IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. JAMES ANTHONY DAVEGGIO AND MICHELLE LYN MICHAUD Defendants and Appellants.	California Supreme Court No. S110294 Superior Court No. No. 13414

APPELLANT JAMES DAVEGGIO'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE LARRY J. GOODMAN, PRESIDING

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DEATH PENALTY

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a verdict and judgment of death. (Cal. Const., art. VI, § 11; Pen. Code§ 1239[1], subd. (b).)

STATEMENT OF THE CASE

Appellant and co-defendant and co-appellant Michele Michaud (Michaud) were both charged by an Indictment of Grand Jury with the following counts:

Counts 1 and 2 - oral copulation in concert by force in violation of section 288a, subdivision (d) upon "Jane Doe 1," later identified as "Sharona Doe;"

Count 3 - oral copulation on a person under 18 years of age in violation of section 288a, subdivision (b)(1) upon "Jane Doe 2," later identified as "April Doe;"

Count 4 – murder in violation of section 187, subdivision (a), of Vanessa Samson.

[1] Unless otherwise indicated all statutory references are to the California Penal Code.

As special circumstances it was alleged that the murder occurred during the commission of a kidnapping (section 207 or 209) and during the commission of a rape by instrument (section 289) within the meaning of section 190.2 (a)(17)(B) and (a)(17)(K).

It was further alleged that appellant had suffered a prior conviction of assault to commit rape, a violation of section 220. (1CT 212-213 .)

Prior to trial, appellant entered a guilty plea to Counts 1, 2, and 3. (5CT 1266, 9RT 2119-2121.)

The jury convicted appellant of Count 4. The jury also convicted Michaud of Counts 1, 2, 3, and 4. As to both appellant and Michaud, the jury found the special circumstances that that the murder occurred during the commission of a kidnapping and during the commission of a sexual penetration. (8CT 1833-1842, 34RT 7396-7400.)

After a penalty phase trial, the jury returned penalty verdicts voting to impose the death penalty on both defendants. (8CT 1937-1938, 39RT 8631-8633)

After an automatic motion to modify the penalty, the trial court imposed the death penalty on both appellant and Michaud. (8CT 2048, 2052, 2056, 2058.)

STATEMENT OF THE FACTS

THE PROSECUTION'S GUILT PHASE EVIDENCE

A. Michaud and Appellant in September 1997

In the summer of 1997, Michaud owned a green 1994 Dodge Caravan. She was working as a prostitute at the time and was able to buy it with the help of Burdell (Skip) Wulf, a friend and client. (16 RT 3762; 17RT 3846, 3924.)

The van was factory-equipped with two bucket seats for the driver and front passenger, two bucket seats in the van's middle section, and a three-passenger bench seat in the rear. The middle bucket and bench seats were secured by a system of fixed and ratcheting hooks. The van had a sliding door on the passenger side and a rear hatch door hinged at the top. The van's rear hatch door could only be opened by a dashboard button or from the exterior of the van with a key. (17RT 3887-3888, 3918.)

In 1996, Michaud was living in a house on McFadden Street in Sacramento with her son Randy and daughter Rachel. That winter Michaud was introduced to appellant by her neighbors. (17RT 3830.) Appellant moved in; and his daughters April, Jamie, and Briann also lived there from time to time. (16RT 3755-3757, 3759.) Michaud's father Leland and mother Regina lived a few houses away. For a time, Michaud's sister Misty Michaud, Misty's boyfriend Rick Boune, and their son Cody also lived in the same neighborhood. (16RT 3746-3753.) Boune saw Michaud every day and appellant occasionally. Everyone called appellant by the nickname "Frog." Michaud called appellant "Frog," "Daddy," and her "Purple God of Thunder." (16RT 3755-3757.)

Boune, appellant, and Michaud used methamphetamine (meth) or crank. (16RT 3760-3761.) According to Boune Michaud did not use drugs until she met appellant. Michaud had been a prostitute since her teen years, but in 1997 Michaud was essentially a stay-at-home mom. She was a member of the Altar Society and a school crossing guard. She sent Rachel to a Catholic school. (17RT

3830, 3846, 3854.) Michaud had the use of credit cards provided by her client William (Bill) Reed. (16RT 3800.)

According to Boune, things went downhill rapidly for Michaud after appellant moved in. Rachel and Randy, who had a history of emotional and psychological problems, began using drugs. On one occasion, Rachel flipped out on acid and climbed onto the roof of the house. Rachel taught Michaud how to smoke meth. Michaud's personality changed. (17RT 3831-3832.) In August 1997, Michaud was evicted from her home. (17RT 3755.)

In early September 1997, appellant, Michaud, Rachel, and a woman named Vicki stayed for awhile in the home of Janet and Ted Williams[2] near the 65th Street Expressway in Sacramento. (18RT 4107-4111, 4128.) During this time, Janet saw appellant with her minicassette tape player. Ted saw appellant with a black or blue revolver. When they moved out, appellant and Michaud left a small suitcase and a box filled with Michaud's clothing and appellant's business cards in the Williams' garage. (18RT 4112-4113, 4146-4147.)

After that visit, on September 11, Janet and Ted drove to Petrolia in northern California to visit Ted's family. Janet alone returned home on September 14; she did not notice anything wrong about the house. (18RT 4114-4116.)

On September 19, Janet drove back to Petrolia to pick up Ted. Appellant and Vicki accompanied her. While they were there, Ted's daughter Janelle cut appellant's hair, changing it from shoulder length to a crew cut. At this time, appellant had a mustache. The group spent one night in Petrolia before returning to Sacramento. (18RT 4120-4122, 4140.)

This time when she returned home, Janet noticed that the screen to the bathroom window was bent. All of her piggy banks had been emptied. Her

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[2] In the briefing, as was often the practice at trial, appellant refers to individuals who share a surname, including the Doe witnesses and murder victim Vanessa Samson and members of her family, by their given names in order to provide clarity in the narrative.

minicassette player was gone; the tape that had been in it left behind. Appellant's box and suitcase were still in the garage. When the Williams' phone bill arrived, Janet discovered that calls had been made from the house during the time she and Ted had been in Petrolia. (18RT 4117-4120.)

Soon after, Michaud called Janet and said they had stayed at the Williams' house because they had nowhere else to go. Michaud said they entered the house through the bathroom window. (18RT 4124-4125.) The Williams home had two bedrooms and one bath. There was a double bed in the master bedroom and twin beds in the second bedroom. The bathroom had been used. (18RT 4126-4127.) Janet did not give appellant and Michaud permission to be in her house between September 11 and 14. She did not tell them it was okay to take a young lady there. (18RT 4123-4124.)

B. Uncharged Offenses involving Christina Doe[3]

In September 1997, Christina Doe was 13 years old and a friend and neighbor of Rachel and Michaud. Christina sometimes visited with Michaud when Rachel was not at home. She met appellant there. (18RT 4157-4159, 4162.)

Around 8:00 one night in mid-September, after Michaud had been evicted from her home, Michaud invited Christina to come out for a ride in the green van. (18RT 4163.) Michaud drove down the 65th Expressway, took an exit ramp, drove into a neighborhood, and stopped at a house. (18RT 4165-4166.)

Inside, appellant was watching a television program about the Italian mob and serial killers. Michaud told Christina to sit down. (18RT 4166-4168.)

Michaud and appellant went into the kitchen where Michaud smashed and arranged meth into rails. (18RT 4174.) Christina had started using meth around

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[3] The trial court admitted evidence of uncharged acts involving Christina Doe as to all four charged counts under Evidence Code section 1101, subdivision (b), as relevant to intent, motive, and common plan and design, and 1108, subdivision (d), as relevant to disposition to commit the charged crimes. (5CT 1205-1206.)

the time she met appellant. He had given her meth in the past. (18RT 4170-4172.) She had also smoked meth with Rachel. (18RT 4173.)

Now, Michaud and appellant each snorted a rail. Both of them told Christina the third line was for her. Christina said she wanted to get off meth, but they both told her to do it, so she snorted the rail. (18RT 4177-4178.)

Michaud grabbed her by the arms and took her into the bathroom. Appellant said nothing. Michaud locked the bathroom door and used the toilet. She said she had been thinking about Christina and wanted to party with her. She asked if Christina understood what that meant. Christina said no. Michaud then pulled a small gun from the back of her pants, held it for a second, and then placed it on the counter within reach. Michaud told Christina not to worry, that the gun was for protection. Michaud told Christina to remove her clothes. Christina refused. Michaud removed Christina's shirt and bra and licked Christina's breasts. Michaud got down on her knee. Christina felt scared and disgusted. Michaud got up and removed her own shirt. Michaud told Christina to do the same to her. Christina refused. Michaud told Christina to remove the rest of her clothes. Christina said she had her period and refused. (18RT 4180-4184, 4205.)

Michaud undressed Christina and opened the bathroom door. Christina attempted to cover herself. Michaud called out, "Here is your present." (18RT 4185-4187.)

Appellant was seated on the couch watching television. He did not appear surprised to hear Michaud's words. Appellant kissed Christina and walked her backwards into a room. Michaud followed and removed appellant's pants. In the doorway, appellant stopped and kissed Christina while Michaud licked his anus. (18RT 4187-4190.)

Appellant placed Christina on the bed, licked her genital area, and digitally penetrated her vagina. Christina cried. Michaud sat on the bed near appellant and masturbated. Appellant put his fingers in Christina's vagina more than once. When he was done, Michaud orally copulated his penis. Twice, Michaud tried to

push Christina's head down onto appellant's penis, but Christina pulled back each time. (18RT 4189-4194.)

Appellant then got on top of Christina and raped her. While he was doing this, Michaud was licking his anus. (18RT 4197-4202.) Appellant did not ejaculate. (18RT 4204.) Both Michaud and appellant knew that Christina was 13 years old. (18RT 4195-4197.)

Michaud drove Christina home in the van. She told Christina she would find out if Christina ever told anyone. Christina took this as a threat because Michaud and appellant dealt with biker gangs. She did not tell anyone what had happened. (18RT 4204-4207.)

About a month later, in October 1997, Michaud's daughter Rachel walked into Christina's home on a school day looking distraught. Rachel had red marks and black lines around her cheeks, mouth, and wrists. (18RT 4208-4209.) She said she was going to Santa Cruz with appellant and Michaud. Christina decided to go along with them because Rachel looked scared. (18RT 4223-4226.) Twenty minutes later, in the bathroom of the AM/PM market on Mack Road, Christina told Rachel for the first time that Michaud and appellant had sexually assaulted her. (18RT 4209-4210.)

