

SUPREME COURT

**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)

**SUPREME COURT**  
**FILED**

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DEPUTY

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 5**  
Pages 1245 - 1372

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Court of California

**DEATH PENALTY**

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On July 29, 1986, in CR 75195, Judge Orfield granted Lucas' *Marsden* motion to relieve William Saunders as counsel. Judge Orfield temporarily appointed Christopher Blake to represent Lucas. (CT 15158-59.) Thereafter, on August 4, 1986, Judge Orfield appointed Steven Feldman to represent Lucas in CR 75195. (CT 15160.)

On January 22, 1987, the prosecution filed a motion to challenge and disqualify Judge Kennedy pursuant to Code of Civil Procedure § 170.1. (CT 9661-62.) However, Judge Kennedy denied the prosecution's motion as untimely. (CT 15232.) On February 6, 1987, in CR 75195, the Fourth District Court of Appeal, at the request of the prosecution, issued a peremptory writ of mandate requiring Judge Kennedy to disqualify himself from all further proceedings in CR 75195. (CT 10300-304.)

On February 9, 1987, in both cases, Judge Wayne L. Peterson assigned the case to Judge Laura Palmer Hammes for all purposes including ruling on the prosecution's motion to consolidate CR 75195 with CR 73093, a separate case which charged Lucas in the Santiago, Strang/Fisher and Swanke matters. (CT 4808; 4811.)

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

On May 13, 1987, the prosecution filed an amended information in CR 75195. (CT 6785-87.)

On May 12, 1988, as to the third party suspect issue, the judge ruled that there was a requisite showing linking William Greene to the murder of Gayle Garcia. (CT 5199-200.)

On June 6, 1988, the consolidation motion was granted and a consolidated information was filed. (CT 4107-4116; 5211-12; 15516; 12970-73.)



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

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

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

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

On April 12, 1989, the prosecution rested their case. (CT 5485.)

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

On June 7 and 9, 1989, the arguments of counsel were presented. (CT 5550-54.)

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, guilty of the kidnapping and attempted murder of Jodie Santiago, and 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.) 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.)

## 5.1 THE GARCIA CASE

### 5.1.2 THE GARCIA CASE: STATEMENT OF FACTS<sup>1004/1005</sup>

#### A. Prosecution Evidence

1. Activities Of The Defendant, Victim And Others On Or About December 8, 1981

a. *Whether Lucas Was Looking For An Apartment*

During the summer of 1981, David Lucas was living on 33rd Street, in the Normal Heights District of San Diego which was within walking distance of M & A Carpet Cleaners where he worked. (RTT 3735; 3860-61; 3877.) In

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<sup>1004</sup> Abbreviations used for the reporter's transcripts are as follows: "RTO" refers to pretrial proceedings before Judge Orfield. (Pretrial volumes 9 through 49.) "RTK" refers to pretrial proceedings before Judge Kennedy. (Pretrial volumes 50 through 65.) "RTH" refers to in limine proceedings before Judge Hammes (Pretrial volumes 70 through 309.) Reporter's Transcript of the Trial (Volumes 1 through 73) are referred to as "RTT" The Clerk's Transcripts are referred to as "CT."

<sup>1005</sup> Even though Lucas was acquitted in the Garcia case, the facts are still relevant to the appeal for two reasons.

First, the jury instructions permitted the jurors to cross-consider an offense even if they only had a "mere suspicion" that Lucas committed that offense. (See Volume 2, § 2.3.4.2, pp. 237-51, incorporated herein.) Thus, the jurors could have used the Garcia evidence to help convict Lucas in any or all of the other offenses notwithstanding their conclusion that Lucas should be found not guilty of the Garcia charge.

Second, Lucas contends that the jury was erroneously precluded from considering the Garcia facts, including his alibi evidence, in deciding whether the prosecution proved the other offenses beyond a reasonable doubt. (See Volume 2, § 2.3.4.4, pp. 260-69, incorporated herein.) In other words, if Lucas' alibi created a reasonable doubt in the minds of the jurors as to Garcia it should have also been considered as defense evidence vis-à-vis the other similar charges. Hence, the facts in Garcia are relevant to this appeal.

November of 1981, Lucas moved from 33rd Street to Bancroft Street, which was also within walking distance of M & A. (RTT 3861; 3875; 3877.)

Frank Clark testified on direct examination that, in late 1981, Lucas was looking for an apartment in the want ads because he wanted to live in the Spring Valley/Casa de Oro area. (RTT 3736-37; 3857; 3862.)<sup>1006</sup> However, on cross-examination, Clark admitted that Lucas actually was not looking for an apartment since Lucas had just moved in November. (RTT 3861-63.) The reason they were looking through the newspaper want ads was because they wanted to open their own carpet business. (RTT 3878.)

*b. Use Of Alcohol And Marijuana By Frank Clark And David Lucas*

Clark and Lucas used to socialize while working at M & A Carpets; they would drink beer together two to four times per week and Clark would occasionally go to Lucas' house. (RTT 3735-36; 3859; 3879.) Clark and Lucas used to smoke marijuana together when they were out driving around, at Lucas' house and occasionally at the business. (RTT 3767-68.) Clark frequently saw Lucas carry marijuana on his person; he would keep it in a baggie or cigarette cellophane wrapper. (RTT 3768-69)<sup>1007</sup> In the latter part of 1981, Clark saw Lucas with marijuana buds. (RTT 3769.) Clark would also frequently have marijuana on his person during that period of time. (RTT

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<sup>1006</sup> Spring Valley/Casa de Oro was further from M & A than Bancroft Street. (RTT 3881.) Clark and Lucas went to the Dictionary Hills area once to look at a house. (RTT 3737.)

<sup>1007</sup> Clark identified Exhibit 126, a manila envelope containing a cellophane wrapper off of a cigarette pack, as being the type of packaging device he was describing. (RTT 3769.)

3770.)<sup>1008</sup>

*c. Whether Lucas Worked On December 8, 1981*

Frank Clark testified that, based on the payroll records, he filled in for Lucas on the afternoon of December 8, 1981. (RTT 4302-03; 4341-43.) However, independent of the payroll records (Exhibit 198), Clark couldn't remember whether or not Lucas was present at the business at any time on December 8, 1981. (RTT 3751.) Lucas was in the office on the morning of December 9, 1981. (RTT 4342-43.)

*d. Annette Goff And William Greene Put Their House On The Market*

In 1981, Annette Goff and William Greene owned a house at 866 Banock Street, in Spring Valley.<sup>1009</sup> Goff and Greene weren't married but had lived together and were business partners. However, by 1981 their relationship had deteriorated and there was animosity between them. (RTT 2610-11; 2655-56; 2660.) Goff obtained a restraining order against Greene to keep him out of the house. (RTT 2656) She also hired an attorney to help recover property Greene had taken and to get her share of the community property. (RTT 2656-57; 2665.) Greene wasn't supposed to come to the

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<sup>1008</sup> When possible, Clark would purchase marijuana in bud form. (RTT 3921.) Clark would package single buds in cellophane wrappers. (RTT 3921.) Clark testified that packaging single buds in cellophane wrappers was very common among marijuana users. (RTT 3921.)

<sup>1009</sup> Greene regularly smoked marijuana at the Banock Street house until he moved out. (RTT 2660-62.) Greene bought marijuana in quarter-ounce quantities that would include buds, stems and seeds. (RTT 2711; 2715.) Goff saw Greene smoke marijuana buds. (RTT 2715-17.) Chris Goff, Annette's brother, would occasionally smoke marijuana at the Banock Street house as well. (RTT 2660-2661.)

house, although he still had a key to it. (RTT 2657-2658; 2673; 2708.)<sup>1010</sup>

Goff and Greene decided to list the house for sale in February 1981. (RTT 2659.) Eventually, in late 1981, the house was listed with Gayle Garcia, a real estate agent friend of Goff's. (RTT 2610-13; 2659-60.)<sup>1011</sup> However, the property didn't sell and they weren't getting very many inquiries. (RTT 2663.) Therefore, in early December 1981, they decided to change the listing to a "rent to own." (RTT 2663.) They ran an ad in the San Diego Union newspaper. (RTT 2611-13.) Garcia told Goff she received a lot of calls about the property from the new ad. (RTT 2664.)

*e. The Stapletons*

In December 1981, Emmett and Maria Stapleton lived in the Casa de Oro/Spring Valley area of San Diego. (RTT 7201; 7209.) They managed apartment units at that address. (RTT 7201; 7210.) The Stapletons had a unit available and were advertising it in the San Diego Union.<sup>1012</sup> (RTT 7201-02; 7209-12.) On December 7, 1981, at about 6:00 p.m., Mrs. Stapleton received a call from a man inquiring about a unit. (RTT 7202; 7204.) The caller said he wanted to see the apartment that they had for rent. (RTT 7202.) Mrs. Stapleton told him that they couldn't show it because they never showed apartments after 5:00 o'clock. (RTT 7202-03.) The man said that he was

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<sup>1010</sup> Goff testified she couldn't get the key back from Greene. (RTT 2709.)

<sup>1011</sup> There was a lockbox on a hose spigot on the front of the house and Garcia scheduled some open houses. (RTT 2615; 2621.) Prior to Garcia, the house had been listed with another friend, Mike Weigele, who also had a lockbox on it. (RTT 2660.) The house had a sign out front with Seagull Realty's phone number listed. (RTT 2711.)

<sup>1012</sup> Emmett Stapleton identified Exhibit 254 and 255 as copies of the ad that ran in the Union on December 5th and 6th, 1981. (RTT 7212-13.)

going to come and see it anyway, and Mrs. Stapleton told him, “No, wait until tomorrow.” (RTT 7202.) The man was kind of pushy; she kept telling him she couldn’t show it and he said he would come anyway. (RTT 7203.) The phone call sounded kind of strange and scary to her. (RTT 7203.)<sup>1013</sup>

Shortly after the call there was a knock on the door. (RTT 7203-04; 7216.) Someone was asking about the available unit. (RTT 7211.) Emmett Stapleton answered the door. (RTT 7216.) To Mr. Stapleton, the man’s clothing did not match and didn’t seem to fit properly; it looked awkward. (RTT 7224-25.) He was wearing a sport coat that was all different colors. (RTT 7225.) He looked like a “geek.” (RTT 7225.) The man had slight features. (RTT 7227.)<sup>1014</sup>

The man just stuttered and didn’t say much at all. (RTT 7216) He didn’t really ask about the rental unit or say anything to Stapleton, and Stapleton didn’t recall any discussion about the apartment. (RTT 7216-17; 7225.)<sup>1015</sup> The man didn’t seem able to talk. (RTT 7217.) He stayed at the front door for only a short time and then left. (RTT 7217; 7225.) The man didn’t say anything when he left and got into a foreign car parked at the entrance of the driveway. (RTT 7217.) Stapleton thought the car was green, but it was dusk so he really didn’t know what color it was. (RTT 7217.)

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<sup>1013</sup> The newspaper ad did not list the Stapleton’s address. (RTT 7214-15; 7224.) Mrs. Stapleton would not have given out the address to the caller over the phone because it was too late and she didn’t want him to come by that night. (RTT 7207.)

<sup>1014</sup> Stapleton couldn’t recall the man having any unique marks or scars. (RTT 7228.)

<sup>1015</sup> Stapleton didn’t remember if he said anything to the man and characterized the meeting as a quick situation. (RTT 7226.)

*f. Annette Goff's Activities In The House Prior To The Murder*

On December 7th, 1981, Annette Goff arrived at the Banock Street house around 7:00 p.m. and began cleaning and vacuuming. (RTT 2639-40.) Her 17-year-old brother, Chris, was with her. (RTT 2644.) There was an open house planned for the following weekend, and she wanted to get a head start cleaning the house. (RTT 2640.) She cleaned and vacuumed until about 12:30 a.m. (RTT 2643-44.)

Goff returned the next morning, December 8, 1981, to feed the cats and check on things. (RTT 2640; 2644.) Again, Chris was with her. (RTT 2644.) She ran the vacuum cleaner about 3 feet into the rear bedroom because she had spilled some cat litter. (RTT 2640.) She didn't notice any objects on the floor when she was vacuuming. (RTT 2642; 2652-53.) All the doors and windows were locked when she left the house that morning. (RTT 2644.)<sup>1016</sup>

Before leaving that morning, Goff put an envelope with \$585.00 in cash in a drawer in the kitchen. She was going to give Garcia the money for title expenses on the house and for the loan payment. (RTT 2650-01; 2700.)

*g. Telephone Calls Among Goff, Greene And Garcia On December 8, 1981*

On December 8, 1981, Goff spoke with Gayle Garcia on the phone at approximately 10:30 a.m. Garcia told her there had been quite a few calls on the ad and there were a number of people who were scheduled to view the house. (RTT 2616; 2664-65; 2667-68; 2696.) Garcia was going to be at the

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<sup>1016</sup> The Banock house only had two doors: a sliding glass door which had a lock in the frame of the door as well as a switch lock like most sliding glass doors, and a front door which had a regular doorknob lock and a double key dead bolt. (RTT 2644.)

house between the hours of 4:00 and 6:00 p.m. to meet with the prospects. (RTT 2615.)

Around 4:55 to 5:00 p.m. Goff called Greene to tell him Garcia was at the house and was going to be showing it to people. Greene had said he might take some friends by the house and Goff didn't want Garcia's clients and Greene's friends there together. (RTT 2647; 2669-70.)<sup>1017</sup> Greene told her, "Okay. No problem." His friends had other plans and they weren't going to come by anyway. (RTT 2647.) However, Greene called Garcia back at 5:15 and asked what her problem was and why she didn't want his friends to visit the house. Goff explained to him that she just didn't want there to be a conflict. (RTT 2647-48; 2671.)

Greene called back again at 5:30. (RTT 2648.) He told Goff that he had just talked to Garcia and he was going over to the house to get some answers. (RTT 2648; 2672-73; 2709.)<sup>1018</sup> He was argumentative and quarrelsome. (RTT 2671-72.) Goff told him not to go there and put Garcia in a bad spot. (RTT 2709.) Goff hung up on Greene. (RTT 2671.)

Five minutes later, at approximately 5:35,<sup>1019</sup> Goff called Garcia at the house to let her know that she would be late and to tell her that Greene might be coming by the house. (RTT 2616-17; 2648; 2668; 2673.) Goff told Garcia she would be there in 20 minutes. (RTT 2617.) Garcia told Goff that she was

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<sup>1017</sup> Greene previously told Goff that he had some people who wanted to look at the house and he intended to bring them by that evening. (RTT 2647; 2669-70.)

<sup>1018</sup> Greene told Goff he talked to Garcia twice. (RTT 2678)

<sup>1019</sup> Goff remembered the time because she usually got off work at 5:00 p.m. but was late that day and was watching the clock, wanting to go home. (RTT 2617-18.)



getting ready to leave and probably wouldn't be there by the time Goff arrived. (RTT 2617.)<sup>1020</sup>

*h. Discovery Of Garcia's Body*

Goff left work at 5:42 p.m. (RTT 2618-19; 2673-74.) Goff stopped at a 7-11 store and picked up a six pack of Miller beer and a pack of cigarettes. She then went directly to the Banock Street house. (RTT 2620-22.)

When Goff arrived, it was dark and Garcia's car, a silver Toyota Celica, was parked in the driveway right in front of the house. (RTT 2626-27; 2652; 2696-97.)<sup>1021</sup> As they were walking up to the house, Goff could hear the phone ringing. Goff looked at the clock; it was 6:05 p.m. (RTT 2622-23; 2674.)<sup>1022</sup> Goff's brother, Chris, sprinted into the house to answer the phone. (RTT 2622-23.) The front door was open two-thirds of the way and the living and dining room lights were on. (RTT 2622-23; 2696.) The call was from Bill Greene. (RTT 2623.) Greene asked if Garcia was still there as he wanted to speak with her. (RTT 2623; 2675; 2713-14.) Goff spoke with Greene on the phone while Chris walked through the house calling for Garcia. Chris saw Garcia in a bedroom and thought she was lying down. Chris told Goff,

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<sup>1020</sup> Garcia told Goff that she was waiting for a woman, but since the woman hadn't shown up, she was going to leave. (RTT 2689.)

