2), pp. 209-11, incorporated herein and Volume 3, § 3.4.2, pp. 904-17, incorporated herein [discussing evidentiary balance in Jacobs and Santiago].

on Swanke, the errors in the Jacobs (see Volume 2, incorporated herein) Santiago (see Volume 3, incorporated herein) and Strang/Fisher (see Volume 5, § 5.2, incorporated herein) cases were prejudicial as to Swanke 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 Swanke 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.[1000] 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

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[1000] 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.[1001] The errors were particularly prejudicial as to the penalty trial since the Swanke count could have been used both to counter the defense theory of lingering doubt and as independent aggravation under factor (a).

[1001] See Volume 6, § 6.5.1(D), pp. 1551-52, incorporated herein [discussing state and federal standards of prejudice at penalty].