C. Uncharged Offenses involving Aleda Doe[4]

In September 1997, appellant and Michaud were in Reno, Nevada. On September 28, appellant pawned a pair of Black Hills gold opal earrings in a pawnshop near the Circus Circus Casino. (17RT 3860-3861, 3865-3867, 3870.) The following day, Michaud pawned a Black Hills gold man's ring. (17RT 3869.)

On September 29, Aleda Doe, a 20-year-old dental assistant, finished her last evening class at Morrison College in Reno at 10:00 p.m. (17RT 3993-3995, 4038.) She waited outside with the security guard for her boyfriend to pick her up. After 15 or 20 minutes, when her boyfriend did not arrive and the security guard wanted to go home, Aleda decided to walk home. Her route took her over an overpass for Interstate 80. She was 4 feet 10 inches tall, weighed 120 pounds, and

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[4] Aleda Doe was the first of the witnesses to testify to evidence admitted under Evidence Code sections 1101, subdivision (b), and 1108, subdivision (d).

Previously, appellant had been convicted of kidnapping Aleda in a federal court. (7CT 1647.)

Before Aleda Doe testified, the court instructed the jurors that they were permitted to consider the testimony of these witnesses for the limited purpose of determining if it tended to show a characteristic method, plan, or scheme, which would further tend to show the existence of the intent that is a necessary element of the murder charged in count 4.

The court further instructed that the Aleda Doe testimony could also be considered to prove the identity of the person or persons who committed the murder charged in count 4.

The court also instructed that the jury was permitted to use evidence that the defendant committed a prior sexual offense to infer that the defendant had a disposition to commit sexual offenses and the charged crimes. (17RT 3989-3991.)

The court further instructed the jury that both defendants were convicted in federal district court in Nevada of committing crimes against Aleda Doe on or about September 29 and 30, 1997, and that both defendants received substantial prison terms for their convictions.

The court specified that it was taking judicial notice that Appellant had been adjudged guilty of conspiracy to commit kidnapping, kidnapping, and aiding and abetting a kidnapping and that Michaud had been adjudged guilty of kidnapping and aiding and abetting a kidnapping on August 23, 1999, and August 12, 1999, respectively. (17RT 3991-3992.)

wore her dark-brown hair down to her shoulders. She was carrying her purse and a backpack filled with books. (17RT 3997-3999.)

An oncoming van passed by Aleda on the freeway overpass. A minute later, a dark-colored van with a light stripe stopped next to her. She thought it was her boyfriend. A big man got out of the van's sliding door, grabbed her by her hair and backpack, and threw her into the van. The man closed the door and the van took off. (17RT 4001-4005.)

The man told her to not say anything and to stay quiet. Aleda was too frightened to scream. She was right behind the woman driver and saw her face in the rear view mirror. The driver had a long pale face and wore clear glasses. The woman's hair, which had damaged ends, was down to her shoulders. (17RT 4009-4010.)

The van was so full of stuff – blankets, pillows, clothes – that Aleda couldn't tell if there were seats in the rear of the van. (17RT 4008.)

The man gave the driver directions. Aleda put her head up and saw they were on Interstate 80 heading west. (17RT 4011-4013.)

At trial, Aleda identified appellant as the man who had pulled her into the van. At an earlier time, she had picked his picture out of a photographic lineup. (17RT 4013.) In the van, Aleda agreed to everything appellant told her to do because this is what she had been told to do in such a situation. Appellant began touching her. He touched her breasts, her body, and put his hands in her pants. He penetrated her vagina with his fingers. (17RT 4011, 4013-4016.) Appellant's voice, which at first had been strong and angry, and made her fearful, was no longer angry. (17RT 4017.)

Appellant told her to remove her clothing. Aleda did. Appellant removed Aleda's bra. (17RT 4017-4018.) All of these events took place in the middle of the van. (17RT 4013.) The driver said nothing during this time. (17RT 4017-4018.)

Appellant kissed and touched Aleda's entire body. He tried to bite her cheeks and lips. He pushed his fingers into her vagina once more. He forced her twice to orally copulate him. His penis never got completely hard. (17RT 4022-4024.) He raped her. Aleda cried but did her best to hide her crying so appellant would not know she was afraid. (17RT 4025-4016.) Appellant made her insert two of her fingers in his rectum at one time and also inserted his fingers into her rectum. He forced her to hold his testicles. (17RT 4027-4029.)

At one point, appellant covered Aleda with a jacket and pillow. He told her to stay down and to stay quiet. They were passing through the agricultural checkpoint between Nevada and California. (17RT 4030.) The driver spoke to one of the agricultural inspectors. Aleda remained silent out of fear. When they started moving, appellant said, "Good girl." (17RT 4030-4033.)

In California, appellant made Aleda orally copulate him. He then masturbated with his hand and ejaculated into her mouth and onto her face and hair. (17RT 4033-4036.)

Aleda cleaned herself up a little and started to talk to appellant so she could learn information to give to the police later. Appellant said he was a truck driver on his way to Oregon. Both the driver and appellant sang along with a tape the driver played. Appellant said the song was about a man from Reno who killed another man just to see him die. Aleda asked appellant if he had ever done that and he said no. (17RT 4038-4042.)

Aleda had no children, but told appellant she had a baby and had to get home because her mother, who was watching the baby, was mean and treated the baby badly. She said she had to go to work and to school. (17RT 4044.)

Appellant called the driver Mickey and asked her for cigarettes. Both the driver and appellant smoked. (17RT 4047-4048.) Appellant asked Aleda if she liked women and if she wanted the driver to come in the back. Aleda did not answer. (17RT 4047-4048.)

Appellant told Aleda he could not take her back to Reno because he had kidnapped her and was concerned about going to jail. (17RT 4045-4047.)

The van was pretty new, but it was full of food-related garbage – Burger King cups, containers of drinks near the driver. Aleda asked if they could stop so she could get something to drink. Instead, the driver handed appellant a cup of flat orange soda for Aleda. (17RT 4050.) Aleda did not see a gun but asked appellant if he had one. He told her he had had one before. (17RT 4063.)

Appellant and the driver began a conversation saying, "What do you think? What should we do? What have you decided?" They did not say what the plan was. The driver asked Aleda, "You have kids? What is his name?" Aleda answered, "Luis. Are you going to let me go?" The driver said, "Let me think about it." (17RT 4052-4056.) Appellant said, "What have you decided?" and "I'll leave it up to you."[5] (17RT 4058.)

The driver exited the freeway and drove down a dead end street where she stopped and told Aleda to get out. Aleda got dressed, picked up her backpack and purse, and got out. (17RT 4061.) The woman told Aleda to count to 20 and to not look back. (17RT 4062.)

In all, Aleda had been with appellant and the woman for about an hour and a half. (17RT 4050.) Aleda waved down a car and was taken to a gas station. She telephoned her parents and then the police. She gave police a description of the people and helped in the preparation of a picture of the man who had kidnapped and raped her (People's Exhibit 76.) (17RT 4067.) A sexual assault response team (SART) nurse examined her and took samples from her face and neck. (17RT 4067.)

Placer County Sheriff's Deputies Jeffrey Adams and Don Murchison responded to the Meadow Vista Chevron station, where Aleda called for help.

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[5] The parties stipulated that the transcript of the federal trial showed that Aleda said the female kidnapper told the male kidnapper he was talking too much and that Aleda was asking too many questions. (17RT 4073-4076.)

Aleda was standing next to the phone booth. She had been crying; her eyes were red; her hair on the right side was matted. She described her assailants and said the woman was called Mickey. She said the van was a newer model minivan and its exterior color was either a dark blue or green. (17RT 4090-4091.)

Washoe County Crime Laboratory senior criminalist Renee Romero tested the swabs taken from Aleda Doe's cheeks and neck and found epithelial cells, but no sperm cells. (24RT 5501.) Department of Justice senior criminalist Richard Waller tested Aleda Doe's cheek swabs and found that they contained a protein found in seminal fluid and also found the enzyme amylase, which is found in high concentrations in saliva, in all three swabs. (25RT 5624-5626.) Waller stated his opinion that the mixture of saliva and seminal fluid was consistent with a circumstance where a victim was forced to orally copulate the penis of her assailant who subsequently ejaculated on her face. (25RT 2526-2527.) The parties stipulated that appellant had had a vasectomy on December 15, 1993. (25RT 5647.)

Substance from the Aleda Doe facial swabs and biological materials from appellant and Michaud were subjected to DNA analysis by Lisa Calandro of Forensic Analytical. Calandro determined that appellant could not be eliminated as the source of DNA from the right cheek, left cheek, and neck swabs. (26RT 5728-5731.) For the neck and left cheek swabs, appellant was identified as a donor at a frequency rate of one in 510 billion Caucasians. Calandro stated her opinion that the fact that appellant could not be eliminated as a source, as well as the frequency of his profile in the Caucasian population, was strong evidence that he was the source of the biological material on those two swabs. (26RT 5732-5733.)

D. Uncharged Offenses involving Rachel Doe[6]

Michaud's daughter Rachel was born on December 7, 1984. (19RT 4272.) She, Michaud, and Randy, who was born on July 21, 1983, lived in a house near her grandparents' home. Christina Doe was her best friend. (19RT 4272-4274.) When Rachel was eleven, they all moved into a house they called the "tri-level" in the same neighborhood. William Reed, whom Rachel described as a "sugar daddy," bought the furniture for the house and lived with them. Reed slept in a bedroom downstairs. Rachel never saw any romantic involvement between Michaud and Reed. Reed gave Michaud money. (19RT 4276.)

Burdell Wulf was another "sugar daddy." (19RT 4277.)

When appellant moved into the tri-level, Reed moved out. Appellant's stepdaughter Briann and his daughters April Doe and Jamie also moved in. (19RT 4279-4280, 4283-4284.)

Appellant offered Rachel a joint when she was 10 years old. In addition to marijuana, Rachel used meth and acid. Randy and April Doe gave the acid to Rachel. (19RT 4279-4280.)

When Michaud was evicted from the tri-level in August 1997, Rachel went to live with Alma Lara, her boyfriend's mother. Rachel stayed in Alma's home for a couple of months. When Rachel was twelve, Michaud and appellant came to Alma's house. Michaud said they were moving to Oregon. (19RT 4287-4288.)

Rachel went with Michaud and appellant to see Michaud's friend Clara. The van's middle seats had been removed, but the bench seat in the rear remained. (19RT 4288-4289.) People at Clara's house were doing meth. (19RT 4291-4292.)

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[6]Uncharged acts involving Rachel Doe were admitted as to all counts as relating to intent, motive, and common plan and design (Evid. Code, § 1101, subd. (b)) and as relating to evidence of disposition to commit the charged crimes (Evid. Code, § 1108.) (5CT 1205-1206.)