<sup>1021</sup> The lockbox was open and the face of it missing, as shown in photograph Exhibit 122D. (RTT 2621.) The face of the lockbox and key were found on a kitchen counter, depicted in photo Exhibit 123H. (RTT 2630-31; 2815.) The two keys attached to the front of the lockbox were the front door keys. (RTT 2644-45.)

<sup>1022</sup> Goff told defense witness Deputy Michael Rodley, who interviewed her at the scene, that she had arrived at the house at approximately 6:10. (RTT 8832 [defense].) Goff also told him of a telephone conversation she had had with Garcia at approximately 5:42. (RTT 8833 [defense].)

“Annette, I think. . .Susie [Garcia] is sick or something. I think she’s laying [sic] down in the room. Maybe you better go see.” (RTT 2623.) Goff told Greene to wait and laid the receiver down. She walked down the hallway to her bedroom, turned on the light and saw that Garcia had been assaulted. (RTT 2623.)<sup>1023</sup> Bruce Bartley, who was also present, leaned over Garcia’s body, checked her pulse and then rolled her off the vacuum cleaner hose which was underneath her. (See § 5.1.2(B)(3), p. 1269 below, incorporated herein [defense].)

Goff turned off the light, backed out of the room and went back to the dining/kitchen area. (RTT 2623-24.) She picked up the phone and told Greene to get off as she had to call an ambulance. (RTT 2624.) She hung up the phone and called for help. (RTT 2624; 2648-49.)

Goff went outside to wait for help to arrive. (RTT 2649.) She sent her brother to get her neighbors, Steve and Carol Peters, and the Peters went into the house. (RTT 2698.) Next, a fire truck arrived and it’s crew went inside. (RTT 2649; 2698.)<sup>1024</sup> Paramedics and a sheriff’s unit soon arrived and they also went inside the house. (RTT 2649.) A lot of other police units arrived after that, including a CHP unit, a city police car and two unmarked cars containing sheriff’s detectives Tom Streed, Sam Bove and Bill Baxter. (RTT 2649-50.) The officers went into the house. (RTT 2650.)

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<sup>1023</sup> Goff identified a photograph of Garcia on the bedroom floor, Exhibit 124D. She believed that Garcia’s head had been turned the other direction when she discovered her, rather than the way she was depicted in the photo. (RTT 2636.)

<sup>1024</sup> Goff couldn’t remember how many firemen arrived in the fire truck but she believed it was at least four. (RTT 2698.)

*i. Investigation Of William And Richard Greene*

Goff remained outside of the house at the Banock scene until about 9:30 p.m. (RTT 2684.) Before she left, she thought she saw William Greene's brother, Richard, drive by on a motorcycle. (RTT 2684-2685.)<sup>1025</sup> She told a uniformed officer at the scene. She also told the officer about her phone calls with Greene earlier that day. (RTT 2685.)

Sergeant Steven Blackwood of the San Diego Sheriff's Department also saw the motorcycle. The rider seemed very interested in what was going on at the scene and nearly stopped in front of the house. (RTT 9113-15.) As Blackwood wrote down the license plate number on the motorcycle, it sped off. (RTT 9115; 9118-19.) Blackwood got into his patrol car and pursued the motorcycle. (RTT 9115-15.) After stopping the motorcycle Blackwood identified the rider as Richard Greene, William Greene's brother. (RTT 9116-19.) Blackwood went to an address given by Richard Greene to see if William Greene would arrive. (RTT 9121.) At about 10:00 p.m. a Mazda that was parked at the residence left. (RTT 9121-22.) Blackwood stopped the Mazda and identified the driver as Dawn Handley. (RTT 9122.) She was very reluctant to speak to Blackwood and avoided questions concerning William Greene's whereabouts. (RTT 9122.)

Detective Streed contacted William Greene at Richard's house at 1:00 a.m. on December 9, 1981. (RTT 2842-43; 2845.) William was taken to the Lemon Grove sheriff's station where he was questioned. (RTT 2844; 2848-49; 2852.)<sup>1026</sup> The interview with William was tape recorded. (RTT 2844.)

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<sup>1025</sup> Both Bill and Richard had motorcycles. (RTT 2685.)

<sup>1026</sup> Streed did not seize Greene's Buck knife. (RTT 2843.)

William Greene was also interviewed by Tom Staninger. (RTT 2972.)<sup>1027/1028</sup>

2. Description Of The Crime Scene And Physical Evidence

It was already dark when Detectives Tom Streed and Sam Bove arrived at the Garcia scene at 7:30 p.m. (RTT 2742; 2747; 2800; 2803.) Streed saw the Seagull Realty sign near the mailbox and curb which was visible from the street, but the sign didn't indicate whether the house was for sale or rent. (RTT 2745-47.) Streed was told that at least 13 people, including paramedics and some civilians, had been through the crime scene prior to the arrival of homicide detectives. (RTT 2742; 2800-01.) He was concerned about crime scene contamination. (RTT 2742-43.) Streed waited for Criminalist Ron Barry and Lab Technician Austin McDougal to arrive. They then entered and searched the residence. (RTT 2801-03; 2914.)<sup>1029</sup>

Garcia was lying on the floor across the tubing for a vacuum cleaner. (RTT 2818.) Paramedics had attempted to revive Garcia and pulled her blouse from the waistband of her pants to attached defibrillator pads. (RTT 2743-44; 2805.) Garcia's head had been moved from one side to the other but other than that, there was no tampering with her body. (RTT 2745.) A

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<sup>1027</sup> Streed did not participate in the Staninger interview. It might have been tape recorded. He looked for the tape, but couldn't find it. (RTT 2972-73.) Nor was Streed able to locate a transcript of the interview. (RTT 2974.)

<sup>1028</sup> Greene was given a lie detector test but the results were lost or destroyed. (See RTH 24300; 25435.) The defense was precluded from mentioning anything about the lie detector test (See RTT 2854-63.) Besides the testimony of Streed, the only evidence permitted on this point was the fact that the polygraph examiner, Tom Staninger, interviewed Greene. (RTT 2972.)

<sup>1029</sup> Barry collected the physical evidence at the scene. (RTT 2873) McDougal collected the latent fingerprints. (RTT 2914.)

cellophane cigarette wrapper was found on the carpet next to the body. (RTT 2755-56; 2817; 2898-99.)<sup>1030/1031</sup> Criminalist Ron Barry collected the wrapper. (RTT 2756-58.)<sup>1032</sup> There was a marijuana bud, inside of the cellophane wrapper. (RTT 2757-59; 2899).<sup>1033/1034</sup> The wrapper was dusted for prints. (RTT 2758; 2842.)<sup>1035</sup>

All of the blood found was in the immediate vicinity of Garcia, most of which was directly under her body. (RTT 2982.) There was no blood on the walls or carpet or anywhere in the residence to suggest an extended range

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<sup>1030</sup> Goff testified that the wrapper was not on the floor when she vacuumed the morning before. (RTT 2641-42; 2652-53.) Goff also testified that she knew Garcia fairly well and that she did not smoke marijuana or cigarettes. (RTT 2652-53.)

<sup>1031</sup> There were numerous pennies scattered on the floor around Garcia which Goff didn't notice when she was vacuuming the night before. (RTT 2637; 2642; 2652-53.)

<sup>1032</sup> Streed couldn't recall whether there were ashtrays, or cigarettes in ashtrays, at the Garcia scene. (RTT 2994.)

<sup>1033</sup> Streed testified that they had thought there was a possibility that the marijuana could have come from some young person in the neighborhood. (RTT 2973-74.)

<sup>1034</sup> Barry analyzed the green vegetable matter found in the cellophane wrapper. (RTT 2897-98; 2900; 2904.) He determined that the vegetable matter was a flowering top or "bud" of a marijuana plant. (RTT 2900-01.) There was a tax stamp on the bottom of the cellophane wrapper. (RTT 2921.) Streed unsuccessfully tried to trace the wrapper to a tobacco producer or retailer. (RTT 2842; 2979-80; 2990-91.)

<sup>1035</sup> The record does not indicate whether or not a usable print was found on the wrapper. Of the 12 usable latent prints found at the Garcia scene, none matched Lucas. (RTT 10782.)

of violence. (RTT 2982.)<sup>1036/1037</sup>

Garcia's right hand was swabbed to obtain a sample of the blood. Debris was collected including hair evidence. (RTT 2912; 2941; 2987-88.) Hair was found on the backside of Garcia's blouse. (RTT 2941-2942; 2944.)<sup>1038</sup> Two parallel smears, similar in consistency to blood, were found on the left inner thigh portion of Garcia's pants. (RTT 2755.)

Open bottles of beer were found on a counter and table in the kitchen area. (RTT 2825-26; 2836-37.) A Coldwell Banker business card was located on a kitchen counter, along with Garcia's purse and keys and an ashtray. (RTT 2630-32; 2935) There were legal papers, including a restraining order, on the table which were examined and seized. (2837-38.)<sup>1039/1040</sup>

Detective Streed concluded from his investigation that Garcia was killed within a 30 minute period between 5:35 and 6:05 p.m. (RTT 2617-18; 2522-23; 2674; 2991.) This was corroborated by the autopsy doctor who

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<sup>1036</sup> The detectives did not use Luminol, a chemical which causes latent bloodstains to glow, at the Garcia scene. (RTT 2986-93.)

<sup>1037</sup> They did not check the sink traps at the Garcia scene for evidence of blood. (RTT 2993.)

<sup>1038</sup> Some of the hairs were brown, a few were light colored and appeared to be animal hair. (RTT 2944.)

<sup>1039</sup> Detective Streed couldn't recall if the papers were dusted for prints. (RTT 2838.)

<sup>1040</sup> Detective Streed asked Goff to make sure all of the knives in the kitchen were accounted for. (RTT 2717.) Initially, Goff thought there might be knives missing from a rack above the stove. The rack had four knives in it. (RTT 2717.) They found all the knives except a little paring knife with a 2" blade. (RTT 2717.). The paring knife was broken and her brother had used it as a screwdriver. (RTT 2717.) That was the only knife they couldn't find. (RTT 2717.)

found fixed postmortem lividity which would have been consistent with a time of death between 5:40 and 6:10 p.m. on the 8th of December, 1981. (RTT 4541-42.)<sup>1041</sup>

Goff discovered that the \$585.00 she had left in the kitchen drawer was missing. (RTT 2650-51.)<sup>1042</sup> She asked the detectives to look for the money. (RTT 2650; 2718.) The detectives went through the drawers in the house but didn't locate the missing money. (RTT 2841-42.)

### 3. Injuries To The Victim And Autopsy Report

Dr. Howard Robin, a contract pathologist with the San Diego Coroner's Office performed the autopsy on December 9, 1981. (RTT 4487; 4490-91; 4541.) There were abrasions on Garcia's forehead. (RTT 4501-03; 4538-39.) There was also an abrasion on Garcia's nose and another on the left side of her face. There were also some abrasions and scratches under her chin. (RTT 4492-95.)

There was a large gaping wound in the throat area which measured approximately six inches. The wound went from the angle of the jaw on the left to the angle of the jaw on the right side. The incision went through the membrane between the hyoid bone and the top of the thyroid cartilage. It cut through the muscles in the neck known as strap muscles, and also cut through the common carotid arteries and major veins on the right and left side of the

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<sup>1041</sup> The deputy coroner's report indicated that the body was cooling to the touch and entering rigor mortis when he examined the body at 9:00 p.m. on December 8. (RTT 4542.) The deputy coroner had also noted postmortem dependent lividity which was unfixated at the time of the deputy's observation. These observations were consistent with a person who had been deceased within 5 hours or less. (RTT 4543.)

<sup>1042</sup> The house contained an array of stereo equipment and a television which were not taken. (RTT 2748-49.)

neck. (RTT 4492-94; 4496-97.) The incision went through the soft thyrohyoid membrane between the hyoid bone above and the thyroid cartilage below. (RTT 4499.) The incision was so deep that it went through the membrane and cut into the second cervical vertebrae, leaving a notch on the right side of the vertebrae. (RTT 4493; 4499-4500; 4509-11; 4521; 4532; 4544-45.)

The incision on the left side of the neck had a jagged edge forming an unusual and irregular pattern. (RTT 4496.) It was Robin's opinion that the wound was caused by a very sharp rigid blade or knife. (RTT 4501-02.) Looking at the edges of the wound, Robin detected only one cutting stroke. (RTT 4503.) There was only one incision in the cervical vertebrae. (RTT 4503.) Robin could not render an opinion about the length of the blade, although he assumed it was a long one. (RTT 4539-40.)

Robin noted some petechial hemorrhaging in the conjunctiva of the eyes. (RTT 4496.)<sup>1043</sup> He did not notice any evidence of ligature marks. (RTT 4533-34.) He also saw no compression marks on the neck. (RTT 4534.) Robin noted an area of hemorrhage or contusion in front of the left front lower incisor which showed an area of hemorrhage in the mucus membrane of the buccal mucosa that overlies that front tooth. (RTT 4498.) The hemorrhage on that portion of the mucus membrane could have been caused by applying pressure over the mouth. (RTT 4499.)

A routine toxicology screen was conducted and there was no evidence

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<sup>1043</sup> This could have been caused by hypoxia or lack of oxygen, a sudden cut off of the blood supply to the eyes, as would occur when the blood vessels in the neck are cut, or with strangulation. (RTT 4497; 4498.) Petechial hemorrhaging might be observed in the absence of strangulation or throat cuts. (RTT 4536.)



of drugs or alcohol in Garcia's blood. (RTT 4535-36.) The cause of Garcia's death was exsanguination due to laceration of carotid arteries. (RTT 4504.)

4. Analysis Of The Physical Evidence

a. *Hair Evidence*

According to Criminalist Ron Barry, two nonhuman hairs were found in Garcia's right hand. (RTT 2940-41.) The hairs found on Garcia's blouse included some animal hair and human hair similar to Garcia's. Barry did not compare the human hairs with Bill Greene's hair. (RTT 2941-42; 2944-48.)

b. *Blood And Fingernail Evidence*

Barry performed a preliminary ABO blood grouping which showed Garcia to have type "O" blood. (RTT 2923.) Even though the fingernail found at the scene could have come off in a struggle, or if Garcia scratched her assailant, Barry did not conduct an examination to determine if any trace evidence existed on the fingernail. (RTT 2924-26; 2910.) Nor did Barry evaluate the fingernail to determine whether or not it was an artificial nail or a real one. (RTT 2910.)

c. *Fingerprints*

Lucas' were did not match any of the latent prints found at the Garcia scene. (RTT 2974; 2989.)

d. *Knife Comparison Evidence*

The sheath for a Model 112 folding knife sheath was found and seized as a result of a search warrant executed at Lucas' house. (RTT 2795.)<sup>1044</sup> There was no knife with the sheath, however, so Detective Streed obtained a Model 112 from the Buck knife factory. (RTT 2795; 2843.)

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<sup>1044</sup> The court gave a limiting instruction regarding this testimony in that it was offered to show why Streed did what he did but not for the truth of the matter asserted. (RTT 2794-95.)

Detective Streed prepared a photo board containing 6 photographs of the stain on Garcia's Levi to determine whether or not the Buck 112 knife was consistent with the bloodstain pattern on Garcia's pants. (RTT 2790-93.)<sup>1045</sup> Streed concluded that there was a considerable degree of consistency between the stain and the general length, shape and characteristics of the Buck Model 112. (RTT 2793-96; 2983.) However, Streed did not compare the wipe marks on the pants with any other kind of knife. (RTT 2844.) He couldn't say how many other kinds of knives might also have been consistent with the marks. (RTT 2844.)

The Model 112 was a commonly manufactured model which was distributed throughout the U.S. and about 30 or 40 foreign countries. (RTT 2843-44.) 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.)<sup>1046</sup> Also, there were many imitations of the Model 112 which were manufactured by other companies. (RTT 6977-78.)

*e. Summary Of Physical Evidence*

None of the items of evidence collected from the scene of the crime were specifically linked to Lucas. (RTT 2916.)