Michaud asked Rachel if she wanted to go to Oregon with them. Rachel agreed and they left Sacramento without even returning to Alma's house to get Rachel's clothes. (19RT 4923.)

Michaud began the drive. Rachel fell asleep on the rear bench seat. When she awakened, it was still daylight and appellant was massaging her leg. Rachel did not think it was sexual. She sat up and crossed her legs "Indian style." Appellant was seated on the van floor and leaning up against the bench seat. He began to massage the inside of Rachel's thigh and then moved his hand up as though he was going to put his hand into her pants. Rachel moved his hand away. Appellant repeated his action. Rachel picked up his hand, moved it, and went to sit in front with Michaud. This was the first time appellant had bothered Rachel in this way. (19RT 4295-4296.)

Rachel sat and talked with Michaud. Appellant moved up behind Rachel and began massaging her shoulder on the side away from Michaud. Rachel did not say anything but repeatedly pushed appellant's hand away. (19RT 4298.)

When Michaud stopped at an area near a lake, Rachel told Michaud that Appellant had been massaging her leg and asked Michaud to tell appellant to stop. Michaud said she would. (19RT 4299-4301.)

When they returned to the van, Rachel got back in and Michaud spoke with appellant outside. Rachel sat in the front with Michaud. (19RT 4302, 4303.)

As she was driving, Michaud told Rachel that she had had sex with everyone Rachel knew and that Rachel was her "secret lust." Michaud said she had had sex with Rachel's brother, grandfather, and grandmother, and said, "Nobody can ride like your Aunt Misty." (19RT 4306.) Michaud said she had let the dog lick her and that she had had sex with Rachel's friend Christina. Michaud said Rachel was her fantasy and that Rachel was going to be an adventure. Michaud said they had had adventures in Reno, that Christina was one of their adventures, and that Rachel was going to be the next one. Michaud said she had

orally copulated Rachel when Rachel had passed out on marijuana.[7] Michaud said she liked it best when Rachel had her period because she liked the taste of blood. Rachel testified Michaud said she would "eat me out." (19RT 4307-4308.)

During this conversation with Rachel, Michaud would interject, "Right, James, isn't that right?" Rachel looked back and saw appellant nodding. (19RT 4310-4311.)

Michaud stopped at a gas station. When Rachel got a drink and dropped it, Michaud told Rachel she was getting "wet" just thinking about it. Rachel felt disgusted. (19RT 4313-4314.)

After it got dark, Michaud said she was going to pull over so they could talk. Rachel asked Michaud not to, but Michaud pulled over near a gate to a long driveway. (19RT 4316.) Rachel decided to run. She put on one of her tennis shoes. Before she could pull on the other, Michaud pushed the button that locked all the doors. Rachel responded by trying to kick out the window. (19RT 4317-4318.)

Suddenly, appellant pulled the lever that made Rachel's seat recline. Michaud jumped on top of Rachel, faced her, straddled her, and undid her pants while appellant held Rachel's arms down. Michaud told Rachel she could go along with this willingly or they would take it from her. Michaud inserted her fingers in Rachel's vagina. Rachel said, "Mommy, stop." Michaud told Rachel not to call her that. Rachel started crying. Appellant pulled Rachel over the top of her seat and into the back of the van. (19RT 4319-4323.)

Appellant put Rachel on the bench seat and orally copulated her. Rachel screamed and cried. Michaud began masturbating. At some point, Michaud pulled appellant's pants down to his knees and licked appellant's butt. (19RT 4325.) After a long while, both Michaud and appellant stopped. They acted like

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[7] There were incidents when Rachel smoked a lot of "weed" and was the first to pass out. On some of those occasions, her brother and friends would write on her with magic marker and put lemon juice in her mouth. (19RT 4309.)

nothing had happened. Rachel pulled her pants back up and went to sleep. (19RT 4327.)

When Rachel awoke, they were at a Quality Inn motel and Michaud was helping Rachel walk into the room. Rachel got into one of the two beds and went to sleep. (19RT 4327-4330.) When Rachel got up later, Michaud was lying on the bed facing her. Michaud was nude. She asked, "Is it okay if James fucks you?" Rachel said no, forcefully. Appellant was lying on the other bed watching television. He said, "Don't worry, I'm not going to do that." (19RT 4335-4336.)

Michaud pulled the covers off Rachel. Either Michaud or appellant duct-taped Rachel's mouth from ear to ear while the other held her down. Next, they turned her over and duct-taped her hands behind her back. (19RT 4337-4339.) Rachel struggled, but could not stop them. Someone removed Rachel's pants, shirt, and bra. Appellant orally copulated Rachel's vagina. Rachel cried. Michaud was lying on the bed masturbating. (19RT 4339-4344.)

This assault lasted longer than the one in the van. It stopped when Michaud just stopped masturbating and said, "Okay, James, you can stop now," and appellant stopped. When they stopped, Rachel rolled over. Michaud and appellant moved to the other bed. Michaud orally copulated appellant's penis and licked his butt. (19RT 4343, 4352.)

When they were done, Michaud left Rachel, who was still crying and taped up, and went into the bathroom. Appellant began watching television as though nothing unusual had happened. Michaud took a shower. About a half hour later, Michaud asked Rachel if she was going to be good and not scream. Rachel agreed and Michaud removed the duct tape. Michaud and appellant continued to act as though nothing unusual had happened. Appellant shaved his head to the scalp. He said the Devil's Horsemen Motorcycle club was looking for him and he didn't want them to recognize him. (19RT 4344-4347.)

After they left the motel, appellant bought a bottle of rum and drank from it until they stopped at a casino. Appellant went into the casino while Michaud and

Rachel stayed in the van and drank from the bottle of rum. When they left the casino, appellant snorted meth until they reached Sacramento. Michaud drove to Christina's house in Sacramento because Michaud and appellant wanted Christina to go to Santa Cruz with them. Appellant hid in the back of the van with a blanket over him while Michaud and Rachel went in to talk to Christina. (19RT 4349-4350, 4411-4416.)

Christina saw the adhesive residue from the duct tape on the side of Rachel's face. Rachel told Christina that something had happened to her and that Michaud and appellant had done it. Christina then told Rachel some of what they had done to her,. (19RT 4352.)

Michaud, appellant, Christina, and Rachel drove to Santa Cruz. Later, on their return to Sacramento, appellant drove off the road into an area with trees. He pointed a gun out of the window and fired it. Rachel thought she and Christina were going to be killed, but appellant turned the car around and drove back to the freeway. (18RT 4259; 19RT 4353.) Christina interpreted appellant's firing the weapon as a threat to Rachel and herself to be quiet about the sexual assaults. (18RT 4260.) At the end of the trip, when Christina and Rachel left the van, Michaud said if they ever told anyone she and appellant would track them down and kill them. (19RT 4354.)

E. Uncharged Offenses involving Amy Doe[8]

On November 1, 1997, Amy Doe was feeling depressed because the anniversary of her father's death was approaching. She was 29 years old and addicted to meth. Amy was staying at the house of a woman named Fawnie. Amy had used meth with Michaud in Fawnie's back room. (19RT 4439-4441.)

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[8] The court admitted evidence of uncharged offenses against Amy Doe as to all counts to show intent, motive, common plan and design (Evid. Code § 1101, subd. (b)) and to show a disposition to commit the charged crimes (Evid. Code § 1108.) (5CT 1205-1206.)

Michaud stopped at Fawnie's on the night of November 1st and invited Amy to go out for a drive. As they were driving, Michaud said she had to stop at the Motel 6 because Appellant was going to call her there. (19RT 4441-4445.)

It was close to midnight when Michaud and Amy reached the Motel 6 at the truck stop off Elsie Road and facing Mack Road. Michaud led the way to an upstairs room and opened the door. The interior was very dark. Michaud either turned on a light or the television and then sat on the corner of the bed. Amy sat on the other corner with her back to the bathroom. (19RT 4445-4449.)

Amy talked about her father and the fact that she was depressed. They talked about men and Michaud began crying. She put her head in Amy's lap and Amy consoled her. Suddenly, Amy felt a blow to the back of her head. Her ex-husband had once hit her on the head with a gun and this felt like that. The blow brought Amy close to blacking out. When she came out of the daze, someone was grabbing her wrist and she was fighting and screaming. (19RT 4552.)

Amy felt something snap over her left wrist and hit the person in front of her with her right hand. Later, she learned that she had punched appellant as he cuffed one of her hands. Amy was then 5 feet 4 inches and 112 pounds. Appellant punched her in the mouth with his fist. Her bottom lip split open and began bleeding. Amy screamed for help. Appellant told her to shut up or die. They cuffed her second hand behind her back. (19RT 4452-4456.)

Michaud placed a bandana over Amy's eyes and tied it behind her head. Amy continued to scream, kick, and spit blood. She was able to see a little under the bandana. Someone tried to duct-tape her mouth, but there was so much blood, the tape would not stick. They finally succeeded in placing the tape over her mouth. (19RT 4456-4459.)

They placed Amy on her stomach on the bed. Michaud straddled Amy's buttocks and legs and grabbed Amy's hair. Michaud cut off Amy's gray sweat shirt, her shirt and her bra. She removed Amy's shoes and pulled her pants and underwear off. Michaud pulled Amy's head back by pulling on her hair. From

beneath the bandana, Amy could see appellant standing in front of her. (19RT 4459-4462.)

Appellant tried to move the duct tape up and put his penis in Amy's mouth. Amy refused to open her mouth. Appellant did not have an erection and could not insert his penis into her mouth. They rolled Amy over onto her back and Michaud put her mouth on Amy's breasts. Amy heard the sound of appellant masturbating. Appellant told Michaud to go down on Amy. Michaud first said no, then laughed, and said okay. Appellant got on the bed and penetrated Amy's vagina with his penis. Then, they both rolled Amy over. Michaud straddled Amy's back again and separated her buttocks. Appellant sodomized Amy. (19RT 4463-4467.)

Amy continued to cry. Appellant got off Amy and Amy could feel Michaud and appellant moving on the bed and then she heard appellant groan. She felt a gun being put against her head and heard a click. Appellant said, "Damn, it jammed." (19RT 4469-4470.) After that, Amy heard footsteps and someone unlocked the handcuffs. Someone removed the blindfold and Michaud pulled the duct tape off Amy's mouth and hair slowly. (19RT 4468-4469.)

At a point during the assault, before the rape and while Amy was screaming, Amy felt the gun behind her left ear and then she heard a click. (19RT 4469-4470.)

Michaud gave Amy a washcloth for her lip, which was still bleeding. At one point in the assault, Amy lay face down on the bed choking on her own blood. When the blindfold was removed, Amy could see blood on the wall, the floor, and the bed. (19RT 4470-4471.) Michaud gathered up all of the bloody things and left the room. She returned about an hour later with the items washed and folded. (19RT 4472.)

Amy dressed herself. She had been in the motel room about six or seven hours. They got back into the van. (19RT 4475-4476.)

They took Amy back to Fawnie's house. On the way, they talked about Amy's injuries. Michaud told Amy that she had called Fawnie and reported that

Amy had fallen down at a bar. When they dropped her off, both Michaud and appellant warned Amy that she would die if she told anyone. (19RT 4476-4477.)

F. Sharona Doe (Counts 1 and 2)

On November 3, 1997, Sharona Doe was 17 years old and working the 4:00 p.m. to midnight shift at a laser tag arena in Dublin called Q-Zar. Her best friends were appellant's daughters April and Jamie. (20RT 4507, 4516.) Sharona had often visited Jamie at Michaud's tri-level home and knew Michaud and appellant. Appellant supplied Jamie and Sharona with meth at no charge. (20RT 4511-4512.)

On this evening, Sharona was standing outside Q-Zar smoking a cigarette when Michaud and appellant drove up in a van and parked a couple of stalls away from her car. Appellant asked Sharona if she wanted to do a rail of meth. (20RT 4516-4519.)

Michaud got into the back seat and appeared to be chopping up the meth. As she was doing so, Michaud knocked the mirror over and asked Sharona for help in locating the meth. Sharona entered the van through the slider. The two middle seats of the van had been removed. Michaud suddenly pushed Sharona down to the van floor, but Sharona managed to push Michaud off. Appellant jumped from the driver's seat into the back and hit Sharona on the top of her head. (20RT 4520-4524.)

Sharona fell to the van floor disoriented. Appellant cuffed her hands and began tying her legs. Sharona began to cry. (20RT 4526-4528.) Michaud drove out of the Q-Zar parking lot and across the street to the Dublin Bowl where she parked in the front. Appellant yelled that this was a stupid place to stop, and Michaud then drove onto the freeway. Sharona told appellant that the handcuffs were digging into her and he unlocked them. Appellant sat on the bench seat and told her to suck his penis and act like she enjoyed it. Sharona cried and orally

copulated him. Appellant told Michaud to get off the freeway. Michaud took the First Street exit in Livermore and parked next to a big field. (20RT 4529-4532.)

Michaud removed Sharona's pants and underwear and orally copulated Sharona. During this time, appellant sat on the floor facing them and masturbated. Sharona cried and said her stepfather used to assault her when she was younger. Appellant told Michaud to stop. Appellant pulled out a camera and photographed Sharona nude from the waist down. He told her he would show the picture if she ever told anyone. (20RT 4533-4536.)

Appellant got behind the wheel and began driving. Michaud and appellant began talking about how they could not let Sharona go because she knew them. Sharona said she would make up a story if they would let her go. Sharona asked Michaud to rip her shirt and said she would tell the police that a bunch of kids took her and that she didn't know who they were. Michaud ripped Sharona's shirt. (20RT 4537-4538.)

Appellant stopped at a gas station in Dublin at the corner of Dublin road and San Ramon Valley Boulevard. Appellant told Sharona things that helped Sharona make up a lie about what happened. Both Michaud and appellant threatened to kill Sharona. Appellant pulled out a gun from behind the passenger seat and flashed it. Sharona pulled her pants on and got out. She had been with Michaud and appellant for two to three hours. (20RT 4538-4540.)

Dublin police officer Rebecca Gandsey interviewed Sharona at Q-Zar the night of November 3. Sharona's shirt was torn; she was emotional, almost hysterical. She said she had been kidnapped by three guys. (21RT 4744-4745.) Dublin police detective Michael Hart also interviewed Sharona and inspected the marks and scratches on her wrist. The marks were characteristic of those he'd seen on people who struggle when they are being handcuffed. (21RT 4760.) Later, Hart and Gandsey compared what each had been told by Sharona. Hart was suspicious about the inconsistencies and interviewed Sharona again on November

15. During that interview, Sharona repeated the story about being kidnapped by three guys. (21RT 4762-4765.)

Sharona called the assistant manager at Q-Zar and he came to pick her up. When they got back to Q-Zar, the police were there. Because she was scared, Sharona told them a story about three guys abducting her. She stuck to her story about the three guys until December 8 when she learned that appellant and Michaud had been taken into custody. After they were arrested, Sharona told Sergeant Hart of the Alameda's Sheriff's Department what had really happened. (20RT 4542-4543.)

At Q-Zar, Sharona showed police where the van used by her kidnappers had been parked in the parking lot. Michaud and Appellant had been smoking Benson & Hedges Ultra Lights 100s and the cigarette butts were on the ground.[9] (20RT 4517, 4546.)

On December 8, 1997, after learning that appellant and Michaud were in custody, Hart interviewed Sharona once more, at which time Sharona said that Michaud and appellant had been the ones who abducted and assaulted her. (21RT 4765- 4768.)

G. April Doe (Count 3)[10]

Appellant's daughter, April Doe, was born on July 13, 1981. April first met Michaud during Christmas 1996 in Michaud's tri-level home where appellant was living. April lived in the tri-level from Christmas 1996 to February 1997 with Michaud, appellant, Randy, Rachel, and Briann. At that time, appellant and Michaud shared a bedroom and April and Briann shared a bedroom. (20RT 4585-4587, 4690.)

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[9] Rachel Doe also testified that Michaud and appellant smoked Benson & Hedges cigarettes. (19RT 4299-4301.)

[10] During jury selection, Appellant entered a plea of guilty to count 3 (oral copulation with person under 18 years (§ 288a, subd. (b)(1)) involving April Doe. (5CT 1264-1265; 9RT 2119-2122.)

In 1997, Thanksgiving fell on November 27th, and appellant and Michaud came to Pleasanton where April was now living with her mother, Annette, her stepfather Chris Carpenter, her sister Jamie Daveggio, and her stepbrother and stepsister Andrew and Cassie Carpenter. (21RT 4880-4881.) Appellant and Michaud were driving the green van. The van's middle seats had been removed, but the rear bench seat was in place. (20RT 4602-4605.)

At this time, April noticed that Michaud was really skinny and pale; she had been much bigger and more robust when April lived in Michaud's home in Sacramento. (20RT 4693.) April was addicted to meth during this time, consuming $60 to $70 worth a day. Appellant gave her one ounce of meth, which is worth a couple of thousand dollars on the street. April gave half to a friend, sold a portion of the remaining half and used the rest herself. (20RT 4608.)

Michaud and appellant stayed at the Candlewood Suites Motel on November 25, 26, and 27. April and Jamie stayed over with them. April snorted and smoked meth with Michaud and appellant and did not sleep the entire time she was at the motel. (20RT 4610-4611, 4616, 4618.)

On Thanksgiving Day, April's mother cooked the holiday dinner for the entire family, including appellant and Michaud. At one point during the day, April was in her room with appellant, Michaud, and Jamie. Appellant handed April a gun, a small gray and black automatic. April had never seen her father with a gun before. (20RT 4619, 4621-4624.)

After dinner, appellant suggested that April spend the night at the Candlewood Motel so he could take her to get her driver's license the next morning. The motel was close to a branch office of the Department of Motor Vehicles. (20RT 4627-4630.) When appellant said he was ready to return to the Candlewood, Jamie, who had also stayed at the motel the previous two nights, got ready to leave. Appellant stopped Jamie, telling her it would be better if she stayed home and got some rest. (21RT 4897.)

When they returned to the Candlewood, April and appellant sat and talked. Michaud was on the bed but awake. As April talked with her father, Michaud made sighing or giggling sounds. Appellant spoke about the perfect way to rob an armored truck. He asked April if she wanted to go on a "hunting," which he described as "where you stalk someone to kill." (20RT 4634-4636.) He talked about serial killers who are able to go on with their everyday life without anyone knowing what they had done. He said he had studied serial killers and knew their flaws and would not make the same mistakes himself. (20RT 4636-4640.)

Earlier, appellant had given April a book about serial killer Henry Lee Lucas. At the Candlewood, appellant said Lucas had a girlfriend who lured the women and together they killed a lot of people. (20RT 4642, 4644.) Toward the end of the conversation, appellant talked about sex. Then, he went to take a shower. (20RT 4650, 4651.)

Michaud approached April. Michaud told April appellant intended to have oral sex with her. Michaud said she thought April would feel better if she knew what was going to happen. April was shocked and said nothing. She didn't know what to do. (20RT 4652-4653, 4698.)

Appellant emerged from the bathroom in shorts and nothing else. He sat next to April and said, "You know that I love you, right." He began to touch April. April said, "No." Michaud stood and went into the bathroom and closed the door. (20RT 4653-4655.)

Appellant removed April's pants and underpants. He told her she would enjoy herself. He kissed her stomach, her legs, and orally copulated her for an hour. He said he had seen her in her bedroom at the house and she was the only girl he could touch that would make him "nut," meaning ejaculate. April cried through the entire assault. The clock was in her view and she marked the time. The assault began at 12:07 and ended at 1:09. (20RT 4656-4658.)

At some point, Michaud came out of the bathroom. April was on her back on the bed. Her father was kneeling on the floor with his head between April's

legs. Michaud gave appellant "head." (20RT 4658.) The portion of the assault that involved Michaud lasted about 15 to 20 minutes. Appellant told April that Michaud didn't enjoy oral sex. (20RT 4659.) Appellant ejaculated in Michaud's mouth. Appellant climbed onto the bed, kissed April's stomach and neck, then gave her a kiss and said, "You know I love you." April, who was still crying, felt violated. (20RT 4660.)

The next day, appellant and Michaud took April home. Michaud asked April if she wanted to go "hunting" with them. Michaud said the day after Thanksgiving was the biggest shopping day of the year and would be the best day to go on a hunt. (20RT 4704-4705.)

April's view of Michaud's relationship with appellant was that Michaud was able to stand up to him. April thought that Michaud was her own person. (20RT 4699.)

Later that night, April went to the home of her boyfriend Spencer Burton. When Spencer began to get intimate, April cried and told him that her father and Michaud had sexually molested her. (20RT 4707; 21RT 4713-4714.)

H. Vanessa Samson (Count 4)

On Sunday, November 30, 1997, Michaud told Jamie that she and appellant were going to Lake Tahoe for a few days because Michaud had a court appearance there. Michaud and appellant left their belongings in Jamie's room. (21RT 4898-4903.)

At 6:51 p.m. on November 30, 1997, appellant and Michaud purchased two curling irons, a man's shirt, and a flashlight from the K-Mart store in Hayward, California. (21RT 4866-4869, 4874.)