5. Events Subsequent To December 8, 1981

*a. William Greene Evidence*

On December 9, 1981, between 2 and 3:00 p.m., William Greene called

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<sup>1045</sup> A Buck model 112 knife and ruler were placed near the stains and superimposed over the stains. (RTT 2792.)

<sup>1046</sup> In addition to the Model 112, other Buck models had the same blade. (RTT 6974.) As many as one million knives with this particular blade were produced over several years. (RTT 6975.)

Annette Goff at a friend's house and they discussed what had happened the night before. (RTT 2681-83.) Greene denied ever having said he was going to the Banock Street house the night before. (RTT 2679-81.)

William Greene died approximately a year prior to trial. (RTT 2710.)

*b. Stapleton Identification Of Lucas*

On December 9, 1981, Emmett Stapleton heard about the murder of the real estate agent, Gayle Garcia. (RTT 7217.) After thinking about it for a while, Mr. Stapleton called the sheriff. (RTT 7218.) Stapleton attempted to describe the person who had been to his house and did a composite at the sheriff's office using an Identi-Kit. (RTT 7218; 7223.) Stapleton spent at least an hour doing the composite. (RTT 7227.) He wasn't really satisfied with the likeness created. (RTT 7218-19.)<sup>1047</sup> From December 1981 until April 1985, Stapleton had no contact with the sheriff's department. (RTT 7229.)

On March 13, 1985, a news broadcast aired in which Lucas' photo appeared. (RTT 10648.)<sup>1048</sup> On March 14, 1985, Stapleton called the sheriff's department and told them that he had recently seen Lucas on TV. (RTT 7221; 7226; 9099.)<sup>1049</sup> Subsequently, Stapleton identified Lucas from a photo spread as the man who came to his door. (RTT 7226-27; 7232-33.) Stapleton

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<sup>1047</sup> Several days after contacting the sheriff Stapleton heard about a \$10,000 reward offered in the Garcia case. (RTT 7229-30.)

<sup>1048</sup> The court took judicial notice that there was a broadcast on San Diego television on the evening of March the 13th, 1985, where Lucas' picture appeared. (RTT 10648.)

<sup>1049</sup> Stapleton denied that he had called the sheriff in 1985 and asked to see a photo of Lucas (RTT 7220-21; 7234) but see RTT 9099-9100 [Detective Streed testified that Stapleton called asking to see a photo of Lucas].

also identified Lucas at trial. (RTT 7215.)

**B. Defense Evidence**

1. Alibi Evidence

On December 8, 1981, the sun set at 4:43 p.m. and it was dark in San Diego county shortly after 5:00 p.m. (RTT 8916; 10598-60.)<sup>1050</sup> Also on that day, about half of the sky was covered with clouds which would have caused it to get dark sooner. (RTT 10600.)

On Tuesday, December 8, 1981, Lucas' sister, Cathy McEvoy (then Graves), gave a birthday party for her future husband, Mark McEvoy, and for her daughter, Trisha. (RTT 8922-23.) The party was held at Cathy's apartment. (RTT 8928.) Mark McEvoy testified that David Lucas arrived at the party around dusk, right before it got dark. (RTT 8925-26.) Lucas arrived with Donna Ellis and two children, Christina and Tiffany. (RTT 8926.)<sup>1051</sup>

Cathy McEvoy also remembered that David Lucas arrived shortly before it got dark. (RTT 8870; 8893.) Cathy was standing near the couch in front of a window and saw David walk up the stairs and into the apartment complex. (RTT 8886.) Cathy remembered seeing a bag in David's hand as he was walking up the steps; she thought he had beer in the other hand. (RTT 8870.) She met David at the door and he came inside. (RTT 8887-88.) In the

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<sup>1050</sup> Judge Hammes also took judicial notice of these facts based on Exhibit 697, a San Diego Union newspaper dated December 8, 1981. (RTT 8916-17.)

<sup>1051</sup> Mark McEvoy was interviewed by District Attorney Investigator Flavin on August 23, 1985. (RTT 8929.) McEvoy told Flavin that he knew that David Lucas got to the house before dark (RTT 8929.)

bag was a present for Trisha, a record player. (RTT 8871.)<sup>1052</sup>

David's departure from the party was marked by an incident that several witnesses remembered. Donald Lucas looked at Tiffany and said something about Elmer Fudd or Uncle Fudd and Donna got very upset about it. (RTT 8871.) Donna got up, went in the kitchen and got David, then she and David left. (RTT 8871; 8889.) Cathy and Mark walked them out to the truck. (RTT 8871-72; 8892.) It was dark when they left. (RTT 8872; 8893.) Cathy estimated that David had been at the party for 2 to 2 ½. (RTT 8871-72; 8890.)

The birthday party was memorable to Cathy McEvoy because, at the time, she and Mark were thinking about having a child and Donna had a brand new baby; Cathy couldn't wait for David and Donna to arrive so she could see the baby. (RTT 8883-84.) Also, it was the first year that Cathy and Mark were together and it was his first birthday party with her. (RTT 8885.)<sup>1053</sup>

Steven Katzenmaier also attended the birthday party. (RTT 8637-

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<sup>1052</sup> Cathy didn't recall where David went after he came inside; she was more focused on the baby, Tiffany. (RTT 8888.) When David left the party 2 to 2 ½ ours later, he was with Donna Ellis and the children. (RTT 8892-93.)

<sup>1053</sup> Cathy McEvoy testified that she loved her brother David very much and that she wanted him to be found not guilty of the charges. (RTT 8884-85.) She also knew that December 8, 1981 was the day that Garcia was killed and that Lucas was charged with Garcia's murder. (RTT 8886.) Cathy did not go to the police with her alibi evidence earlier because she was afraid of them, and had been all her life. The police had threatened her family when she was younger. Her mother had an officer kicked off the police force. The police did not ask Cathy to talk to them; if they had, she probably would have talked to them, but no one ever came to her. (RTT 8891.)

38.)<sup>1054</sup> He got to the party at about 4:30 in the afternoon. (RTT 8638.) He had been there for less than a half hour and was sitting in the living room when David Lucas and Donna Ellis arrived. (RTT 8638; 8641-43.) It was still light out. (RTT 8638-39.) Katzenmaier didn't know what time David Lucas and Donna Ellis left the party, but it was dark. (RTT 8639.)

Donald Lucas, David's brother, also confirmed that it was not yet dark when David arrived at the party and that he stayed for 2-3 hours. (RTT 8651-55.)

Thomas Caldwell drove from Cathy McEvoy's apartment to the Banock Street house where Garcia was killed. (RTT 10709.)<sup>1055</sup> The distance between the apartment and Banock Street was 11 miles. (RTT 10710.) Caldwell made the trip between 4:30 and 4:45 p.m. and the trip took him approximately 42 minutes going the speed limit. (RTT 10710-11.) The route was very congested with traffic. (RTT 10711.) The round trip was 22 miles and took approximately an hour and 24 minutes. (RTT 10711.)

## 2. Lucas Moved To A New Residence In November, 1981

In 1981 Erven Meyer owned some apartments in San Diego. (RTT 8622.) Lucas was tenant in the apartments in 1981 and paid rent on a monthly basis. (RTT 8622-23.) On November 4, 1981, Lucas said he was going to move on November 29th. (RTT 8625-27.) Lucas told Meyer that he found a place to live on Bancroft Street. (RTT 8625.)<sup>1056</sup> On December 1, Meyer

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<sup>1054</sup> Katzenmaier wasn't sure of the date of the party but believed it was before December 16th, 1981. (RTT 8646.)

<sup>1055</sup> Caldwell couldn't recall what day of the week it was that he made the trip. (RTT 10711-12.)

<sup>1056</sup> The court originally sustained a hearsay objection to this portion of  
(continued...)

checked Lucas' unit and found the place empty except for the refrigerator. (RTT 8626.) Lucas had moved. (RTT 8626.)

In 1981, William Ellis Jr., Donna's brother, spent Thanksgiving with Lucas and Donna Ellis who was living with Lucas. (RTT 8629-30.) They were living on Bancroft Street. (RTT 8629.) They had been living there a while; everything was in order and their furniture was there. (RTT 8629-30.)

### 3. Evidence That Bruce Bartley Left The Marijuana Bud

In December 1981, Chris Goff lived at 866 Banock Street in Spring Valley. (RTT 9228.) On December 8, 1981, he went to the Banock Street house with his sister and Bruce Bartley. (RTT 9228.) Bartley smoked marijuana. (RTT 9230.) Two or three days before December 8, 1981, Goff gave some marijuana buds to Bartley. (RTT 9233-34; 9237; 10793.) Bartley inserted the buds inside the cellophane wrapper of a cigarette pack and put it in his pocket. (RTT 9234-35; 10793.) On another occasion, Goff saw Bartley take the cellophane wrapper off a cigarette package and place marijuana in the wrapper. (RTT 9239.)

When they first discovered Garcia's body, Bartley leaned over and checked Garcia's pulse and then rolled her off to her right shoulder off the vacuum cleaner. (RTT 9229-30.) Bartley was wearing a work shirt with two open pockets on each side. The pockets did not have flaps or buttons. (RTT 9229; 9233.)

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<sup>1056</sup>(...continued)

Meyer's testimony and ordered it stricken. (RTT 8625-26.) However, the court later reversed her ruling, stating it was admissible under either section 1241 or 1250 of the Evidence Code as a statement of intent offered to prove the conduct of the declarant and that the circumstances were such as to indicate its reliability. (RTT 8631.)

4. Comparison Of Knife Stain On Garcia's Pants With Different Knives

Parker Bell, a forensic expert, examined a number of knives to see whether they might be consistent with the bloodstain on Garcia's pants. (RTT 8296.) For this purpose, Bell created and compared eight black and white photos of different knives with the bloodstain mark on Garcia's pants. (RTT 8297-98; 8301-02.)<sup>1057/1058</sup>

Bell concluded that there were numerous different brands and models of knives that could have made the mark. Any one of the eight knives he tested could have made that mark. (RTT 8296-8302.) Any knife that had a similar type of blade could have caused that kind of mark. (RTT 8302.)

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<sup>1057</sup> Bell placed a label on each knife blade indicating the model of the knife being photographed. (RTT 8299.)

<sup>1058</sup> Bell laid an old pair of Levi's jeans across his knee. He wiped a Schrade LB5 (RTT Exhibit 670D) knife in blood and wiped the knife on the pants over his knee to cause a mark. He then photographed the mark, creating Exhibit 672. (RTT 8304-05.) Exhibit 673 was a photograph of another mark created using a Schrade 153UH model hunting knife; Bell made mark the same way and photographed it. (RTT 8305-06). Exhibit 674 was made using Buck 119. (RTT 8306.) Exhibit 675 was made using a Buck 110 folding knife. (RTT 8307.) Exhibit 676 was made using a Buck 112. (RTT 8307-08.) Exhibit 677 was made using a kitchen knife (RTT 8308); Exhibit 678 was made using a Gerber hunting knife (RTT 8308); Exhibit 679 was created using a Coleman Western hunting knife (RTT 8309.) All the wipe marks were created the same way. (RTT 8311.) The blades of the knives he used weren't identical; there were some differences between them. (RTT 8312.) After making the wipe marks and comparing them to Exhibit 132, Garcia's pants, Bell concluded that any of the knives could have caused the stain found on the pants. (RTT 8311.) Bell did not rule out any knife other than ones he used; however, some could be eliminated because the blades were far too small. (RTT 8311.) A small pocketknife could not have caused the stain. (RTT 8311-12.)



Because of the variation in the way the stain could have been made, the range of possible blades was very wide. (RTT 8311-12.)

**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, herein.

For a comparison of Garcia to Suzanne Jacobs see Volume 2, Chart 2.2(R)(1), pp. 128-29, incorporated herein.

**CHART 5.1.2(C)(1) – COMPARISON OF GARCIA TO SANTIAGO**

<b>Factor</b>	<b>Gayle Garcia</b>	<b>Jodie Santiago</b>
Victim Age	29 (RTT 21 [Op. Arg])	34 (RTT 21 [Op. Arg])
Single/Multiple Victims	Single	Single
Number of Strokes	Only one cutting stroke (RTT 4503); but some possible movement of the cutting instrument or victim. (RTT 9398; 9420.)	One stroke (RTT 3703); sawing or carving motion (RTT ; 3692; 7057; 7062)
Location of Throat Wound	Cut went through membrane between hyoid bone and the top of the thyroid cartilage (RTT 4493; 4499-4500; 7058). Notch on right side of 2nd cerv. vertebrae (RTT 4493; 4500)	Wound b/t the thyroid cartilage and hyoid bone (RTT 3687; 3690; 7058). Within 1/16" of cervical vertebrae (RTT 3686); would have impacted C-3 or C-4 (RTT 3691)
Jugular/Carotid severed?	Both jugulars and carotids on both sides (RTT 4493-94)	One (left) external jugular vein severed; internal jugulars and carotids not cut (RTT 3686)
Direction Of Throat Wound	From left to right (RTT 4493)	---
Stabs to Torso	None noted	No
Hypoxia/Petechiae	Yes (RTT 4496)	---
Evidence of Ligature Marks	No (RTT 4533-34 [K]; 7074 [G])	Yes (RTT 3694; 7073; 7075)
Lip/Tongue Wounds	Yes; hemorrhagic contusion of lower lip left of midline over front left incisor (RTT 4498-99)	---

Other Injuries To Face/Head	Three linear abrasions on left side of forehead; one midline of forehead (RTT 4492; 4501; 4502-03); abrasion on tip of nose (RTT 4492); abrasions & scratches under the chin (RTT 4493); abrasion near left ear (RTT 4495)	Severe closed head trauma; skull fractures (RTT 3695); concussion (RTT 3714); brain swelling (RTT 3717); amnesia (RTT 3711)
Other Nondefensive Injuries	None noted	No
Defensive Wounds	No (RTT 9395 [Wecht])	Middle and ring finger of right hand cuts; cut through tendons to bone (RTT 7054-55; 9395-96)
Sexual Overtones of Attack	None noted	Yes; nude from waist down (RTT 3048); Slides made from vaginal swabs detected sperm cells (RTT 8766-71; 10862-63 [Exhibits 689, 690, 691].)
Had Advertised In Paper	Yes; Goff ran ad "rent to own" on house (RTT 2611)	No
Victim Abducted?	No (See place of attack)	Yes; off street (RTT 7325-7334)
Victim Tied Up?	No	Yes (RTT 7340)
Place of Attack	Inside 3rd party home (RTT 2615; 2623)	Taken to house and choked (RTT 7338-44); found along side a public street (RTT 2997-99; 3033-34)
Time of Attack	Early evening [between 5:35 p.m. and 6:05 p.m.] (RTT 2616-17; 2618-19; 2622)	Late evening [around 10:30-11:00 p.m.] (RTT 7324)
Moved After Attack	Not noted	Yes (see above)
Victim's Clothing	Fully clothed (RTT 2941 [Barry])	No apparent cutting of clothing
Acquainted w/ Lucas	No	No

**CHART 5.1.2(C)(2) – COMPARISON OF GARCIA TO STRANG**

<b>Factor</b>	<b>Gayle Garcia</b>	<b>Rhonda Strang</b>
Victim Age	29 (RTT 21 [Op. Arg])	24 (RTT 6983)
Single/Multiple Victims	Single	Multiple
Number of Strokes	Only one cutting stroke (RTT 4503); but some possible movement of the cutting instrument or victim. (RTT 9398; 9420.)	5 distinct cutting injuries to cervical vertebrae (RTT 6993)
Location of Throat Wounds	Cut went through membrane between hyoid bone and the top of the thyroid cartilage (RTT 4493; 4499-4500; 7058). Notch on right side of 2nd cerv. vertebrae (RTT 4493; 4500)	Cut went through upper portion of the thyroid cart., below the hyoid, through top part of body of larynx (RTT 6998; 7058). 5 cutting injuries on anterior surfaces of the 3rd & 4th vert.; most pronounced on left side (RTT 6989; 6998); uppermost cut extended 1/4" into 3rd vertebrae (RTT 6989)
Jugular/Carotid severed?	Both jugulars and carotids on both sides (RTT 4493-94)	Both carotid arteries; all jugular veins (RTT 6988)
Direction Of Throat Wound	From left to right (RTT 4493)	Right to left (RTT 6986-88; 7010)
Stabs to Torso	None noted	No (RTT 6984-85)
Hypoxia/Petechiae	Yes (RTT 4496)	Yes; in sclera, skin of forehead, cheeks and chin (RTT 6983-84); ["suffusion" of the face; possibility that she had been choked (RTT 6987)]
Evidence of Ligature Marks	No (RTT 4533-34 [K]; 7074 [G])	Yes (RTT 6992; 7059)
Lip/Tongue Wounds	Yes; hemorrhagic contusion of lower lip left of midline over front left incisor (RTT 4498-99)	No (RTT 7018)