On November 30th and December 1st, appellant and Michaud were still in the Pleasanton area. Appellant called Jamie on the night of the 30th and said he was staying at the Motel 6 in Pleasanton. The next night, December 1, appellant called Jamie and said he was still at the Motel 6 in Pleasanton and that he and

Michaud were going to Tahoe for Michaud's court appearance. (21RT 4908-4911.) Registration records of the Motel 6 on Hopyard in Pleasanton showed that Appellant used his driver's license in registering for a two-day stay for two persons on November 30, 1997, and that he checked out on December 2, 1997. (21RT 4833-4836, 4842.)

Also, on December 1, Federal Bureau of Investigation (FBI) special agent Lynn Ferrin, who had been assigned to investigate the Aleda Doe kidnap and sexual assault, showed Aleda Doe a photographic lineup that included a photograph of appellant. Aleda had completed a composite sketch of one of her kidnappers soon after the defendants released her and that sketch had already been aired on television stations by Placer County detectives. (24RT 5401) Aleda selected appellant's picture from the photo lineup as her captor and assailant. (24RT 5404.) Aleda was also shown a photo lineup that included Michaud's photograph. She selected the photograph of a woman other than Michaud as looking most like the van's driver. (26RT 5462.) Aleda told Ferrin that the female driver of the green van was called Mickey. (24RT 5464.)

At 6:17 p.m. on December 1, 1997, appellant and Michaud purchased a ball gag and a cassette tape entitled "Submissive Young Girls" from the adult entertainment store Not Too Naughty in Livermore, California. Their images were captured on the store's surveillance tape and played for the jury. (21RT 4844-4856.)

Rick Boune saw a newspaper article about the Aleda Doe case that included a composite sketch of appellant. He had heard Michaud refer to herself as Mickey. (16RT 3775.)

On December 2, 1997, Ferrin obtained an arrest warrant for appellant from a federal magistrate. (24RT 5404.) He was unsuccessful in getting one for Michaud. (24RT 5462.)

Around 7:00 or 7:30 on the morning of December 2, Michaud appeared briefly at the home of her friend Fred Martinez and asked to borrow $20.

Martinez did not see appellant in the van. Michaud acted normal and did not say anything was wrong. She said they were going to the welfare office and then to Lake Tahoe where she had to make a court appearance. (30RT 6387-6392.)

That same morning, Vanessa Samson left her Pleasanton home to walk to work, but never arrived at her workplace. Vanessa was 22 years old and living at home with her parents and brother and sister. She did not own a car and customarily walked to her job in an insurance office a mile away. Her usual route took her along Singletree Way where she cut through a Lucky's Market shopping center, crossed Hopyard, and walked down West Las Positas Boulevard to her office. (22RT 4928-4930.)

Vanessa spoke with her mother Christina before leaving the house between 7:20 and 7:45 a.m. She was dressed in blue jeans, a gray San Diego State University sweatshirt with red lettering given to her by her boyfriend Robert Oxonian, a black jacket, and white tennis shoes. She carried a green Jansport backpack and a red Safeway lunch pack. Her hair was down. (22RT 4935-4038.)

Around 7:45 or 7:50 that morning, David Valentine and David Elola were working on the roof of Valentine's home when their attention was caught by a loud scream, a woman's voice. Both men looked toward Singletree Way, the direction of the scream. On hearing the scream, Valentine thought in his heart that something was wrong. Elola described it as a screeching scream, loud, high-pitched, violent, chilling. (22RT 4943-4945, 4975, 4980.) The sound of the scream was immediately followed by the sound of a sliding door shutting quickly. (22RT 4953, 4975.)

Valentine saw a forest green van driving slowly away. Its light-colored California license plate began with the number 3. (22RT 4951.) He did not see the person who screamed. He thought the van's driver was a woman because the driver had long hair, but he did not see the driver's face. (22RT 4950.) At the intersection near Lucky's, the van stopped, then turned to the right. (22RT 4951.)

Elola saw a forest green Ford minivan traveling at a slow pace before it moved in a smooth acceleration in the direction of Lucky's, where it stopped at the corner, and turned right. The driver was a woman with long brown or black shoulder-length hair. (22RT 4977-4978.)

Elola turned to Valentine and told him, relax, it's okay. It's a woman driving the van and she's probably dealing with her daughter. (22RT 4979.) Because the van drove away slowly, Valentine accepted Elola's thinking and did nothing more. (22RT 4959.)

When Christina Samson returned home at 5:30 that afternoon, Vanessa, who usually reached home before her, was not there. Instead, there was a phone message from Vanessa's supervisor Heidi Wolfe[11] saying that Vanessa had never arrived at work. At 9:00 that night, Vanessa's sister Nicole Samson telephoned the police and reported her missing. (22RT 4939-4940.)

Pleasanton police officer Sabrina Sams took a telephonic missing person report for Vanessa Lei Samson at 8:46 p.m. on December 2. (23RT 5231.)

Two days later, David Valentine saw a flier posted on his front door about a missing girl. (22RT 4953.) Valentine called police on December 4 and told them about the forest green van with the California license plate beginning with the number 3. (22RT 4960.)

At 9:44 on the morning Vanessa disappeared, Michaud went into the Florin Road branch office of the Sacramento County Department of Human Assistance (welfare office) near Highway 99 in Sacramento. Michaud was known to clerk Terri Hardy. (22RT 4987-4990.) Hardy thought Michaud looked and acted as she normally did. Michaud always presented herself nicely, dressed nicely, her hair and makeup were nicely done. This morning, Michaud did not appear upset and

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[11] Heidi Wolfe testified that Vanessa usually arrived in the office ahead of her 8:00 a.m. start time. She had always shown up for work when expected. At 9:00 a.m., Wolfe went to personnel to get Vanessa's home phone number and called and left a message. (23RT 5227-5229.)

did not say she needed help although there was a security guard in the office. (22RT 5001.) Michaud displayed her California driver's license as is required and received an AFDC (Aid to Families with Dependent Children) check for $538.00 and a Fair Card for food stamps. Michaud left the office at 9:52 a.m. (22RT 4494-4498.)

At 10:04 a.m. that morning, Michaud cashed the AFDC check at Check Mart, a check-cashing facility less than a minute by car from the welfare office. (22RT 5007-5011.) Before cashing Michaud's AFDC check, Check Mart clerk Tanyia Marie Chinn Martinez verified Michaud's identity through a computer check of Michaud's driver's license and Michaud's right thumbprint. (22RT 5012-5015.)

At 11:40 a.m.[12] that day, park employee Michael Petersen saw a dark green Dodge or Plymouth minivan in the parking lot of the Sly Park recreation area in Pollock Pines. Sly Park is 4.5 miles off Highway 50, the route linking Sacramento and Lake Tahoe. The park has a self-service pay station where park users place fee monies in an envelope and deposit it in a lock box. (22RT 5022-5023, 5027.) The van had a five-inch wide white-colored stripe below the windows that ran the length of the van. Petersen wondered why someone would deface their new van with the stripe. A white male in a brown jacket and blue jeans was at the back of the van. He was 5 feet 10 or 11 inches, between 180 to 200 pounds, and slightly overweight with a pot belly. Petersen also saw a white female with longish brown hair dressed in light-colored clothing in the front passenger seat. (22RT 5027-5031.)

Sometime between 11:15 and 11:30 a.m. that day, appellant rented a room for two people at the Tahoe Sundowner Motel in South Lake Tahoe. The motel's

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[12] Petersen told FBI special agent Kent Hittmeier that he saw the van at 11:40 a.m, but Park ranger Mike Reeves, who was present during that interview, corrected Petersen and said Petersen was not in Sly Park at 11:40 a.m.; he was there at 2:00 p.m. (22RT 5040.) However, Petersen told Pleasanton police officers he saw the green van at 11:40 a.m., consistent with his testimony at trial. (22RT 5043-5045.)

owner-manager Mukesh Patel thought appellant looked as though he had not had enough sleep and had not shaved for a couple of days. Patel matched appellant to his driver's license photograph. (22RT 5053-5056.)

Appellant moved his green van and parked it in front of room 5, the assigned room. (22RT 5059-5060.)

Ten minutes later, Patel saw a white woman with black hair driving the green van out of the motel grounds. The van returned about 25 minutes later. The woman parked it near room 5. (22RT 5061-5063.)

Later that night, when it was dark, Patel noticed that all of the windows to room 5 were fogged, which happens when people take long showers. The drapes were closed but Patel could see there was a light on in the room. The green van was gone. (22RT 5063-5064.)

The next morning at checkout time at 11:00, Patel entered room 5 and found it nice and clean. The contents of the trash can, including the liner, had been removed. Patel saw a light coffee-colored stain on the bedspread. He removed the bedspread and washed it. (22RT 5064-5065.)

At 7:19 p.m. that same evening, appellant and a dark-haired woman registered for a room at the Lakeside Inn & Casino in Stateline, Nevada. Lakeside desk clerk Gary Marchesano looked at appellant's California driver's license and made a record of it. Appellant described the car he was driving as a 1995 Dodge. (23RT 5080-5086.)

The next morning, December 3, FBI agents went to Rick Boune's home looking for appellant and Michaud. Boune told them Michaud was in court in Lake Tahoe because she had been caught passing bad checks. (16RT 3801.)

On December 3, Michaud appeared in her bad check case in Douglas County, Nevada, Justice Court, across the street from the Lakeside Inn, and made a payment of $40, which was some but not all of the money due. Alan Buttell, the Deputy District Attorney in that case, described Michaud's demeanor as "at ease and very cooperative." (23RT 5100, 5111.)

That same day, FBI special agents Mike West and Michael McKinley located the green Dodge minivan in the parking lot of the Lakeside Inn and Casino and kept it under surveillance. (23RT 5123-5127.) Appellant was arrested by FBI special agents Bruce Wick and Kepp Steele in the casino on a federal warrant for kidnapping Aleda Doe. (23RT 5115-5116.) After West learned that appellant had been arrested, he learned that someone presumed to be Michaud was in room 133. West could see lights and hear a voice in the room. Special agent Christopher Campion donned a maroon hotel uniform as a disguise and knocked on the door to room 133. Michaud opened the door and Campion entered the room. Special agent Lynn Ferrin, the case agent for the Aleda Doe case, entered the room immediately after Campion and took Michaud into custody and into an adjacent room. (23RT 5131; 24RT 5405-5407.) Michaud was arrested under a state warrant. (23RT 5145.)

Agents West and Campion cleared the room and then searched it. West found a pay envelope for Sly Park parking that had been ripped into four pieces. He also assisted Campion in clearing a loaded .25 automatic Colt pistol located in a black cash box. The cash box also contained two bags of green substance resembling marijuana, a pipe, a torch, plastic bags with a white substance, a digital scale, and a premier credit card bearing appellant's name. (23RT 5137-5138.)

Douglas County deputy sheriff Aaron Crawford transported Michaud to the Douglas County jail facility where she was booked. Michaud was still dressed in the clothes in which she was arrested. Deputy sheriff Rick Sousa searched Michaud at the jail facility while she was still cuffed. He felt a lumpy object in Michaud's right front jean pocket and asked Michaud what was in there. Michaud made no response. Sousa removed a 2 ½ to 3 foot length of yellow nylon rope. (23RT 5200, 5202.) After that, Michaud's restraints were removed and she was placed in a holding cell where she undressed as instructed on a clean sheet and changed into jail clothing. Michaud's street clothes were booked into evidence. (23RT 5178-5180.)

On December 4, 1997, John Schoettgen found Vanessa Samson's body along Highway 88. Sometime between 10:30 and 11:00 a.m., Schoettgen pulled over in a plowed-out turnout and got out of his car. (23RT 5239-5240.) He saw a body lying face down in the snow on the downhill grade at the side of the road. He yelled, but there was no response. The body was dressed in blue jeans, white tennis shoes, a blue jacket. Schoettgen did not go down to the body. Instead he got into his car and went to call for help from a small store in Woodfords, about three minutes away. (23RT 5240-5243.)

First, Alpine County Sheriff Henry "Skip" Veatch and then deputy sheriff Everett Brakensiek arrived at the location of the body. Brakensiek looked over the snowbank and saw a human body, small in stature, lying face down in the clean and undisturbed snow. There were no footprints. There was no snow on the top of the body. (23RT 5265-5266.)

Brakensiek walked down and saw that the body was that of a woman, who was deceased and frozen. He saw a ligature-type mark surrounding the neck. He could see a red nylon lunch bag under the body. (23RT 5267-5269, 5272.)

Brakensiek and other officers recovered a six-foot length of rope with human hair stuck to it twisted in a type of loop; a dark green backpack; a Snapple-brand drink bottle; and a smashed 12-ounce Coca-Cola can.[13] (23RT 5276-5278, 5283, 5284.) There was no snow on the green backpack. Inside the backpack, everything was neat. Brakensiek saw a hair clip, pager, hair scrunchies, cassette tape player, numerous cassettes, and a California driver's license for Vanessa Lei Samson. (23RT 5286-5287.)

Vanessa's clothes were in disarray; her jeans were buttoned at the top, but not zipped; her left tennis shoe was tied, but her right shoe was not. She wore a watch. (23RT 5182-5282.)

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[13] The parties stipulated that the Snapple bottle and crushed Coca-Cola can were examined for latent prints and that no prints sufficient for comparison were found on either. (28RT 6104.)

Using information from her driver's license, Brakensiek ran Vanessa's information through the missing persons' database and matched her name to a report out of Pleasanton. (23RT 5290.)

An autopsy was performed on Vanessa's body on December 5, 1997, in the Placer County Coroner's Office in Auburn, California, by pathologist Dr. Curtis Rollins. (23RT 5304-5305.) Her clothing and property, including her backpack, wallet, credit card, California driver's license, day planner, lunch bag, watch, gold heart bracelet, and black hair scrunchy were recovered. (23RT 5307-5309, 5311-5324.)

The prosecution engaged forensic pathologist Dr. Brian Peterson to review the work done by Dr. Rollins[14] and to review case-related investigatory materials and render his own opinion about the autopsy, the cause of death, and the injuries sustained by Vanessa. (28RT 6039-6040.) Peterson determined that the forensic protocol met all the necessary requirements and provided enough detail for him to render his own opinion. (28RT 6050.)

The autopsy revealed no visible injury on the outside of the scalp but the presence of actual bleeding on the inside of the scalp. There was no injury to the bone or membranes around the brain or to the brain itself. The scalp injuries were caused by blunt force injury either through application of blows to the head or blows by the head against something else. (28RT 6054-6055.)

There was a ligature furrow around the neck measuring 10 ¼ inches in length and ¼ inch in width; areas of weaving were present in the ligature furrow. (28RT 6055-6056.)

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[14] Forensic pathologist Dr. Curtis Rollins performed the autopsy of Vanessa Sampson's body on December 5, 1997. In February 1998, Dr. Rollins concluded that he was addicted to the prescription medication Demerol and sought treatment. (32RT 6792-6808.) The prosecution called Dr. Brian Peterson to testify to the result of the autopsy in its case-in-chief. In turn, the defense called forensic pathologist Dr. Gregory Reiber to testify concerning the autopsy. (29RT 6207ff.) The prosecution then called Dr. Rollins as a rebuttal witness. (32RT 6779ff.)

Other external findings included bleeding or petechial hemorrhages in the white of the eye and the lining of the eye socket, which is a soft sign of asphyxia and consistent with the ligature pattern on the neck. (28RT 6058.)

Internal findings of the neck included extensive and deep bleeding in the strap muscles that surround the larynx, trachea, and esophagus, as well as petechial hemorrhage in the epiglottis and back of throat. In Peterson's opinion, the bleeding exceeded what he would expect to see in a ligature strangulation, leading him to conclude that manual strangulation had also been applied. Moreover, because the bleeding involved multiple layers of muscles all the way to the back of the neck, the finding implied that substantial manual force was involved. Peterson testified that the ligature and manual strangulation could have occurred at separate times or simultaneously. (28RT 6060.)

Photographs of the dissected esophagus with bleeding supported the conclusion that ligature and manual strangulation had been applied. The presence of blood-tinged foam within the trachea fit with everything else regarding the mechanism of death. (20RT 6061-6062.) The diagnosis of asphyxial death was also supported by findings of petechial hemorrhages of the pericardium and the pleura. (28RT 6063.)

Rollins had assigned mechanical asphyxia due to ligature strangulation as the cause of death. Peterson testified he would add the aspect of manual strangulation. (28RT 6066.) Peterson was unable to speak to whether asphyxia was the only cause of death or whether freezing temperatures played a part. (28RT 6078.)

Rollins described bruising and scraping on the right front chest wall and the left front armpit. Peterson said such injuries could have been caused by Samson being grabbed and thrown into a van. (28RT 6064.)

The final set of injuries described was a series of bruises to both the left and right buttock. The left buttock group measured 3 ¼ inches by 3 inches made up of several individual bruises. The right buttock group of three separate injuries

together measured 1 ½ inches by 1 inch. The bruising was deep and went beyond the skin down to the gluteus maximus on both sides. Peterson said the bruises were inflicted by blows with a blunt object; simple slapping or spanking would not cause the deep bruising. (28RT 6065-6066.)

Vanessa Samson was 64 inches tall and weighed 120 pounds. There were no drugs or alcohol in her system. (28RT 6066.) There was no evidence of defensive wounds and no visible marks that her extremities were restrained. (28RT 6067.) Rollins described no injuries to vaginal, anal, or rectal areas. (28RT 6087.)

Pleasanton police detective Kris Phelps observed no abrasions on Vanessa's wrist. There was fecal matter on the inside of her underwear. (23RT 5326.) Department of Justice (DOJ) senior criminalist Ricci Cooksey collected clothing, hair, fiber, and other evidence, including tape lifts of ligature marks. (24RT 5332.) Cooksey observed fecal matter exuding from the anus and on the underwear. He saw no body fluids on the underwear, no signs of bleeding on the body, no broken fingernails. (24RT 5356.) He observed Dr. Rollins perform the tests and take the samples for the sexual assault kit. (24RT 5346.)

The green van was towed to the Washoe County Crime Laboratory in Reno, where it was searched on December 4, 1997, and again on December 8, 1997. (23RT 5141-5143; 24RT 5411-5412.) The following were among the items relevant to this case that were recovered from the van: a cassette tape titled Submissive Young Girls seized from the van's dashboard player; a duct tape roll; a hairbrush with fibers; carpets; 16 .25 caliber cartridges and 19 .38 caliber cartridges; a white towel; a cocked crossbow; an Arizona iced tea can; a Pepsi can; an AM/PM cup from the side drink compartment in the cargo area; an empty Benson & Hedges 100s package; a Candlewood Inn notepad; two Revlon curling irons with duct tape; orange nylon rope; red nylon rope; a green ball gag; and

napkins with a reddish stain. (24RT 5416-5425, 5437-5451, 5544-5557, 26RT 5761-5767, 5778-5820.)[15]

Department of Justice crime laboratory DNA expert Brian Burritt examined and performed DNA tests on items relevant to the investigation in the case, including items seized from the green van. Burritt determined there were no semen stains in Vanessa's underwear. (27RT 5913-5914.)

He examined the two curling irons. The first curling iron was 12 inches long and had been modified. The electrical cord had been cut off; the clasp had been removed and the portion of the curling iron where the clasp had connected to the iron was wrapped in duct tape. The tip of the curling iron was ¾ inches long and brown material was packed in there. Burritt also observed brown stains and brown material in the grooves of the tip of the curling iron. Burritt dislodged a pellet of brown material from the tip of the curling iron and observed what appeared to be mold or fungal growth on the material. (27RT 5918-5927.) The brown pellet and grooves of the first curling iron tested positive for blood. (27RT 5937-5941.)

The second curling iron had been similarly modified. There were brown stains at the tip. There was a brown pellet in the folds of the wrapping for the second curling iron which tested positive for blood. (27RT 5941-5943.)

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[15] The police also recovered several carpets from the van interior. Four slits had been cut into one of the carpets. (24RT 5420-5425.) The district attorney's investigator Tim Painter, created a template by replicating the carpet with evidence paper. Painter then placed the template in the van's cargo area and found the cuts in the carpet allowed access to the recess bracket anchor points that had held the middle chairs and rear bench seat in place before they were removed. (28RT 6110.) The prosecutor argued that the combined presence of ropes in the van with the accessibility of the anchor points suggested a method of restraints. However, none of the women who had been sexually assaulted in the van reported or testified to being restrained in this manner. The prosecution's forensic pathologists reported that Vanessa Samson's body showed no sign her extremities were restrained. (28RT 6067, 6068; 32RT 6840.)

There was fecal matter and blood on the irons and on the napkins, which were stained in a pattern consistent with having been used to wipe the irons. DNA analysis of the biological material was strongly consistent with the profile of Vanessa Samson. (27RT 5967-5969, 5972, 5984-5985.)

Burritt also examined and tested a green ball gag attached to a black leather harness, which was recovered during the search of the green van. There were three sets of bite marks made by a small mouth and small set of teeth on the green ball gag. (27RT 5948.)