Other Injuries To Face/Head	Three linear abrasions on left side of forehead; one midline of forehead (RTT 4492; 4501; 4502-03); abrasion on tip of nose (RTT 4492); abrasions & scratches under the chin (RTT 4493); abrasion near left ear (RTT 4495)	1/4" superficial cut at right border of neck wound [point of origin] (RTT 6986)
Other Nondefensive Injuries	None noted	Right shoulder 4" right of midline, superficial hemorrhagic area, 1/4" diam. (RTT 6990; 7011-12)
Defensive Wounds	No (RTT 9395 [Wecht])	None noted (RTT 7009-10)
Sexual Overtones of Attack	None noted	No (RTT 6985)
Had Advertised In Paper	Yes; Goff ran ad "rent to own" on house (RTT 2611)	No
Victim Abducted?	No (See place of attack)	No (See place of attack)
Victim Tied Up?	No	No
Place of Attack	Inside 3rd party home (RTT 2615; 2623)	Inside own home (RTT 3201-02)
Time of Attack	Early evening [between 5:35 p.m. and 6:05 p.m.] (RTT 2616-17; 2618-19; 2622)	Morning/Early Afternoon [between 9:00-9:30 a.m. and 1:30 p.m.] (RTT 3395; RTT 3402-03)
Moved After Attack	Not noted	Not noted
Victim's Clothing	Fully clothed (RTT 2941 [Barry])	Not indicated (but in limine testimony was fully clothed w/o shoes (RTH 4301))
Acquainted w/ Lucas	No	Yes (RTT 3425)

**CHART 5.1.2(C)(3) – COMPARISON OF GARCIA TO SWANKE**

<b>Factor</b>	<b>Gayle Garcia</b>	<b>Anne Swanke</b>
Victim Age	29 (RTT 21 [Op. Arg])	22 (RTT [Op. Arg] 21)
Single/Multiple Victims	Single	Single
Number of Strokes	Only one cutting stroke (RTT 4503); but some possible movement of the cutting instrument or victim. (RTT 9398; 9420.)	More than one stroke; 7 strokes on left side and 4 on right (RTT 4867-68)
Location of Throat Wounds	Cut went through membrane between hyoid bone and the top of the thyroid cartilage (RTT 4493; 4499-4500; 7058). Notch on right side of 2nd cerv. vertebrae (RTT 4493; 4500)	Cut through upper portion of thyroid cartilage slightly above vocal cords (RTT 4871; 7058). Two marks; one very high up somewhere between C-2 and C-3, but see RTT 4974 [first near C-1 or C-2]; and one just behind the cut in the larynx between C-4 and C-5 (RTT 4872)
Jugular/Carotid severed?	Both jugulars and carotids on both sides (RTT 4493-94)	Both carotids arteries and both jugular veins (RTT 4867; 4870)
Direction Of Throat Wound	From left to right (RTT 4493)	Blade moved across neck in both directions (RTT 7196); likely that handle of blade was to Swanke's right (RTT 7196)
Stabs to Torso	None noted	No
Hypoxia/Petechiae	Yes (RTT 4496)	Eyes were sunken "somewhat dehydrated" (RTT 4854; 4973); No (RTT 7191); maybe some petechiae on inner aspect of scalp (RTT 4910; 4974)
Evidence of Ligature Marks	No (RTT 4533-34 [K]; 7074 [G])	Yes. (RTT 4854; 4836-64) Could have been caused by choke chain found around neck (RTT 4864; 4703; 4997)
Lip/Tongue Wounds	Yes; hemorrhagic contusion of lower lip left of midline over front left incisor (RTT 4498-99)	Yes, hemorrhage due to tongue being clenched b/t teeth (RTT 4905; 7194; 4910)

Other Injuries To Face/Head	Three linear abrasions on left side of forehead; one midline of forehead (RTT 4492; 4501; 4502-03); abrasion on tip of nose (RTT 4492); abrasions & scratches under the chin (RTT 4493); abrasion near left ear (RTT 4495)	Minor injury 1" behind lower portion of left ear (RTT 4976)
Other Nondefensive Injuries	None noted	Brush marks or line-like scrapes on buttocks and thighs (RTT 4854; 4858; 4888); number of scratches between buttocks & knees (RTT 4858; 4888); discoloration on palmar aspects of both hands at base of the thumb (RTT 4923); linear mark on right wrist (RTT 4923)
Defensive Wounds	No (RTT 9395 [Wecht])	Cut on ring finger of left hand (RT 4912-13; 4918-19) Occurred short time before death (RTT 4914; 4924-25)
Sexual Overtones of Attack	None noted	Nude from waist down except socks (RTT 4705); RTT 10723; 10730 [weak indication of acid phosphatase (seminal fluid) from swab]; unidentified pubic hair found (RTT 5145; 5152; 10726-27; 10730-32)
Had Advertised In Paper	Yes; Goff ran ad "rent to own" on house (RTT 2611)	No
Victim Abducted?	No (See place of attack)	Yes, off street (RTT 4722)
Victim Tied Up?	No	Possibly [linear mark on right wrist (RTT 4923)]
Place of Attack	Inside 3rd party home (RTT 2615; 2623)	Kidnapped off street; place of killing unknown—found outside in remote area (RTT 4549-53; 4701-02; 4722)
Time of Attack	Early evening [between 5:35 p.m. and 6:05 p.m.] (RTT 2616-17; 2618-19; 2622)	Early morning [between 1:15 or 1:30 a.m.] (RTT 4549-53; 4552; 4561; 4599-4600)
Moved After Attack	Not noted	Unknown; kidnapped off street; place of attack unknown—found outside in remote area (RTT 4701-02)
Victim's Clothing	Fully clothed (RTT 2941 [Barry])	Clothing was cut (RTT 4706)
Acquainted w/ Lucas	No	No

## **5.2 STRANG/FISHER CASE**

### **5.2.1 STRANG/FISHER CASE: STATEMENT OF CASE (CR 73093)<sup>1059</sup>**

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 Strang/Fisher murders, the Santiago attempted murder (see Volume 3, incorporated herein), and the Swanke murder. (See Volume 4, incorporated herein.) (CT 70-72.) Count Three alleged that on or about October 23, 1984, Lucas murdered Rhonda Strang in violation of Penal Code § 187. It was further alleged that in the commission of that crime, Lucas had personally used a knife within the meaning of Penal Code § 12022(b). Count Four alleged that on or about October 23, 1984, Lucas murdered Amber Fisher in violation of Penal Code § 187 and had personally used a knife within the meaning of Penal Code § 12022(b). (CT 70-72.)

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

On December 2, 1985, the defense filed a motion to sever the Santiago, Strang/Fisher, and Swanke counts. (CT 928-55.) On July 7, 1986, Judge Orfield denied the motion for severance. (CT 4720; 15150-52.)

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, Judge Wayne L. Peterson assigned

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<sup>1059</sup> All references in this statement are to CR 73093 unless otherwise indicated.

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 May 12, 1988, as to the third party suspect issue, Judge Hammes ruled that there was a requisite showing linking Robert Strang to the murder of Rhonda Strang.

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 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. (CT 5222-23; 15518-19.)

Jury selection commenced on August 23, 1988, and was completed on December 8, 1988. (CT 5237-38; 5359-61; 15535-36; 15647-49.)

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

On June 7, 8 and 9, 1989, argument of counsel was presented to the jurors. (CT 5550-53.)

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

After eight days of deliberation, the jurors, on June 21, 1989, 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,<sup>1060</sup> guilty of the kidnapping and attempted murder of Jodie

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<sup>1060</sup> The jury also found true the enhancements for Penal Code § 12022(b) [personal use of a deadly and dangerous weapon] in Jacobs, (continued...)



Santiago, guilty of the kidnapping and murder of Anne Swanke (CT 5565-66; 5569-72; 14232-33; 14236-39) 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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<sup>1060</sup>(...continued)

Santiago, and Swanke, and Penal Code § 12022.7 [infliction of great bodily injury] in Santiago and Swanke.

## 5.2 THE STRANG/FISHER CASE

### 5.2.2 THE STRANG/FISHER CASE: STATEMENT OF FACTS<sup>1061</sup>

#### A. Prosecution Evidence

##### 1. Rhonda Strang's Contact With David Lucas And Frank Clark

Rick Adler's sister, Rhonda Strang, was married to Robert Strang and had a baby named Jessica. (RTT 3425-26.)<sup>1062</sup> Rhonda was acquainted with Lucas. Adler had introduced them. (RTT 3425.) Lucas had been to Rhonda's house once or twice. (RTT 3428-29; 3566-67; 3569.) During the latter half of 1984, Rhonda would contact Lucas once or twice a week. (RTT 3449-50; 3777.)<sup>1063</sup> According to defense witness Peggy Shelton, Lucas and Rhonda were good friends. (RTT 10463 [defense].)

Frank Clark also knew Rhonda Strang. Clark met Rhonda once at the business he and Lucas owned: Carpet Maintenance Company (CMC). Also, Clark and Lucas went to Rhonda's house to purchase cocaine from either Rhonda or her husband. (RTT 3775-76; 4182-85.)<sup>1064</sup>

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<sup>1061</sup> Abbreviations used for the reporter's transcripts are as follows: "RTO" refers to pretrial proceedings before Judge Orfield. (Pretrial volumes 9 through 49.) "RTK" refers to pretrial proceedings before Judge Kennedy. (Pretrial volumes 50 through 65.) "RTH" refers to in limine proceedings before Judge Hammes (Pretrial volumes 70 through 309.) Reporter's Transcript of the Trial (Volumes 1 through 73) are referred to as "RTT" The Clerk's Transcripts are referred to as "CT."

<sup>1062</sup> Adler estimated the baby was 6 to 9 months old. (RTT3426.)

<sup>1063</sup> Rhonda never expressed a dislike for Lucas. (RTT 3504.)

<sup>1064</sup> Clark couldn't recall when that occurred. (RTT 3775-76.)

2. Rhonda's Fear Of Her Husband, Robert, Because Of His Involvement With Drugs

According to Rhonda, Robert Strang was using drugs. (RTT 3499.)<sup>1065</sup> Rhonda was not a drug user. (RTT 3514.)

Rick Adler corroborated Robert's involvement with narcotics. (RTT 3508-10.) According to Adler, Robert snorted cocaine and smoked marijuana. (RTT 3510-11; 3562.) Adler also believed that Robert used crystal methamphetamine. (RTT 3511.)<sup>1066</sup> Robert was purchasing the drugs from a woman named Paula St. Germaine. (RTT 3499.)<sup>1067</sup> Adler had introduced Robert to St. Germaine, as Robert wanted to invest \$500.00 in drugs. (RTT 3514; 3556.) Adler knew St. Germaine and had purchased marijuana and cocaine from her. (RTT 3557-58.) Adler introduced Robert to St. Germaine so Adler wouldn't have to act as the middle-man. (RTT 3558-59.)

Rhonda told Adler that she was afraid of St. Germaine. (RTT 3502.) Rhonda's fear centered around Robert's drug activity. (RTT 3508.) Rhonda said she was keeping a diary. (RTT 3506-07.)<sup>1068</sup> Rhonda thought she was

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<sup>1065</sup> Rhonda never told Adler that she was considering going to the police to stop Robert from dealing narcotics. (RTT 3566.)

<sup>1066</sup> Adler knew Robert bought drugs, but wasn't sure if he sold them as well. (RTT 3511.)

<sup>1067</sup> Adler testified that he had no direct knowledge of St. Germaine being affiliated with any motorcycle gangs. (RTT 3564.)

<sup>1068</sup> Adler didn't recall Rhonda telling him that she tape recorded phone calls. (RTT 3507.) He did remember her recording noises from the house. (RTT 3508.) He also didn't recall her taking notes. (RTT 3508.)

being watched. (RTT 3512-3513.)<sup>1069</sup>

Rhonda kept the door and windows locked all the time. (RTT 3429.) Rhonda always checked to see who was at the door before she opened it. (RTT 3429-30.) She was security conscious. (RTT 3497.)

### 3. Lucas' Absenteeism At Work

In October, 1984, Frank Clark felt that business at CMC was "shaky" and was going downhill. (RTT 3778.) It was getting out of control; the profit was way down. Also, the relationship between Clark and Lucas had become strained. (RTT 3795.)<sup>1070</sup> Lucas wasn't the same person Clark had known in previous years. Lucas was a lot more moody and his temper seemed a little bit more explosive. (RTT 3778-79.) Lucas' attendance at work was poor. (RTT 3794; 3778-79.)

### 4. Lucas' Absence From Descanso

Because of a drunk driving charge Lucas had to work two days for 8-10 hours at the Descanso Detention Facility. On October 22, 1984, Lucas reported to the facility for work. (RTT 3635-36.) Lucas worked the entire day on October 22. (RTT 3636.)<sup>1071</sup> However, Lucas said he had a large carpet job on October 23,<sup>1072</sup> so his second day was rescheduled to October

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<sup>1069</sup> Rhonda told Adler she was considering divorcing Robert. (RTT 3498.)

<sup>1070</sup> Before they had been very good friends. (RTT 3778.)

<sup>1071</sup> Lucas signed in and out in the logbook for October 22, 1984. (RTT 3639.)

<sup>1072</sup> There was a carpet cleaning job scheduled for Tuesday, October 23, 1984 between 12:00 and 2:00 p.m. The dispatch sheet indicated that the job had been completed Saturday and they never dispatched any cleaners to the house on Tuesday, October 23. (RTT 3784.) Clark saw no indication of  
(continued...)

25. (RTT 3637-38; 3643.)<sup>1073/1074</sup>

Clark remembered that on October 23, 1984, Lucas was scheduled to go the Descanso Detention Facility. (RTT 3793-94.) On October 23, 1984, Lucas called Clark early in the morning at CMC. Lucas told Clark that he had gone to Descanso but they wouldn't admit him because he was sick, and he rescheduled for another day. (RTT 3794.)<sup>1075</sup> Clark assumed Lucas was calling in sick. Lucas didn't come to work that day. (RTT 3793-94.)<sup>1076</sup> Clark couldn't recall when he saw Lucas next. (RTT 3794.)<sup>1077</sup>

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<sup>1072</sup>(...continued)

a large carpet cleaning job on the dispatch sheet for October 23, 1984. (RTT 3786.)

<sup>1073</sup> The court took judicial notice that October 22nd was a Monday and the 25th was a Thursday. (RTT 3638-39.)

<sup>1074</sup> Lucas' signature did not appear in the logbook for October 23, 1984. (RTT 3639-40.) Lucas' signature was in the logbook for October 25, 1984. (RTT 3640-41; 3650; 3669.) Deputy Sheriff Richard Richardson, the work release deputy, didn't see anything unusual about Lucas on the 25th. (RTT 3650-51.)

<sup>1075</sup> The work release deputy at Descanso, Richard Richardson, had no idea if Lucas was sick on 10/23/84 because he had no contact with him. (RTT 3649-50.)

<sup>1076</sup> After Lucas was arrested in December, Clark called Detective Henderson and told him about the Descanso incident. (RTT 3793.) He didn't tell Henderson about it in the earlier interview. (RTT 3793.) Clark was interviewed four times on December 20, 1984, but he didn't mention anything about Lucas' Descanso call during the first three interviews. (RTT 4196-97.) In the fourth interview Clark told Henderson that Lucas called in sick on October 23, 1984 and took the day off. (RTT 4198.)

<sup>1077</sup> Following Lucas' visit to Descanso, his attendance at work was poor. (RTT 3794.)

5. The Events Of October 23, 1984

On October 23, 1984, Rhonda Strang agreed to babysit Gregory Fisher's daughter, Amber. (RTT 3393-95.) Fisher dropped Amber off around 9:30 a.m. (RTT 3395-99.)<sup>1078</sup>

At approximately 1:30 p.m., Lynn Haines of the Lakeside Fire Department received a call regarding a throat slashing. (RTT 3402-03; 3415.) It took the fire department crew about two minutes to arrive at the Strang house. (RTT 3403.) A neighbor, Mrs. Cook, met the fire engine outside and told Haines that Rhonda's daughter came home from school and found her mother with her throat slashed. (RTT 3403; 3417.)

Haines and Captain Strange entered the house through the unlocked kitchen door. (RTT 3403-04; 3415-18.) They walked through the kitchen and dining room. (RTT 3418.) As they approached the living room area, Haines saw a playpen with a baby lying in it. (RTT 3404.)<sup>1079</sup> As he stepped into the doorway to the living room, Haines saw Rhonda Strang lying on her back. Her throat was slashed. (RTT 3404.) Taking a step inside, he could also see a little girl, later identified as Amber Fisher. She was lying on her side next to the doorway leading out the other side of the house, and she also had her throat cut. (RTT 3404.) Haines walked into the room and looked for other victims. (RTT 3404-05; 3419-20; 3428.)<sup>1080</sup> Haines picked up the baby

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<sup>1078</sup> Fisher tried calling Rhonda's house between 3:00 and 4:30 that afternoon, but got no answer. He tried calling a little later, but the phone was busy. (RTT 3397.)

<sup>1079</sup> Haines estimated the baby's age at approximately 6 months. (RTT 3407.)

<sup>1080</sup> Haines saw no blood anywhere in the house other than near the  
(continued...)

and carried it out of the house, following Captain Strange through the same door they had come in. (RTT 3405; 3418-20.)<sup>1081</sup>

Haines handed the baby to a neighbor and waited outside until the sheriff arrived. (RTT 3405; 3408.)<sup>1082</sup> When paramedics arrived, Strange told them they weren't needed and could not enter the house. (RTT 3421.) Two uniformed sheriff's deputies then arrived and entered the house. (RTT 3421-22.)

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

Detective Robert Fullmer received a call at approximately 2:00 p.m. and arrived at the scene at approximately 2:20. (RTT 3201; 3305; 3316.) Deputies had secured the scene. (RTT 3306.) The house was in a residential area at the end of a long driveway on a hill. There were other residences that were off that particular driveway. (RTT 3201.)

Tire impressions were found in some soft loose dirt approximately 250 feet down the driveway where it met the street. (RTT 3314; 3328-29.)<sup>1083</sup> It

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<sup>1080</sup>(...continued)

victims. There were no signs of a forced entry or struggle inside the house. Everything appeared to be very neat. (RTT 340607.) Haines was careful not to disturb any crime scene evidence. (RTT 3408.) He didn't touch anything except the door knobs to gain entry to the rest of the house. (RTT 3408.)

<sup>1081</sup> The baby seemed to be very lethargic. Its diaper had soaked all the way through. The baby didn't cry the whole time Haines was there. (RTT 3406-07.)

<sup>1082</sup> To Haines' knowledge, no one else entered the house except April La Follette and sheriff's deputies. (RTT 3209; 3306; 3409.)

<sup>1083</sup> These impressions were memorialized in Defendant's Exhibits 550 A, B, and C. (RTT 3313.)

was Detective Fullmer's opinion that while the tire impressions could possibly have been left by the assailant, they also could have been left by a vehicle going to one of the other houses on that driveway. (RTT 3314-15.) There was also a shoe impression left in the dirt at the same location. (RTT 3315.)<sup>1084</sup>

Detective Fullmer examined the exterior of the house and found no additional footprints or tire impressions. (RTT 3202; 3308; 3310-11.) Fullmer walked the entire perimeter of the exterior of the house and found no evidence of forced entry. (RTT 3202; 3389.) The windows were shut and the screens in place. All of the doors to the residence were locked except the one between the kitchen and garage. (RTT 3202-03.) Fullmer checked each of the window sills for evidence of pry marks but found none. (RTT 3389.) The garage had an automatic garage door opener; the door was down and the mechanism was locked. (RTT 3204.)

At 4:39 p.m. Fullmer entered the house through the unlocked door on the north side of the house between the kitchen and garage. (RTT 3316-18; 3321; 3390.)<sup>1085/1086</sup> Rhonda Strang was on the living room floor with her throat cut from ear to ear. (RTT 3207; 3212.) There were also some abrasions on Rhonda's neck. (RTT 3212.) Fullmer saw no other wounds on Rhonda Strang at the time. (RTT 3212.) There were some loose hairs on her left and right arm. (RTT 3336; 3337.) Her right arm was outstretched and pointed toward a table near her head. (RTT 3213.) There was a partially

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<sup>1084</sup> Memorialized in Defendant's Exhibit 551. (RTT 3313.)

<sup>1085</sup> Fullmer did not direct anyone to attempt to obtain fingerprints from the door. (RTT 3321.)

<sup>1086</sup> The television was on when Fullmer entered. (RTT 3209.)



burned Marlboro filter cigarette on the floor near Rhonda's foot which had partially burned the carpet. (RTT 3207; 3234; 3329; 3333-34.)<sup>1087</sup> The cigarette was seized. (RTT 3207.)<sup>1088</sup> Amber Fisher's throat had also been cut. (RTT 3212.) Loose hair was found and collected from both of Fisher's arms, and a loose hair underneath her. (RTT 3337.)<sup>1089</sup>

It did not appear to Fullmer that a struggle had taken place because most of the blood was close to the bodies. (RTT 3212-13.)<sup>1090</sup>

In the kitchen there were two blood droplets on the dishwasher in a configuration that might have been caused if someone had blood dripping from their hands. (RTT 3205; 3218; 3227.)<sup>1091</sup> There was a wet rag in the

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<sup>1087</sup> The cigarette had a gold filter with three gold bands around the filter. (RTT 3332-33.) There were also three holes in the cigarette filter but Fullmer didn't know anything about them. (RTT 3333.)

<sup>1088</sup> Fullmer identified the cigarette as People's Exhibit 187. (RTT 3234.)

<sup>1089</sup> No attempt was made to determine the body temperature of either victim or the room temperature. (RTT 3382-83.)

<sup>1090</sup> There was some blood on an end table near Strang's head. (RTT 3212-14.) There was also some blood on the leg of a coffee table near Amber Fisher's head. (RTT 3208; 3213-14.) There was no other blood in the living room. (RTT 3214.) The seat cover of a dining room chair had a drop of blood on it. (RTT 3207.) That portion of the seat cover was cut out and collected. (Exhibit 185.) (RTT 3231-32.) There were a series of blood "rings" on the floor between the dining room/living room area and the area near the dishwasher in the kitchen. (RTT 3215-17.) It was Fullmer's opinion that the blood had fallen on the floor and started to dry; the outer rings of the blood drops had dried and the remainder of the blood had been wiped away. (RTT 3216; 3339.) There was one intact blood drop on the floor tile near a chair in the kitchen/dining room area. (Exhibit 183.) (RTT 3216; 3228-29.)

<sup>1091</sup> Exhibit 184. (RTT 3231.)

kitchen sink that had a stain on it. (RTT 3340; 3359.)

In the refrigerator, there was an open can of Olympia beer and an open can of Pepsi on the shelf above it. (RTT 3335.)<sup>1092</sup> There was an open carton of Marlboro Lights in the freezer compartment of the refrigerator. (RTT 3334-35.)<sup>1093</sup> The drapes in the kitchen were open. (RTT 3328.)

Leaning against the north wall of the master bedroom was a door that had been removed from the door jam which appeared to belong to the master bedroom. The door had a hole in it. (RTT 3322-24.)<sup>1094</sup> A blue steel revolver was found in the closet in the master bedroom. (RTT 3391.) Also in the master bedroom, there was a mirror with white powder residue on it which was consistent with cocaine or crystal methamphetamine. (RTT 3378-81.)<sup>1095</sup>

Fullmer directed the lab tech, Deputy Masters, to dust the house for prints. (RTT 3360.) One print was found and collected. (RTT 3360.)<sup>1096</sup>

Fullmer interviewed Robert Strang on October 23, 1984. (RTT 3366-67.) A couple of days later, Fullmer returned to the house with Robert Strang's mother and father. (RTT 3363; 3365-66.) Fullmer was looking for additional evidence as he had information that there may be a diary or audio

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<sup>1092</sup> Neither can was seized or fingerprinted. (RTT 3335.)

<sup>1093</sup> Memorialized in Defendant's Exhibit 553. (RTT 3334.)

<sup>1094</sup> The door and door jam were memorialized in Defendant's Exhibits 552 and 552A. (RTT 3322-24.)

<sup>1095</sup> While it was his duty as a law enforcement officer to seize unlawful items, Fullmer didn't seize the mirror because the residue wasn't a usable quantity. (RTT 3380-81.) The mirror was not dusted for prints. (RTT 3381-82.)

<sup>1096</sup> Head hair samples were collected from each victim by Criminalist Ron Barry. (RTT 3337-38.)

tapes in the house. (RTT 3363-65.)<sup>1097</sup>

7. Robert Strang's Work Routine

In October 1984, William Ralls was working for Robert Strang's father at his company, Strang Heating and Air Conditioning. (RTT 10889; 10895.)<sup>1098</sup> Ralls was an on-job foreman. (RTT 10890-91.) Robert's job was to help Ralls. (RTT 10891.) Ralls had to keep track of what Robert and another worker, Dale Pride, did every day and report their progress. (RTT 10891-92.) They worked from 7:00 a.m. to 3:30 p.m. Monday through Friday. (RTT 10892.) Ralls was aware that Robert sometimes went home between 10:00 and 11:00 a.m. (RTT 10895.) Robert had a reputation for sneaking off the job site, but Ralls kept an eye on him. (RTT 10896; 10924.)<sup>1099</sup> On the job, they didn't punch a clock; they filled out time cards. (RTT 10927.)

Ralls recalled the day Robert's wife, Rhonda was killed. (RTT 10890.) Robert arrived for work at about 8:00 or 8:30 a.m. and was at the job site until about 3:30 p.m. (RTT 10892; 10897.) He had lunch with Robert and was with him all day. (RTT 10924.)<sup>1100</sup> He had no recollection of Robert injuring himself on the job that day, but it was possible because they cut themselves all

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<sup>1097</sup> Fullmer couldn't remember collecting the diary and/or tapes. (RTT 3364.) There was no reference to this in Fullmer's report. (RTT 3366.)

<sup>1098</sup> Ralls testimony was offered by the prosecution as rebuttal evidence.

<sup>1099</sup> Ralls heard rumors about Robert Strang's drug use but had not actually observed Strang using drugs. (RTT 10896.)

<sup>1100</sup> According to Ralls, there was no way Robert could have left the job the day Rhonda was murdered; Robert had a reputation for sneaking off the job and Ralls was keeping a close eye on him. (RTT 10924-25.)

the time doing sheet metal work. (RTT 10928.)<sup>1101</sup> Ralls had no recollection of seeing any blood on Robert's clothing. (RTT 10928.)<sup>1102</sup>

8. Autopsies Of The Victims

a. *Blood Samples*

Blood samples were collected from both victims. (RTT 3339.) Blood samples from the victims were sent to the toxicology lab for evaluation. No drugs or alcohol were found in the blood samples. (RTT 7023-24.)

b. *Amber Fisher Autopsy*

On October 24, 1984, Dr. Robert Bucklin, a forensic pathologist, performed the autopsies on Strang and Fisher. (RTT 6979; 6983.) As to Amber Fisher,<sup>1103</sup> Bucklin noted nothing unusual about the chest or abdomen; the extremities were normal and showed no injury. (RTT 6994.) There was a bruise on Fisher's right shoulder. (RTT 6994.)

The neck injury was a deep cutting wound on the anterior front surface of the neck. Its upper border was two inches below the tip of the chin and the lower border was at the level of the thyroid cartilage. The wound gaped to two inches in its mid-portion. The wound was six inches long in the upper

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<sup>1101</sup> Ralls testified that Robert Strang carried a Buck knife. (RTT 10894.) Ralls denied having heard the name Peggy Shelton or knowing Linda Fletcher or Artie Garcia. (RTT 10894-95.)

<sup>1102</sup> There was a spot of blood on Robert Strang's Levis that was apparently consistent with his own blood and inconsistent with the blood of Amber Fisher or Rhonda Strang. (See RTT 5314-16.) The defense sought to admit this evidence to impeach Ralls' testimony that he saw no blood on Robert's clothing. However, the judge excluded it ruling that the spot was too small to have impeachment value. (RTT 11256-66.)

<sup>1103</sup> Bucklin described Amber Fisher as a female Caucasian, approximately 3 years old, 32" long, weighing 32 lbs. (RTT 6994.)

border and six inches long on the lower border. The point of origin of the cutting instrument was on the right side of the neck. (RTT 6995.) This wound went from the right side of the body to the left. (RTT 7010.) The wound exposed the deep structures of the neck. The carotid arteries and the jugular veins had been incised and had retracted. The cut went through the upper part of the larynx, just below the epiglottis, a flap of cartilage which covers the upper end of the voice box. The body of the larynx was in the upper portion of the wound and the upper part retracted toward the chin. The cervical vertebrae were exposed and there were cutting injuries on the cervical vertebrae on the left side. (RTT 6995.)<sup>1104</sup>

Bucklin concluded that the wound was caused by more than one stroke because of the irregularity of the skin. The presence of a skin flap or tag on the side indicated that there was more than one application of the cutting instrument. (RTT 6996-97.)

Fisher also had several small superficial abrasions on the forehead and a cut through the tip of the finger. (RTT 6997.)<sup>1105</sup> Bucklin thought the wound to the finger was fresh and consistent with the time of death. (RTT 6997-98.)

Bucklin examined Fisher's stomach contents and found that it contained less than one ounce of light yellow liquid having no characteristic

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<sup>1104</sup> Bucklin did not indicate which of Fisher's vertebrae were impacted in his report, but estimated they were either C-3 or C-4, based on his examination of the photos and the report. (RTT 6999.)

<sup>1105</sup> The wound to the finger was depicted in People's Exhibit 29 LL. Bucklin did not describe it in his autopsy report. (RTT 6997; 7009.) He had testified that Fisher's arms, hands and fingers showed no injury. (RTT 6994.) He also did not describe any defensive wounds to Rhonda Strang in his report. (RTT 7009.)

odor. No food or medication was present in the stomach. (RTT 7023.)

Fisher's cause of death was attributed to the cutting wound to the neck which had transected the airway and blood vessels; she bled to death. (RTT 6998.)

*c. Rhonda Strang Autopsy*

Dr. Robert Bucklin also performed Rhonda Strang's autopsy. (RTT 6984.)<sup>1106</sup> Strang's gaping neck wound extended across the front part of the neck. It measured six and one-half inches long on its upper border and eight inches on its lower border. It was two inches wide at its widest point. At the right border was a one-quarter inch superficial cut, indicating the probable starting point of the wound. (RTT 6986.)

The wound appeared to go from the right side of the body to the left. (RTT 7010.) The head showed suffusion, which is a dusky color, much more dusky than the skin of the rest of the body. This indicated that there had been some obstruction to the blood flow from the head to the heart by some means; most likely external. (RTT 6987.) Such suffusion would occur if Strang had been choked before death. (RTT 6987-88.)<sup>1107</sup>

The wound in the neck went through the structures of the neck from right to left. Both the carotid arteries, all the jugular veins, and the larynx were cut. The cut went completely through the structure of the larynx. The thyroid Horns, the top part of the larynx, protruded upward above the margin of the wound. The upper part of the larynx was retracted upward toward the neck. (RTT 6988.) There was substantial hemorrhaging into the structures of

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<sup>1106</sup> Bucklin described Rhonda Strang as an adult Caucasian female, with long blond hair, 67 inches tall, weighing 133 pounds. She appeared to be about 24 years of age. (RTT 6983; 6984.)