Burrit also tested stains found on three paper napkins recovered from the green van. The napkin stains bore a distinct U-shaped appearance. There were several brown stains at the base of the U, a shape consistent with the napkin being used to wipe off the curling iron. The stains on all three napkins tested presumptive for blood. (27RT 5954, 5960.)

Burritt developed DNA profiles for Vanessa, appellant, and Michaud from reference blood stains. (27RT 5976.) Michaud and appellant were excluded as donors of any biological material from the items Burritt tested. (27RT 5977.) Vanessa was included as a possible contributor for stains on the napkins and swabs from the curling irons and ball gag. Both PCR (polymerase chain reaction) and RFLP (restriction fragment length polymorphism) results showed Vanessa was the likely source of stains on two napkins. (27RT 5977-5979.) PCR results from the ball gag and both curling irons were also consistent with Samson's profile. (27RT 5979-5980.)

Department of Justice latent print analyst Felita Chapman matched Michaud's known prints to four prints found on the 13-inch curling iron and the duct tape wrapping it. (28RT 6122, 6135-6142.) Chapman matched Michaud's known prints to two prints found on the 12-inch curling iron, one on the nonadhesive side of the duct tape and the second a reversal on the curling iron. (28RT 6145-6146.)

Chapman matched two of Michaud's prints to the Arizona iced tea can; three of Michaud's prints to the Coca-Cola bottle; six of Michaud's prints to the Pepsi bottle. (28RT 6148-6149.) Appellant's prints were found on the book Dead of Night; the cassette tape, and the cassette tape case, and on the black cashbox. (28RT 6149-6151, 6155.)

Chapman made eight identifications from the AM/PM cup – four matches to Michaud; three to appellant; and one to Vanessa Samson. (28RT 6153-6154.)

THE DEFENSE GUILT PHASE EVIDENCE

A. Michaud's Guilt Phase Defense Evidence

Forensic pathologist Dr. Gregory Reiber reviewed Dr. Rollins' autopsy report and attachments and his grand jury testimony, Dr. Peterson's report and trial testimony. (29RT 6209-6210.) Dr. Reiber had known Dr. Rollins, who had received his pathology training at the University of California at Davis under Dr. Reiber's supervision, since 1993. (29RT 6211.) Dr. Rollins had spoken to Dr. Reiber in January 1998 concerning his Demerol addiction and his intention to enter a drug diversion program. (29RT 6212-6213.)

Because the pathologist's ability to attend to detail is critical to the autopsy record and because Demerol affects the ability to attend to detail, Dr. Reiber would only rely upon those observations of Dr. Rollins he could personally verify through other means. (29RT 6212-6214.) Photographs provided independent confirmation. (29RT 6215.)

In this case, Dr. Rollins, through Dr. Peterson, suggested asphyxiation as cause of death. Dr. Peterson testified that the presence of substantial bleeding in the strap muscles suggested asphyxiation was the cause of death. Dr. Reiber examined the photographs of the strap muscles and found that the areas of hemorrhage all pretty much followed a line that corresponded to the ligature mark on the outside of the neck. That raised a strong possibility that asphyxiation was

the cause of death. But Dr. Reiber felt it was also necessary to look at other variables to see whether there was another reasonable mechanism to explain death. (29RT 6216.)

He explained that a person can be strangled, but not fatally. A person can be strangled into unconsciousness and to a level of unconsciousness where the person is not moving and the breathing would be shallow and infrequent. The person is alive but does not look alive. (29RT 6286-6287.)

The body was found in the snow so exposure as a cause of death would have to be considered with some weight. An individual in a cold environment, incapacitated from having been severely but non-lethally strangled with a ligature, might not be able to extricate herself from the situation and might succumb to hypothermia. The presence of petechiae would be consistent with both lethal and nonlethal strangulation, as is true of bleeding in the strap muscles. (29RT 6216-6217.)

Dr. Reiber's opinion was that Vanessa Sampson may have frozen to death based on fact that she was in a cold environment and that she suffered injuries that could have been either fatal or non-fatal but very incapacitating. She could have succumbed to hypothermia. (29RT 6223.) As a pathologist, it would be very difficult to say the strangulation itself was fatal rather than less than fatal but incapacitating and the person died of another environmental problem, i.e, from exposure. (29RT 6288.)

Dr. Reiber also testified that the rectum and anus are fairly tender organs. He would expect to find signs of trauma if these organs were penetrated by a hard metallic object such as a curling iron because the tip is very blunt, the irons are not very tapered, and the tip is a hard object. (29RT 6276.) He also stated that the bruising on Vanessa Sampson's buttocks could be consistent with someone having been tossed from the car and landing on rough gravel. (29RT 6218.)

Phil Everall Schmaling lived in the tri-level house with Michaud and Appellant and their children. (30RT 6369.) Schmaling used meth in the house, as

did Michaud. He knew Michaud was a prostitute, and that she had a "sugar daddy" named Bill Reed. Schmaling had also met Skip Wulf, the client who had helped Michaud acquire the green van. (30RT 6371-6373, 6374.) On one occasion Schmaling saw and heard an argument between Michaud and Rachel. Rachel screamed at Michaud and then pushed her down the stairs. Michaud fell and slid across the entryway floor. (30RT 6370.)

Schmaling left the house after an incident during which Rachel had threatened to falsely report to the police that he had raped her. Schmaling said the incident began after Rachel refused to do the dishes. Schmaling offered to help if Rachel would do them. Rachel replied she did not have to do what he said. Rachel said something to the effect of, "All I have to do is make a phone call and you will be history. I will tell them you raped me or tried to rape me." (30RT 6371.)

Fred Martinez was a friend of Michaud and appellant. He noticed a change in Michaud's appearance and demeanor in 1997. Michaud was using drugs. She was no longer outgoing. (30RT 6382.) Appellant too had increased his meth use. He looked like things were bothering him, like things weren't going right. (30RT 6383.)

Tina Murrell knew both Rachel Doe and Christina Doe when they were nine and ten, respectively. Both claimed to be gang members. (30RT 6449-6450.) Rachel came home from school one day and told Randy that a boy from school pulled down her skirt. Randy left to beat the boy up. After he left, Rachel laughed and told Tina that the boy never pulled her skirt down. She was mad at the boy over something and wanted Randy to beat him up. (30RT 6451.)

From March 1997 to March 1998, Murrell lived in a home with Sheri James, whom she called her mother, and with Sheri's sister Fawnie James, and with Amy Doe. Murrell saw Amy daily and never saw bruises or marks or cuts on her face. Amy never said she was attacked by anyone. (30RT 6451.) Murrell had seen Amy use drugs and hallucinate. (30RT 6471.) Sheri and Fawnie dealt in

meth sales from the house, but Murrell never saw Michaud or Appellant buy meth from them. (30RT 6453.)

Sheri James met Michaud when Michaud was 16 years old and came to apply for a job. Sheri ran Happy Massage for five years, a place where prostitution took place. Michaud brought her own client base with her, including her father Leland. Leland would bring customers to Happy Massage to see Michaud. Sheri walked in one day and Leland and Michaud were engaged in sex. (30RT 6505-6506, 6522.)

Michaud had an abusive relationship with a boyfriend named Johnny Garcia. Michaud would show up for work with bruises on her arms and face. Once, Garcia brought Michaud to work, dragged her by the hair out of the car, and kicked her in the face. (30RT 6506-6507.) Michaud once told Sheri that Garcia poured Drano down her throat and burned her throat. (30RT 6537-6538.)

James said Michaud was beautiful when she moved into the tri-level house. She placed her children in a private Catholic school. (30RT 6507.) After appellant moved into the house, Michaud quit caring about herself and got very thin. (30RT 6508.)

Psychiatrist Dr. Pablo Stewart testified that Posttraumatic Stress Disorder (PTSD) is a syndrome, a variety of symptoms that result from exposure to trauma. Trauma is either an actual assault upon one's body where there is significant injury and/or possible loss of life or the witnessing of this occurring to someone else. (31RT 6598-6599.)

Stewart interviewed Michaud for over six hours; reviewed the report by psychologist Dr. Michael Fraga; discussed Michaud with Sheri James, Skip Wulf, and with psychologist Dr. Helga Mueller who treated Michaud's son Randy; and reviewed the testimonies of Rick Boune and Aleda Doe. (31RT 6600.)

Stewart diagnosed Michaud as suffering from complex posttraumatic stress disorder as a result of chronic, severe trauma over an extended period of time. (31RT 6606.) Complex PTSD is a diagnosis that is intended to separate people

who have experienced multiple incidents of trauma from those who experience single-incident trauma. (31RT 6602.) Under normal circumstances, a person who is exposed to trauma "numbs out" as a coping mechanism that allows her to exist. Persons who are exposed to chronic severe trauma, e.g., repeated sexual abuse and domination by another person, develop different responses. (31RT 6603.)

It is common for people with PTSD to attempt to self-medicate the effects of the trauma with the use of substances. (31RT 6608.)

Sex between a father and daughter constitutes sex abuse in its most severe form.

In complex PTSD situations, the traumatized person goes along with the perpetrator of the trauma. (31RT 6610-6611.)

Michaud manifested symptoms that resulted in Stewart's diagnosis, including documentation that she was exposed to traumatic events and the evidence that she was re-experiencing traumatic events. (33RT 6612.) Stewart concluded that Michaud had a propensity to be controlled by someone in a relationship. (31RT 6613.)

Based on Michaud's degree of Complex PTSD, Stewart categorized Michaud as being severely mentally ill. (31RT 6708.)

B. Appellant's Guilt Phase Rebuttal Evidence[16]

Vicki Fairbanks met appellant in mid-1995 while he was working at a bar in Sacramento. They became romantically involved for a period and remained friends afterwards. Appellant introduced Fairbanks to Michaud. (32RT 6724-6725.)

Fairbanks found Michaud to be obsessed by appellant. She did anything and everything he asked or needed. (32RT 6726.) When appellant went to live with Liz Bingenheimer for a period, Michaud drove by Bingenheimer's home,

[16] At the guilt phase trial, appellant initially rested on the state of the prosecution's evidence. (7CT 1733; 29RT 6205-6206.)

became friends with people appellant knew, and went to places he frequented just to have a connection with him. (32RT 6726-6727.) She collected information about him from his friends and called him to find out where he was and what he was doing. (32RT 6733.)

Fairbanks also saw that Michaud manipulated appellant in certain kinds of behavior. She kept him stirred up; she would not let things drop. She controlled appellant. (32RT 6729.) For example, Michaud told appellant that she had received threatening phone calls from members of the Devil's Horsemen Motorcycle Club when she had not. She told appellant about graffiti on the Devil's Horsemen club house when the graffiti did not exist. She drove by the homes of members of the club and called them. (32RT 6732.)