<sup>1107</sup> The neck cut would not have caused the suffusion. (RTT 6988.)

the back part of the neck along the cervical spine. (RTT 6988-90.)

Bucklin found five cutting injuries involving anterior surfaces of the third and fourth cervical vertebrae. (RTT 6989; 6998; 7018.) The implement, which had gone through the larynx, produced cuts on the surfaces of the vertebrae primarily on the left side. The uppermost of these cuts extended one-quarter inch into the body of the third cervical vertebra. (RTT 6989.)<sup>1108</sup> On the left side of the wound was a one-quarter inch flap of skin. (RTT 6990.)<sup>1109/ 1110</sup>

In Bucklin's opinion, there was more than one stroke. He based that opinion on the fact that the cervical vertebrae showed five distinct cutting injuries and each one of those would have to imply one stroke of a cutting tool. (RTT 6993.) Also, the skin tag indicated to him that the knife had changed directions and was reapplied. (RTT 6994.)

There were a number of irregular abrasions around the neck consistent with pressure from an encircling necklace. (RTT 6991-92.)<sup>1111</sup> There was a gold chain imbedded in the left side of the neck wound. (RTT 6992) Bucklin believed that manual strangulation with the gold chain would have been a possible explanation for the irregular scratches at the lower extremity of the neck incision. (RTT 6992.) Bucklin noted a number of petechiae, small

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<sup>1108</sup> The injuries to the cervical vertebrae were depicted in Exhibit 29 QQ. (RTT 6989.)

<sup>1109</sup> This was depicted in Exhibit 29 NN. (RTT 6990.)

<sup>1110</sup> At the lower border of the mandible of the jaw close to the angle of the neck was a three quarter inch superficial abrasion. (RTT 6990.) Bucklin described it as a "lesion." (RTT 6990.)

<sup>1111</sup> This was depicted in People's Exhibit 29 QQ and RR. (RTT 6992.) The chain was depicted in People's Exhibit 29 MM. (RTT 6992.)

superficial hemorrhages, in the skin of the forehead, the cheeks and the chin. (RTT 6983.) There was also petechiae in the sclera, the white parts of both eyes. (RTT 6984.)

There was a bruise on Strang's right shoulder at a point four inches to the right of the midline. It was similar to the bruise Bucklin found on Amber Fisher, and in the same general area. (RTT 6990.)<sup>1112</sup> There was a remarkable similarity in the wounds. (RTT 6991.) The same kind of force had been applied to the same part of their anatomies. (RTT 7012.)<sup>1113</sup> Other than Strang's two old scars, Bucklin saw no other injuries. (RTT 6985.)

Bucklin concluded that Strang's cause of death was due to the cutting wound to the neck which transected the airway and blood vessels. (RTT 6993.)

9. Lucas' Arrest

Gary Fisher obtained a search warrant for Lucas' home and an arrest warrant for Lucas. (RTT 6874-75.) On Sunday morning, December 16, 1984, Fisher executed the warrants. Lucas was arrested and his home searched. (RTT 2793; 3525; 5085; 6875-80.) The search warrant also authorized a search of Lucas' truck. (RTT 5399; 6877.)

**B. Defense Evidence**

1. Robert's Prior Assaults Of Rhonda

a. *Ronnie Christensen's Observations*

In 1983 and 1984, Ronnie Christensen knew Rhonda Strang and her

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<sup>1112</sup> This wound was depicted in People's Exhibit 29 RR. (RTT 6990-91.) The similar wound found on Amber Fisher was depicted in People's Exhibit 29 JJ and II. (RTT 6991.)

<sup>1113</sup> Bucklin couldn't say what kind of instrument caused the injury. (RTT 7012.)



husband, Robert. (RTT 9191.) On one occasion, at a party,<sup>1114</sup> Christensen saw Robert grab Rhonda by the throat and say, "I am going to kill you, bitch." (RTT 9191-93.)<sup>1115</sup> Robert then slapped Rhonda in the face. (RTT 9191-93.) Strang was wearing a folding 110 Buck knife. (RTT 9193-94.)<sup>1116</sup>

About a week after the party Christensen saw Rhonda with scratches on the side of her neck and bruises on her left shoulder. (RTT 9194.) Christensen asked what happened and Rhonda told him that Robert beat her up. (RTT 9194-95.)<sup>1117</sup>

*b. The July 8, 1984 Altercation At The Strang House*

In July 1984 Thomas Bradshaw lived in Lakeside. The Strang house on Riverview Avenue was about 2000 feet from his house. (RTT 9104-05.) Bradshaw's house was on top of the hill and his backyard looked over the Strang's house. (RTT 9104-05; 9108.)<sup>1118</sup>

On July 8, 1984, at approximately 2:00 a.m., Bradshaw heard arguing

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<sup>1114</sup> It wasn't established when the party occurred.

<sup>1115</sup> Christensen couldn't see Robert's right hand but he was sure both his left and right hands were around Rhonda's neck. (RTT 9192.)

<sup>1116</sup> Christensen collected Buck knives and also had worked for Buck in Santee. (RTT 9194.)

<sup>1117</sup> The court advised the jury that this testimony was being offered to show Rhonda's state of mind and Rhonda's conduct as a result of her state of mind; not to prove the truth of the matter asserted. (RTT 9195.)

<sup>1118</sup> Throughout Bradshaw's testimony there is reference to 9414 Riverview; however, the correct address was 9418 Riverview. (RTT 9105.) (See testimony of Fullmer (RTT 3201); Haines (RTT 3402); Parr (RTT 9461) and Lones (RTT 10076).) Nevertheless, when Bradshaw was shown Exhibit 180, a photo of the Strang house, he identified it as being the correct house. (RTT 9111; see also 9109.)

coming from the Strang house. Someone was saying, "Get out of my house. This is my house, and I want you out." Bradshaw thought he heard a few follow-up words, and then about an hour later he heard a woman screaming. (RTT 9108.) The woman was screaming, "Help me. Help me. He's trying to kill me." (RTT 9108-09.)

Bradshaw called the sheriff's office and reported what he heard. (RTT 9109-10.) He looked out the window and tried to direct the deputies to the area from where he heard the sounds. (RTT 9108.) After he called the sheriff, Bradshaw heard what sounded like pounding on a door and then the sound of glass breaking. (RTT 9108.)

The next morning, Bradshaw saw a two foot by four foot hole through the large glass window in the front of the Strang's house. (RTT 9109.)

On July 8, 1984, at approximately 7:15 a.m. Andrew Parr, a paramedic for the Lakeside Fire Protection District, responded to 9418 Riverview and contacted Rhonda Strang. (RTT 9459-65.)<sup>1119</sup> However, Rhonda did not appear injured and refused aid. (RTT 9464-65.)<sup>1120</sup>

On July 8, 1984, David Lones, a firefighter/EMT responded to a call at 9418 Riverview. (RTT 10076.) When they pulled up to the house the front door was open and the window in the front of the house was broken. (RTT

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<sup>1119</sup> Parr identified Defendant's Exhibit 701 as a field incident report dated 7/8/84. (RTT 9459.) Parr remembered going to 9418 Riverview because the fire engine got stuck in the driveway. (RTT 9461.) Battalion Chief Norman Lepker identified the second page of Exhibit 701 as a medical incident report. (RTT 9466; 9467.)

<sup>1120</sup> To Parr, Rhonda Strang didn't seem to be a victim of any sort. (RTT 9463.) Parr couldn't remember why they were summoned to the house or whether he conducted any kind of physical evaluation on Rhonda. (RTT 9464.)

10076.) As he approached the house he saw a wooden 4 x 4 in the dirt at the base of the broken window. (RTT 10076-77.)

In July 1984, Cynthia Cowser was one of the Strang's neighbors. (RTT 9891-92; 9895.) One evening, Cowser was home with her children when Rhonda came to Cowser's house and asked to use the phone. (RTT 9892.) Cowser had never met Rhonda before. (RTT 9894.) Rhonda had her daughter, April, with her. (RTT 9892-94.) Rhonda appeared to be upset; she was crying and in a hurry. (RTT 9893-94.) She said that her husband was crazy and that she had to get out of her house; she needed to call someone to pick her up. (RTT 9892-93.) Rhonda called her mother-in-law. (RTT 9892.)

*c. Richard La Follette's Observations*

Between July and October 1984, Richard La Follette saw Rhonda with a black eye and red marks on her face. (RTT 10635-36.)<sup>1121</sup> While at the Strang house, La Follette saw a door with a hole in it, some holes in the walls and damage to some of the kitchen cabinets. (RTT 10639.) He believed that Robert had a violent temper. (RTT 10639.) He felt that Robert was a walking time bomb. (RTT 10640.)

*d. Paul Fortin's Observations*

Paul Fortin saw Rhonda with bruises on her face and arms. (RTT 10091-93.) Rhonda told Fortin that Robert hit her. (RTT 10092.) Fortin also testified that Robert threatened Rhonda with guns and told her that if she left him he would kill her. (RTT 10095.) Robert had held a gun to her on many occasions. (RTT 10095.)

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<sup>1121</sup> La Follette could not pin down a specific month as to when he made these observations. However, he knew it was in 1984. (RTT 10640.)

*e. Peggy Shelton's Observations*

There were several arguments between the Strangs while Margaret ("Peggy") Shelton lived at the house. Robert slapped Rhonda around a couple of times. (RTT 10223.) He had slapped Rhonda in the face, pushed her into a wall. (RTT 10223.) Robert put a hole in a door once. (RTT 10223.) Shelton saw a picture of the door. (RTT 10454.)

*f. Robert Pulled A Gun On Rhonda In August, 1984*

Peggy Shelton remembered a time when Rhonda and Robert had a fight. (RTT 10454.) Robert pulled a gun on Rhonda and pointed it at her head; Shelton called the police. (RTT 10223-25; 10454.) Shelton told the police what had occurred. (RTT 10225.) Rhonda had Robert arrested. (RTT 10454.)

On Monday, August 27, 1984, Deputy sheriff John McPeek was dispatched to the Strang house on a family disturbance call involving a gun. (RTT 9124; 9169-70; 9174.) McPeek made contact with two women there who identified themselves as Rhonda Strang and Margaret Shelton. (RTT 9170-71.) Rhonda told McPeek that her husband Robert had pulled a gun on her and told her he would make her leave. (RTT 9172-73.)<sup>1122</sup> Rhonda initiated a citizen's arrest of Robert. (RTT 9173.) McPeek contacted Robert Strang and asked Strang for the gun. (RTT 9173.) He was taken to a bedroom and shown a five shot .22 derringer in a dresser drawer which McPeek seized along with four .22 bullets. (RTT 9173-74.) It was the gun that Robert had threatened Rhonda with. (RTT 9173-74.) McPeek took Robert

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<sup>1122</sup> The jury was instructed that this testimony was not offered for the truth of the matter asserted but rather to show Rhonda Strang's state of mind and how she acted. (RTT 9171-72.) The court also read Evidence Code section 1250 and 1252 to the jury. (RTT 9490-91.)

Strang into custody and seized the .22 derringer with which he had threatened Rhonda. (RTT 9173-74.)<sup>1123</sup>

*g. Observations Of Ron Adler*

Once while Ron Adler, Rhonda's father, was visiting Rhonda, Robert spoke of his ability to "take somebody out." (RTT 10042-43.)<sup>1124</sup> Robert implied that if anybody reported his drug dealings he could have them taken out, meaning that he could have them killed. (RTT 10043.) Rhonda was in the house at the time but Adler didn't know if she heard the conversation. (RTT 10043-45.)

*h. Observations Of Arthur Garcia*

Rhonda told Arthur Garcia that she was keeping notes concerning the fights between Robert and herself. (RTT 9484.) Rhonda took a photograph of a door that Robert had kicked in. (RTT 9484.)

*i. Arguments Between Rhonda And Robert The Night Before The Murder*

On October 23, 1984, Sheriff's Deputy Lawrence Torkelson was one of the first responding officers at the Strang/Fisher scene. (RTT 10645-46.) Torkelson interviewed a five-year old girl identified as April La Follette. (RTT 10646.) April told him she had heard her mother, Rhonda, arguing with Robert Strang the night before. (RTT 10646.)

2. Robert's Drug Use

Sometime during the summer of 1984 San Diego police detective Dale Kitts received a call from a woman identifying herself as Rhonda Strang.

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<sup>1123</sup> McPeek couldn't recall if the bullets were in the gun or not. (RTT 9174.)

<sup>1124</sup> Quotation marks were omitted in the reporter's transcript. (RTT 10043.)

(RTT 8802.) She was concerned that her husband was using large amounts of cocaine and breaking up the family, causing problems with the family and spending most of the money on drugs. Strang told Kitts that Robert's drug connection was Paula St. Germaine. (RTT 8809-10.)<sup>1125</sup> Kitts was familiar with the name St. Germaine as there was a family by that name that had been involved in narcotics activity in the past. (RTT 8810.) Kitts had more than one conversation with Rhonda Strang. (RTT 8809.)

Arthur Garcia had known Rhonda Strang since 1975. (RTT 9475.) During 1984, Garcia visited the Strangs at their house in Lakeside at least ten times. (RTT 9475-76.) On occasion, he would visit a couple of times a week. (RTT 9476.) According to Garcia, Robert was using cocaine. (RTT 9478.) Rhonda told Garcia that she intended to record conversations between Robert and his drug supplier. (RTT 9485-86.)

Rhonda told Richard La Follette she was concerned about Robert's involvement with cocaine. (RTT 10637.) Rhonda told La Follette she was keeping a diary, tapes of phone conversations, and a list of drug dealers and drug deals. (RTT 10637.) Rhonda had a fear of drug dealers. (RTT 106434.) Rhonda told La Follette she didn't want anything to do with drugs. (RTT 10643.) She was getting away from alcohol as well. (RTT 10643.) She wanted to keep drugs out of the house, and she wished that Robert would stay off drugs. (RTT 10643.) Rhonda was concerned about how much money Robert was spending on drugs. (RTT 10643-44.) Rhonda was afraid that

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<sup>1125</sup> She gave Kitts St. Germaine's address on Dunbar Lane in the Flinn Springs area of San Diego county. (RTT 8809.) The court instructed the jury that this portion of the testimony was not admitted for the truth of the matter asserted but only to explain Rhonda Strang's conduct. (RTT 8807.) The court also reiterated her limiting instruction with respect to statements by Rhonda Strang. (RTT 8807-08.)

drugs were destroying her family. (RTT 10644.)

Margaret (“Peggy”) Shelton was Rick Adler’s girlfriend and met Rhonda Strang through Adler. (RTT 10219-20.) They became very close. (RTT 10219-21.)

In August 1984, Shelton and her son moved in with the Strangs. (RTT 10220; 10225; 10453.) While she was living with the Strangs, Shelton noticed that Robert was heavily involved with drugs. (RTT 10221.) Robert would leave the house at least once, if not two or three times a day to get drugs. (RTT 10454; 10456-57.) Once, Robert came home and said he had gotten some coke and asked Rhonda and Shelton if they wanted a line. (RTT 10230; 10447.) Shelton declined but Rhonda accepted and Robert put the cocaine on a mirror and proceeded to chop it up with a razor blade and draw up lines. (RTT 10447-49.) Shelton saw Robert snort cocaine on more than one occasion. (RTT 10449.)

Rhonda spoke to Shelton about the problems she was having with Robert dealing drugs and spoke with Shelton about trying to make arrangements to have Robert’s dealer arrested. (RTT 10221-22.) Rhonda told Shelton she was recording conversations between Robert and Paula St. Germaine. (RTT 10450.) Once, when Robert wasn’t home, Rhonda brought out a tape and played it for Shelton. (RTT 10450-51.) Rhonda was trying to get Paula St. Germaine arrested so that Robert would quit going to her for drugs. (RTT 10451.) Rhonda was trying to get Robert to stop using drugs so they could get their life together. (RTT 10451.)

According to Linda Fletcher, a friend of Rhonda’s mother, Robert was very heavily into drugs and Rhonda was trying to get help for him. (RTT 9510.) Rhonda said Robert was spending family money on drugs. (RTT 9510.) Rhonda kept a list of everyone who came to their house because of

the drugs, a day-to-day diary of Robert's drug use, and was also making tape recordings related to Robert's drug use. (RTT 9510-11.)

On November 26, 1984, Deputy Ruff of the San Diego Sheriff's Department executed a search warrant at the residence of Paula St. Germaine and Richard Estabrook. In the bedroom located in the southwest corner of the residence, two white envelopes were found and removed, each containing plastic baggies. Each baggie contained cocaine. The net weight was 5.85 grams. Also seized was an Ohaus triple beam scale. (RTT 10646-47.)<sup>1126</sup>

### 3. Rhonda's Fear Of Robert And His Associates

Rhonda Strang expressed her fear of her husband Robert to a number of people.

Rhonda told Linda Fletcher, a friend of Rhonda's mother, that she was afraid of Robert. (RTT 9492-94; 9510-11.) She wanted a divorce and to get away from him. (RTT 9494; 9515.)<sup>1127</sup>

Rhonda was concerned about the people Robert was dealing with; she was afraid because there were so many people coming to the house. (RTT

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<sup>1126</sup> This testimony was offered by way of stipulation between the prosecution and defense.

<sup>1127</sup> Rhonda also told Peggy Shelton that she wanted to get a divorce. (RTT 10224.) She told Shelton that she was keeping a diary. (RTT 10226.) Rhonda told her that one of the reasons she was keeping a diary was to insure that, in the event of a divorce, she would keep custody of the child. (RTT 10457.) She was trying to get evidence against Robert regarding his drug abuse so he wouldn't get custody of the baby. (RTT 10457-58.)

Rhonda told Paul Fortin she wanted to get out from underneath it all and Robert was forcing her to sell. (RTT 10095.) Rhonda had contacted someone in law enforcement. (RTT 10095.) Rhonda told Robert that she wanted a divorce and that she was going to move out of state with April and the baby. (RTT 10095.)



9514.)<sup>1128</sup> Fletcher told her she should go to the police. (RTT 9514.) Rhonda told Fletcher she was afraid she was about to be killed. (RTT 9515.)

Richard La Follette had been married to Rhonda. (RTT 10633.) After they split up La Follette continued to have contact with Rhonda. (RTT 10633.) Their daughter, April, lived with Rhonda. (RTT 10633-34; 10638.) La Follette visited April at Rhonda's house. (RTT 10634.) He would also see Rhonda. (RTT 10634.)

From July through October of 1984, La Follette saw Rhonda at least three or four times a week at her house. (RTT 10635; 10639.) La Follette maintained a friendly relationship with Rhonda; they were very close. (RTT 10635.) La Follette never knew Rhonda to be a timid person. (RTT 10636.) She was pretty gutsy and not the kind of person to be afraid of anything. (RTT 10636-37; 10641.) However, in the months prior to her death, Rhonda changed drastically. She became fearful and afraid. (RTT 10637; 10641.) She also became religious. (RTT 10642-43.)

Rhonda would call La Follette late at night and tell La Follette that there were noises that she would hear in the attic and outside. (RTT 10641.)<sup>1129</sup> Rhonda always kept the door and windows locked. (RTT 10459-60; 10642-43.) Whenever La Follette came over, she would unlock the door to let him in. (RTT 10642; see also RTT 10459.)

Rhonda also told Margaret Shelton that she was afraid of Robert.

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<sup>1128</sup> Rhonda hid a telephone in a shoe box in their closet; she was afraid the phone had been tapped. Robert unplugged the phones and took them with him, and Rhonda wanted to have a phone. (RTT 9514; 10638.)

<sup>1129</sup> On one occasion La Follette went to the Strang house and saw footprints outside the windows and fingerprints on the window sills. (RTT 10642.)

(RTT 10224; 10226.) Rhonda told her that she was frightened because the people Robert were dealing with were “big time.” (RTT 10458.) Rhonda was always looking out the windows because she would hear things and she was scared. (RTT 10459.)

About a month before her death, Ronald Adler spoke with his daughter, Rhonda, on the phone. (RTT 10026-27.) Rhonda told him that she was afraid of Robert. (RTT 10027.) Rhonda told him that she thought she was going to be killed; Robert was involved in “big-time” dealing and she knew too much and was going to be killed. (RTT 10027.) Rhonda also expressed a fear of Paula St. Germaine to her father. (RTT 10043.)

Approximately two weeks before she was killed, Rhonda called her step-father, Paul Fortin, who was married to her mother. (RTT 10089-90; 10093.) Rhonda was scared, she was crying and very upset. (RTT 10090-91.) Rhonda told him she was afraid because she knew she was going to be killed. (RTT 10091.) She said she knew too much and was trying to expose certain people who were involved in Robert’s drug transactions. (RTT 10091.) Fortin told Rhonda she should go to the authorities but she told him she couldn’t because there were four Santee sheriff’s involved, as well as Robert’s attorney. Everywhere she went she was followed. (RTT 10093-94.) There was a blue van that was constantly seen in the area, and every time Rhonda went anywhere the van would follow her. (RTT 10094.) Rhonda was afraid. Fortin told her that he would come and get her, but Rhonda didn’t want Fortin to get involved because she was afraid something could happen to him and her mother. (RTT 10094.) Rhonda told Fortin she was keeping two diaries relating to the drugs Bob was dealing; one that she had hidden in the bedroom and one that was hidden under a drawer in the kitchen with names, dates, places, what was sold, who bought the narcotics and the names of the people

who were involved. (RTT 10094.) Rhonda wanted to expose the drug ring. She wanted to file charges to put a stop to it. (RTT 10094-95.) The phone call lasted about an hour and a half. (RTT 10090.)

4. Robert's Fetish For Knives

Robert had a fetish for knives and was always sharpening them. (RTT 9494.)<sup>1130</sup> Richard La Follette saw Robert carrying a Buck knife on his belt. (RTT 10639; see also RTT 10095-96 [Paul Fortin].)

Ronnie Christensen saw Robert Strang on a number of occasions. (RTT 9193.) Every time Christensen saw Robert he always had the knife on his belt. (RTT 9194.)

On occasion during 1984, Rhonda's father Ronald Adler saw Robert in person. (RTT 10028.) Robert usually carried a .22 derringer in his right pocket. (RTT 10028.) Robert also carried a folding Model 110 Buck knife and a fixed blade knife in his boot. (RTT 10028.)

5. Whether Rhonda Strang Always Locked Her Doors

Ronnie Christensen visited the Strang's house in Lakeside at least ten times. (RTT 9195-96; 9197.) Christensen would drop by during the day to say "hi" to Rhonda. (RTT 9197.) Rhonda was an old friend and he would stop in to see how she was doing and whether she needed anything. (RTT 9197.) Every time he went there he found the door open. (RTT 9196.)

6. Affair Between Michael O'Brien And Rhonda Strang

In the beginning of 1984, Michael O'Brien was living in Mission Beach. (RTT 9179-80.) O'Brien worked for Lucas' and Clark's Carpet Maintenance Company, CMC. (RTT 9180.) In the spring of 1984 O'Brien

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<sup>1130</sup> The testimony regarding Robert's fetish for knives was originally stricken. (RTT 9494.) The court later admitted the testimony to allow the jury to determine why Rhonda said she was fearful. (RTT 9506-07.)

met Rhonda Strang. Sometime thereafter, but prior to June 1984, Rhonda visited O'Brien at his house and they had sexual relations. (RTT 9180-83.)<sup>1131</sup>

7. Robert Strang's Sexual Advances Toward Peggy Shelton

Robert propositioned Margaret Shelton while she was living at the house. (RTT 10452.) He wanted Shelton to stay at the house with him and take care of him and the baby. (RTT 10453.) He was going to kick Rhonda out. (RTT 10453.) He also requested sexual favors from Shelton which Shelton declined. (RTT 10453.) About two days after he got out of jail for the gun incident, Robert asked Shelton to leave the house. (RTT 10453-54; 10461.) He told her she had to be out by that afternoon. (RTT 10453; 10454.)

8. Direction Of The Wounds Was Right To Left

Dr. Cyril Wecht, a specialist in anatomic, clinical and forensic pathology, testified that the direction of the wounds in the Strang/Fisher case suggested that the assailant was left-handed. (RTT 9369; 9399-400.)<sup>1132</sup> While he could not rule out a right-handed person as the assailant, as a forensic pathologist it was Wecht's opinion that the assailant was left-handed. (RTT 9400-01.)

9. Trip To Disneyland

Margaret Shelton moved out of the Strang's house around the 15th of October, 1984, but she maintained contact with Rhonda. (RTT 10225;

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<sup>1131</sup> On cross examination, O'Brien admitted he was a friend of Lucas' and had worked for him. (RTT 9183.) O'Brien also testified that the accident occurred in the spring of 1984. (RTT 9185; 9186.) Rhonda was at his place in Mission Beach after the accident but before June. (RTT 9186.)

<sup>1132</sup> Dr. Bucklin testified that both Strang's and Fisher's wounds went from right to left. (RTT 9400.)

10462.) Shortly after Shelton moved out,<sup>1133</sup> Rhonda told Shelton that she and Robert were going to go on a trip to Disneyland and that they were trying to get back together. (RTT 10462-64.) They were trying to repair their marriage. (RTT 10463; but see § 5.2.2(B)(1)(i), p. 1299 above, incorporated herein [arguments the night before].)

Detective Fullmer searched the Strang house in an attempt to locate the tape cassettes and/or diary. (RTT 10045-46.) In the course of the search he never located Rhonda's list of names of people involved with Roberts drug activities. (RTT 10046.)

On January 27, 1986, Frederick Freiberg compared a latent fingerprint obtained from the Strang residence with the known prints of Lucas and Rhonda Strang. (RTT 10782-83.) He identified Rhonda Strang as being the donor of the print, not Lucas. (RTT 10783-84.)

10. Failure Of Robert Strang To Show Emotion At Rhonda's Funeral

Linda Fletcher attended Rhonda's funeral. (RTT 9515-17.) Robert Strang was also at the funeral. Robert didn't show any emotion. (RTT 9517.)

**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 Strang/Fisher to Jacobs see Volume 2, Chart 2.2(R)(3), pp. 132-33, incorporated herein. For a comparison of Strang to Garcia see Volume 5, Chart 5.1.2(C)(2), pp. 1273-74, incorporated herein. For a comparison of Strang to Santiago see Volume 3, Chart 3.2(C)(1), pp. 807-08, incorporated herein.

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<sup>1133</sup> Shelton testified it was possible that the Strangs took the trip to Disneyland in September, but she thought it was shortly after she moved out in October. (RTT 10464.)

**CHART 5.2.2(C)(1) – COMPARISON OF STRANG TO SWANKE**

<b>Factor</b>	<b>Rhonda Strang</b>	<b>Anne Swanke</b>
Victim Age	24 (RTT 6983)	22 (RTT [Op. Arg] 21)
Single/Multiple Victims	Multiple	Single
Number of Strokes	5 distinct cutting injuries to cervical vertebrae (RTT 6993)	More than one stroke; 7 strokes on left side and 4 on right (RTT 4867-68)
Location of Throat Wounds	Cut went through upper portion of the thyroid cart., below the hyoid, through top part of body of larynx (RTT 6998; 7058). 5 cutting injuries on anterior surfaces of the 3rd & 4th vert.; most pronounced on left side (RTT 6989; 6998); uppermost cut extended 1/4" into 3rd vertebrae (RTT 6989)	Cut through upper portion of thyroid cartilage slightly above vocal cords (RTT 4871; 7058). Two marks; one very high up somewhere between C-2 and C-3, but see RTT 4974 [first near C-1 or C-2]; and one just behind the cut in the larynx between C-4 and C-5 (RTT 4872)
Jugular/Carotid severed?	Both carotid arteries; all jugular veins (RTT 6988)	Both carotids arteries and both jugular veins (RTT 4867; 4870)
Direction Of Throat Wound	Right to left (RTT 6986-88; 7010)	Blade moved across neck in both directions (RTT 7196); likely that handle of blade was to Swanke's right (RTT 7196)
Stabs to Torso	No (RTT 6984-85)	No
Hypoxia/Petechiae	Yes; in sclera, skin of forehead, cheeks and chin (RTT 6983-84); ["suffusion" of the face; possibility that she had been choked (RTT 6987)]	Eyes were sunken "somewhat dehydrated" (RTT 4854; 4973); No (RTT 7191); maybe some petechiae on inner aspect of scalp (RTT 4910; 4974)
Evidence of Ligature Marks	Yes (RTT 6992; 7059)	Yes (RTT 4854; 4836-64) Could have been caused by choke chain found around neck (RTT 4864; 4703; 4997)
Lip/Tongue Wounds	No (RTT 7018)	Yes, hemorrhage due to tongue being clenched b/t teeth (RTT 4905; 7194; 4910)
Other Injuries To Face/Head	1/4" superficial cut at right border of neck wound [point of origin] (RTT 6986)	Minor injury 1" behind lower portion of left ear (RTT 4976)

Other Nondefensive Injuries	Right shoulder 4" right of midline, superficial hemorrhagic area, 1/4" diam. (RTT 6990; 7011-12)	Brush marks or line-like scrapes on buttocks and thighs (RTT 4854; 4858; 4888); number of scratches between buttocks & knees (RTT 4858; 4888); discoloration on palmar aspects of both hands at base of the thumb (RTT 4923); linear mark on right wrist (RTT 4923)
Defensive Wounds	None noted (RTT 7009-10)	Cut on ring finger of left hand (RT 4912-13; 4918-19) Occurred short time before death (RTT 4914; 4924-25)
Sexual Overtones of Attack	No (RTT 6985)	Nude from waist down except socks (RTT 4705); RTT 10723; 10730 [weak indication of acid phosphatase (seminal fluid) from swab]; unidentified pubic hair found (RTT 5145; 5152; 10726-27; 10730-32)
Had Advertised In Paper	No	No
Victim Abducted?	No (See place of attack)	Yes, off street (RTT 4722)
Victim Tied Up?	No	Possibly [linear mark on right wrist (RTT 4923)]
Place of Attack	Inside own home (RTT 3201-02)	Kidnapped off street; place of killing unknown—found outside in remote area (RTT 4549-53; 4701-02; 4722)
Time of Attack	Morning/Early Afternoon [between 9:00-9:30 a.m. and 1:30 p.m.] (RTT 3395; RTT 3402-03)	Early morning [between 1:15 or 1:30 a.m.] (RTT 4549-53; 4552; 4561; 4599-4600)
Moved After Attack	Not noted	Unknown; kidnapped off street; place of attack unknown—found outside in remote area (RTT 4701-02)
Victim's Clothing	Not indicated (but in limine testimony was fully clothed w/o shoes (RTH 4301))	Clothing was cut (RTT 4706)
Acquainted w/ Lucas	Yes (RTT 3425)	No

## **5.2 STRANG/FISHER CASE**

### **5.2.3 STRANG/FISHER: THIRD PARTY GUILT ISSUES**

#### **ARGUMENT 5.2.3.1**

#### **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 5, 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 Strang/Fisher case.<sup>1134</sup>

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 Strang/Fisher murder. However, the third party guilt instruction given in the present case was insufficient to assure that

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<sup>1134</sup> The third party suspect in the Strang case was Robert Strang, Rhonda's husband, and/or the drug dealers with whom he was involved. (RTT 9169-75 [Testimony of John McPeek]; RTT 9191-98 [Testimony of Ronnie Christensen]; RTT 9483-89 [Testimony of Arthur Garcia]; RTT 9506-17 [Linda Fletcher]; RTT 10026-29; 10042-46 [Testimony of Ronald Adler]; RTT 10089-96 [Testimony of Paul Fortin]; RTT 10219-30; 10447-64 [Testimony of Margaret Shelton] RTT 10633-44 [Testimony of Richard LaFollette].) (See also § 5.2.2(B), pp. 1294-1307 above, incorporated herein.)



the jury understood and properly applied the burden of proof to the third party guilt defense theory.

**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 As To Guilt**

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.<sup>1135</sup>

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.<sup>1136</sup>

Additionally, other instructions further reinforced the burden shifting

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<sup>1135</sup> These instructions correctly informed the jurors to acquit if they “have a reasonable doubt . . . .” (CT 14312; 14286.)

<sup>1136</sup> 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.)

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 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 (not predicated on Strang/Fisher) 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. Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders, and the error likely contributed to that conclusion. In turn, any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in

Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

#### **G. The Error Was Prejudicial As To Penalty**

The error was also prejudicial as to penalty. Even though the jurors were told at the penalty phase not to consider Strang/Fisher evidence, the errors contributing to 11 jurors concluding beyond a reasonable doubt that Lucas murdered Rhonda Strang and Amber Fisher were nonetheless prejudicial at penalty because: (1) the conclusion that Lucas had committed those two murders would have helped to undercut lingering doubt as to Lucas' guilt of the other three murders (and the attempted murder), (2) that same conclusion plus the lack of a conviction may well have left some of those 11 jurors frustrated and angry (and feeling Lucas had "gotten away" with a double murder of a woman and young child) – and provided an improper incentive to vote for death, and (3) no juror, having reached such a conclusion, could have followed an admonition to ignore the evidence on which it was based in determining the appropriate sentence.

## 5.2 STRANG/FISHER CASE

### 5.2.4 STRANG/FISHER: CROSS-ADMISSIBILITY ISSUES

#### ARGUMENT 5.2.4.1

**THE STRANG/FISHER CRIMES WERE NOT ADMISSIBLE TO PROVE IDENTITY IN THE OTHER CHARGES, AND ACCORDINGLY THE JUDGE 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 OTHER CHARGES**

[The legal basis for this claim has already been briefed in Volume 2, § 2.3.3, pp. 224-29, incorporated herein. Here, in Volume 5, that claim is renewed and the briefing in Volume 2 is fully incorporated herein by reference.]

Even though the jurors did not reach a verdict in the Strang/Fisher case, they were split 11 to 1 in favor of conviction. (RTT 12319; CT 5563.) Therefore, because each individual juror was permitted to cross-consider the offenses, any error in allowing joinder and cross-consideration of Strang/Fisher should be considered on appeal. Because there was insufficient independent evidence connecting Lucas to the Strang/Fisher murders, it was error to join those counts for trial with the other charges and to allow the jurors to rely on Strang/Fisher to convict in the Jacobs, Santiago and/or Swanke cases.

The error in joining the counts and allowing the jurors to consider the Strang/Fisher cases as to identity in the other cases was highly prejudicial. Joining the counts for trial and allowing the jurors to consider the Strang/Fisher case on the issue of identity in the other cases was reversible

error because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Although Lucas was not convicted in Strang/Fisher, those 11 jurors were free to rely on their conclusions in Strang/Fisher to convict Lucas in Jacobs, Santiago and Swanke. 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.)

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas’ federal constitutional rights (see Volume 2, § 2.3.1(H), pp. 207-08, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS – OVERVIEW**

Judge Hammes, after having erroneously permitted the joinder of all five incidents for trial and erroneously determined that each would be cross-admissible as to the other, aggravated the prejudicial impact of those errors with a series of instructional errors. The judge erroneously and prejudicially gave instructions which, among other deficiencies, unduly emphasized other crimes evidence, failed to require as a prerequisite to considering other crimes evidence on the issue of identity that the jury find that Lucas was guilty of the other crimes and that the other crimes and the crime under consideration shared signature-like similarities, failed to require unanimity as to the existence of the level of similarity the court did require, and failed to convey that where, as here, a defendant has presented compelling alibi evidence as to one crime, perceived similarities between crimes can serve as a basis for acquittal and not solely as a basis for conviction. These instructional errors, alone and in combination, deprived Lucas of his right to due process, fair trial by jury, reliable determinations of guilt and penalty, the right to present a defense, compulsory process and effective assistance of counsel, in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS**

#### **ARGUMENT 5.2.5.1**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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].) (See Volume 2, § 2.3.4.1, pp. 232-37, incorporated herein.)

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders, and the error likely contributed to that conclusion. In turn, any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.3.4.2(D), pp. 249-50, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)



## **5.2 STRANG/FISHER CASE**

### **5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS**

#### **ARGUMENT 5.2.5.2**

#### **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. 238-52, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke.

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.3.4.2(D), pp. 249-50, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS**

#### **ARGUMENT 5.2.5.3**

#### **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. 253-60, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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 jurors 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 11 jurors to conclude, based on one case (e.g., Santiago), that Lucas committed the Strang/Fisher offenses; and, in turn, to rely on Strang/Fisher to vote for conviction in the other cases (e.g., Jacobs and/or Swanke).

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should

be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.3.4.3(D), pp. 257-58, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS**

#### **ARGUMENT 5.2.5.4**

#### **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. 261-70, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

The jury was generally instructed to decide each count separately. (CT 345.) However, the court gave a special instruction which permitted the jury to consider the other counts evidence “for certain limited purposes.” (CT 14307.) This instruction improperly, unfairly and unconstitutionally, presented only the prosecution’s side of the issue. That is, it failed to inform the jury that if the defendant did not commit one of the other offenses the jury could consider this as evidence that he did not commit the crime under consideration.

This improper, one-sided other crimes instruction was a substantial error because it improperly allowed the jurors to rely on the other charges to convict Lucas of the Santiago charges without conveying the relevance of that evidence as a potential basis for acquittal.

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas’ federal constitutional

rights (see Volume 2, § 2.3.4.4(E), pp. 265-68, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS**

#### **ARGUMENT 5.2.5.5**

#### **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. 271-75, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

The error was prejudicial because only 11 jurors voted to convict in Strang/Fisher. Any or all of those jurors were improperly permitted to rely on Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke.

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)



## 5.2 STRANG/FISHER CASE

### 5.2.5 STRANG/FISHER CROSS-ADMISSIBILITY ISSUES: INSTRUCTIONS

#### ARGUMENT 5.2.5.6

#### **THE STANDARD FOR DETERMINING WHETHER THE DEFENDANT COMMITTED THE OTHER OFFENSES SHOULD HAVE BEEN PROOF BEYOND A REASONABLE DOUBT<sup>1137</sup>**

[This claim is fully briefed in Volume 2, § 2.3.4.6, pp. 276-77, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

In Volume 2, § 2.3.4.2, pp. 238-52, 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. (See Volume 2 § 2.3.4.6, pp. 276-77, Volume 3, § 3.8.1, pp. 998-1000, incorporated herein.)

The erroneous other crimes instruction was a substantial error because it improperly allowed 11 jurors to conclude, based on one case (e.g.,

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<sup>1137</sup> *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*.

Santiago), that Lucas committed the Strang/Fisher offenses; and, in turn, to rely on Strang/Fisher to vote for conviction in the other cases (e.g., Jacobs, Santiago and/or Swanke).

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.6 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION**

#### **ARGUMENT 5.2.6.1**

#### **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 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

One of the most important in limine decisions for the trial judge was whether to allow consolidation and cross-admissibility of the five different incidents. Cross-admissibility was critical to the prosecution's case because it allowed the jury to rely on all the other counts in deciding whether the prosecution had met its burden to prove the identity of the culprit as to any particular count. Without consolidation and cross-admissibility each count would have to stand on its own.<sup>1138</sup>

In support of its motion for cross-admissibility and consolidation the prosecution presented much of its case-in-chief evidence. (See Volume 2, § 2.3.5.1(H), pp. 293-300, incorporated herein.) However, in response to appellant's request to present defense evidence in opposition to cross-

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<sup>1138</sup> 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.)

admissibility (such as the confession of Johnny Massingale to the Jacobs murders), the trial judge ruled that defense evidence would not be permitted.

This ruling was an abuse of discretion which violated Lucas' rights under the Due Process Clause of the 14th Amendment and the Cruel and Unusual Punishment Prohibition of the Eighth Amendment of the federal constitution.<sup>1139</sup> This is so because cross-admissibility must not be granted without considering the extent to which the evidence implicates the defendant in the various offenses at issue. Furthermore, cross-admissibility analysis also requires the trial court to weigh the probative value of the evidence in the context of Evidence Code § 352 and consider the impact of joining a strong case with a weak one. Obviously, these determinations cannot be fairly and reliably made without considering both the prosecution and defense evidence. Accordingly, because the trial judge granted cross-admissibility without knowing and considering all the material facts, her ruling was an abuse of discretion. (See *In re Cortez* (1971) 6 Cal.3d 78, 85-86 [sound exercise of discretion requires that all material facts are known and considered].)

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956)

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<sup>1139</sup> Consolidation/cross-admissibility issues must be evaluated with greater caution in a capital case. (See e.g., *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 454.)

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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.6 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION**

#### **ARGUMENT 5.2.6.2**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G),  
p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.6 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION**

#### **ARGUMENT 5.2.6.3**

#### **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 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

In ruling that all the charges were cross-admissible the judge considered the offenses as a whole rather than determining cross-admissibility on a case-by-case basis. This failure to conduct the required independent analysis necessitates remand.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.3.5.3(E), pp. 309-12, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.6 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION**

#### **ARGUMENT 5.2.6.4**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.3.5.4(E), pp. 314-17, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.6 LUCAS WAS DENIED A FULL AND FAIR HEARING ON CROSS-ADMISSIBILITY AND CONSOLIDATION**

#### **ARGUMENT 5.2.6.5**

#### **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 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

In response to Lucas' assertion of his statutory speedy trial rights, the prosecution moved to consolidate the two cases and amended its Notices of Aggravation. The defense had successfully obtained an appellate order for a speedy trial in case number 75195. However, the prosecution responded by filing an eleventh hour motion to consolidate the two cases, thus undermining the appellate court's order and defeating Lucas' speedy trial rights. Hence, under the circumstances, there was at least prima facie evidence that the prosecution's motion to consolidate was vindictive, and a denial of due process. However, Judge Hammes unfairly precluded the defense from presenting evidence on this issue.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke.

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.3.5.5(C), pp. 324-26, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.1**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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**

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G),  
p. 1313 above, incorporated herein.)



## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.2**

#### **BY ALLOWING THE PROSECUTORS, OVER DEFENSE OBJECTION, TO REFER TO THEMSELVES AS REPRESENTATIVES OF “THE PEOPLE” THE TRIAL JUDGE VIOLATED LUCAS’ STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL**

[This claim is fully briefed in Volume 2, § 2.9.2, pp. 538-50, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.9.2(C), pp. 539-45, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.3**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.9.5(D), pp. 566-68, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.4**

#### **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. 570-73, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas’ federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G),  
p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.5**

#### **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 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

The Strang/Fisher charges were based entirely upon speculation from the other charges. Hence, it was essential that the instructions correctly define the term “inference” so that the jurors would not be tempted to vote for conviction based on mere speculation.

The failure to provide such an instruction was prejudicial error.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas’ federal constitutional rights (see Volume 2, § 2.9.7(E), pp. 576-78, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)



## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.6**

#### **THE INSTRUCTIONS IMPROPERLY ALLOWED THE JURY NOT TO CONSIDER ALL THE EVIDENCE**

[This claim is fully briefed in Volume 2, § 2.9.8, pp. 579-84, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.7**

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

[This claim is fully briefed in Volume 2, § 2.9.10, pp. 590-600, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be

reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights (see Volume 2, § 2.9.10(D), pp. 596-98, incorporated herein), 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.8**

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

[This claim is fully briefed in Volume 2, § 2.9.11, pp. 600-04, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.9**

#### **THE FINAL INSTRUCTIONS WERE CUMULATIVELY DEFICIENT**

[This claim is fully briefed in Volume 2, § 2.9.12, pp. 605-21, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges and the previous briefing in Volume 2 is fully incorporated herein by reference.]

#### **A. Introduction**

Numerous instructional deficiencies in the final instructions were individually and cumulatively deficient and prejudicial.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the errors 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 errors could have affected the proceedings. (*Chapman v. California* (1967) 386 U.S. 18, 23-24.)

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

See Volume 2, § 2.9.12(B), pp. 605-06, incorporated herein.

**C. The Willfully False Instruction Improperly Failed To Define “Material”**

See Volume 2, § 2.9.12(C), pp. 607-08, 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. 608-10, 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. 610-15, incorporated herein.

**F. Numerous Instructions Were Improperly Limited To The Testimony Of “Witnesses”**

See Volume 2, § 2.9.12(F), pp. 615-18, 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. 618-20, incorporated herein.

**H. The Instructional Errors Were Cumulatively Prejudicial**

See Volume 2, § 2.9.12(H), pp. 619-20, incorporated herein.

**I. The Errors Were Prejudicial As To Penalty**

The errors were also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.7 JURY INSTRUCTIONS: EVIDENTIARY AND DELIBERATION**

#### **ARGUMENT 5.2.7.10**

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

[This claim is fully briefed in Volume 2, § 2.9.13, pp. 622-32, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)



## **5.2 STRANG/FISHER CASE**

### **ARGUMENT 5.2.8**

#### **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 5, these claim are renewed as to the Strang/Fisher charges convictions and the previous briefing in Volume 2 is fully incorporated herein by reference.]

#### **A. Introduction**

For numerous reasons the instructions given in the present case regarding the prosecution's burden of proving guilt beyond a reasonable doubt were deficient.

The errors violated the state and federal constitution. The failure to properly instruct on the prosecution's burden to prove every essential element of the charge beyond a reasonable doubt violated Lucas' state (Art. I, sections 1, 7, 15, 16 and 17) and federal (6th and 14th Amendments) constitutional rights to due process and fair trial by jury. (*In re Winship* (1970) 397 U.S. 358; see also *Sullivan v. Louisiana* (1993) 508 U.S. 275; *Neder v. United States* (1999) 527 U.S. 1; *Cage v. Louisiana* (1990) 498 U.S. 39; *Jackson v. Virginia* (1979) 443 U.S. 307.)

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

*Gilmore v. Taylor* (1993) 508 U.S. 333, 342.)

Further, because Lucas was arbitrarily denied his state created right to proper instruction on the burden of proof, under the state constitution and Evidence Code, including Evidence Code sections 500, 501 and 502, the error violated his right to due process under the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *People v. Sutton* (1993) 19 Cal.App.4th 795, 804; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

**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. 643-53, 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<sup>1140</sup> 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 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. 654-58, incorporated herein.)

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<sup>1140</sup> 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.)

**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. 659-64, 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. 665-70, 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. 671-77, 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. 678-82, 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. 683-90, incorporated herein.)

**J. The Errors Were Prejudicial As To Guilt**

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke.

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

**K. The Errors Were Prejudicial As To Penalty**

The errors were also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.9 DELIBERATION ISSUES**

#### **ARGUMENT 5.2.9.1**

#### **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. 698-724, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in

Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)



## **5.2 STRANG/FISHER CASE**

### **5.2.9 DELIBERATION ISSUES**

#### **ARGUMENT 5.2.9.2**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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.<sup>1141</sup>

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 (see Volume 2, § 2.8.1, pp. 485-507, incorporated herein) Judge Hammes abridged Lucas’ right to a public trial.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke.

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<sup>1141</sup> “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.)

Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.9 DELIBERATION ISSUES**

#### **ARGUMENT 5.2.9.3**

#### **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 5, the claim is renewed as to the Strang/Fisher charges 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, 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so

because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)

## **5.2 STRANG/FISHER CASE**

### **5.2.9 DELIBERATION ISSUES**

#### **ARGUMENT 5.2.9.4**

#### **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. 736-40, incorporated herein, in the context of the Jacobs convictions. Here, in Volume 5, the claim is renewed as to the Strang/Fisher charges 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.

Even though the jurors did not convict in the Strang/Fisher case the error was prejudicial as to the Jacobs, Santiago and Swanke cases. This is so because 11 jurors concluded that Lucas committed the Strang/Fisher murders. Any or all of those jurors could have relied on their conclusions in Strang/Fisher to vote for conviction in Jacobs, Santiago and/or Swanke. Therefore, the guilt convictions in Jacobs, Santiago and Swanke should be reversed under the state harmless-error standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Moreover, because the error violated Lucas' federal constitutional rights, the judgment should be reversed 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.)

Finally, the error was also prejudicial as to penalty. (See § 5.2.3.1(G), p. 1313 above, incorporated herein.)