Appellant had lived with Michaud in the tri-level house for two or three months in the spring and summer of 1997. He then moved in with Liz Bingenheimer in July and August. (32RT 6743-6744.) While appellant was living with Bingenheimer, the Devil's Horsemen took appellant's motorcycle because he owed them money. Fairbanks had never seen any member of the motorcycle club do anything threatening to appellant. After Michaud lied about the phone call from the Devil's Horsemen, Michaud and appellant went on the run. In this way, Michaud had Appellant all to herself. (32RT 6749.)

Fairbanks has known Michaud to lie (32RT 6736) and once witnessed someone restraining Michaud from throwing a glass during an escalating verbal argument in Bobby Joe's bar. (32RT 6727, 6745.)

PROSECUTION'S GUILT PHASE REBUTTAL EVIDENCE

Dr. Curtis Rollins[17] autopsied Vanessa Samson's body. (32RT 6779-6792.) In Rollins' opinion, the injuries to her buttocks were not consistent with falling on

[17] Dr. Rollins testified that he is an addict and had abused alcohol at an early age; cocaine and marijuana in college; ecstasy in the 1990s; and Demerol since 1985. He performed the autopsy on Vanessa Samson on December 5, 1997, and in

gravel because the injuries were deep, intradermal contusions that went down deep into the fatty area of the buttocks and into the muscle. Moreover, there was no abrasion, such as would be present with a fall on gravel. (32RT 6819.) The scalp injuries were not visible from the outside. If a person was struck on the head with a fist but without enough energy to cut or lacerate the head, there would be bruising underneath the scalp. Vanessa had three bruises on the left and two on the right side of the scalp. (32RT 6820.)

There was no doubt in Rollins' mind that Vanessa died from ligature strangulation. Rollins described the ligature mark as a patterned injury. An object was placed on the neck with enough force to cause a friction abrasion. (32RT 6821.) An internal examination of the neck indicted there were extensive hemorrhages, but these were mainly restricted to the area immediately under the ligature mark. (32RT 6824.) She had some of the worst neck injuries he had ever seen. There was no evidence she died from hypothermia, which is a diagnosis of death by exclusion. She did not have the cherry red lividity, the severe skin discoloration, seen with hypothermia. Instead, she had a clear anatomic reason to be dead. He was absolutely certain the cause of death was strangulation. (32RT 6825-6827.) Rollins looked at the black and green and red rope found next to the body and could only say the rope was consistent with the furrow mark in Vanessa's neck, but it was not the only rope in the world that could do that. On the other hand, the yellow rope recovered (from Michaud's clothing) was inconsistent with the furrow mark because the weave pattern and the porosity were too tight. They did not match the pattern on the neck. (32RT 6831-6832, 6842.)

Rollins was unable to say with certainty that Vanessa was dead before she was placed in the snow bank. But factors suggested she was dead, e.g., her

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February 1998 he concluded that he was addicted to Demerol. He began using Demerol and almost died, which caused him to seek treatment. (32RT 6792-6808.) He was positive he was not "loaded" on Demerol when he performed the autopsy. (32RT 6816.)

posture in the snow bank was not natural; the lividity was fixed on the right lateral exactly as if she'd been placed in the snow bank so she did not move once she had been placed in that position. When they rolled the body over in the snow, there was nothing in the snow under or around the body illustrative of death throes. The reasonable medical certainty was that she was dead when she was placed in the snow bank. (32RT 6828-6829.)

There was no external trauma to the vaginal and rectal area. The published data says 50 to 56 percent of the time there will be trauma when there is forcible entry into the rectum. In hindsight, he would have done a rectal exam, but the facts presented to him at the time of the autopsy and the absence of trauma informed his decision. (32RT 6833-6835.) He was unable to say there was any kind of penetration of the vagina or rectum. (32RT 6841.)

There were no defensive wounds on the body, no areas of nail chipping, bruising to hands, to arms, or nails in ligature marks. (32RT 6835, 6843.) There were no obvious signs of restraints to the wrists or extremities – no cuff, chain, or rope marks. (32RT 6840.)

PROSECUTION'S PENALTY PHASE EVIDENCE

A. Summary of Penalty Phase Evidence.

The prosecution's penalty phase evidence consisted of victim impact testimony of Vanessa's high school friend, her fiancé, and members of her family. As to appellant, evidence was introduced as to prior sexual offenses against four other victims.

Appellant's penalty phase defense consisted of testimony as to his childhood and family relations and history. He also presented evidence of his religious conversion, remorse, and good conduct in jail. He admitted the kidnapping and sexual assault on Vanessa, but testified that Michaud killed Vanessa when appellant was not present and did not know that she was going to do that.

Penalty Phase Testimony

Liz Silos and Vanessa were high school friends who regarded each other as sisters. They planned to be in each other's weddings, to live near each other so each could be an aunt to the other's children. (35RT 7486-7489.)

Robert Oxonian hoped to marry Vanessa after he finished college. She made him feel special. They saw each other on Thanksgiving Day 1997 and then on the Sunday following. He put together collections of songs on cassette tapes for her. (35RT 7541-7546.)

Vanessa's sister Nichole and brother Vincent missed her presence in their close-knit family. Vanessa was outgoing, caring, giving, kind. The family felt the pain of her loss. (35RT 7655-7666, 7667-7671.)

Vanessa's father Daniel went to Vanessa's gravesite every day. He missed the daughter who was his fishing buddy. (35RT 7673-7677.)

Vanessa's mother Christina described Vanessa as "sunshine" and said it was difficult to come home after work and realize that Vanessa is not there. The family and children were close. Christina spoke of the difficulty of learning that Vanessa was missing, of seeing the trial photographs, of seeing family photos. (35RT 7680-7692.)

Rachel Doe described Michaud as being obsessed with appellant. Michaud hated men, but not appellant. He was the first person who did not judge her; he told her all the right things and so she fell in love. (35RT 7647.)

In 1985, after she finished work, Beverly Doe went to Joey's Bar in Tracy, where she met appellant. She had a couple of beers and then they went to another bar, Bill's Club, where she had some more to drink. (35RT 7503-7506.) Because she had too much to drink, she was going to walk home, when appellant and the person he was with offered her a lift to her home. She got in their car, with appellant driving, and they started driving towards her house. When they passed the street where she had planned on getting out, appellant kept driving, telling her

that they were going to get some more beer. She said she needed to get home. (35RT 7506-7507.)

When they started to get out of town, she became afraid, crying and asking them to let her get out. Either appellant or his companion turned to the back seat and hit her in the head. (35RT 7507-7508.) After the car stopped, appellant told her to orally copulate him, forcing her head down on his penis when she did not comply, telling her he would "beat the crap out of [her]" if she did not do a good job. (35RT 7509.) At that time the other person was feeling her breasts. (35RT 7509.) At some time, they removed her shirt and bra. (35RT 7510.)

After she finished orally copulating appellant, she asked if she could go out to urinate, which they let her do. While she was urinating, she heard a gun shot and turned to see the other person was holding a gun. (35RT 7511.)

Eventually they had her get back in the car, and they started driving again. While they were driving, the police stopped the car. The police officer approached the car and asked her if she was okay. She shook her head, and the police ordered all three out of the car. (35RT 7514-7517.)

Michael Rieter, the police officer who stopped the car appellant was driving, testified that when he approached the car, it appeared that the woman passenger in the back seat was "tight-lipped," and it seemed she was trying to pass a message to him. He ordered appellant and the other male to get out of the car, at which time the woman told him that she had been raped by the two men, and that they had a gun. (35RT 7524-757.) Rieter and his partner then arrested appellant and his companion. (35RT 7527.)

Later, the woman directed Rieter to a location out of town where by the side of the road he found some cigarette butts, three live .38 rounds of ammunition, an empty ammunition box, and a wet spot, which appeared as it someone had gone to the bathroom. (35RT 7528-7529.)

Hope Doe was 14 years old when she met appellant. At that time, appellant was in his 20's. (35RT 7557.) Once, when appellant was giving her a ride, he

stopped the car because appellant said he was sick. Appellant got out of the car for a while. Returning to the car, he pushed her seat back and got on top of her, trying to put his hand under her skirt. She tried to scream, and appellant grabbed her by the throat and hit her three times. (35RT 7559-7561.)

When appellant kissed her, she bit down on his tongue, and did not let go. She managed to get the car door open, and still biting on to appellant's tongue she dragged him over to a barbwire fence, where she was able to break off a piece of barbed wire, to try and "get" appellant with it. She then saw a car coming down the road, and she managed to flag down the car, which turned out to have some of her friends in it. (35RT 7565.)

On July 8, 1984, Patricia Doe attended a wedding at the Black Angus in Pleasanton. She was drunk, and decided to wait in the car of her boyfriend, Charles Vasquez. The next thing she remembered was waking up in someone else's car. She vomited, and the man whose car she was in hit her and bit her breast. He demanded she orally copulate him, and when she refused he hit her several times. After she orally copulated him, he drove her back to the Black Angus. The man also pulled her panty hose aside and inserted his fingers in her vagina and anus. She later identified appellant as the person who assaulted her. (35RT 7599-7603, 7615.)

Donetta Doe, appellant's first wife, testified that one morning in 1982, when they were married, appellant came into their bedroom with a friend of his, Gary Silverstri. Donetta was naked under the covers. Appellant got in the bed and told Gary that he could get in the bed also. Appellant kept pushing her legs open, and she kept saying, "No." Appellant held her hands, while Gary performed oral sex on her. (35RT 7616-7620.)

Donetta described appellant as "scary" and "intimidating." (35RT 7630.)

B. Appellant's Penalty Phase Defense

Terry Harrington, appellant's older sister, testified that their mother left their father, and raised them as a single mother, until their mother married Roy Kilgore. While they were growing up, their father, James Daveggio, Sr., had no part in raising them. Appellant has a good relationship with her sons. (36RT 7695-7696, 7699.) She described appellant as a "generous" person. (36RT 7699.)

The first time she met Michaud was when appellant brought her to their mother's birthday party in August of 1997. Appellant appeared upset because he was in a motorcycle group and the bikers were "after him" because he had stolen something from them. Appellant said that he thought he would be better off dead. (36RT 7700-7701.)

Although they did not have a religious upbringing, after her fiancé died, she started going to church. After appellant was arrested, he sent her a bible from jail. (36RT 7699-7703.) She loves appellant, and does not know what caused him to act in the way he did. (36RT 7704.)

Deta (Donetta), appellant's ex-wife, married appellant in 1988 and has a son with him. They separated in 1995, and until then appellant worked and contributed to the support of the family. (36RT 7728.) Appellant used to coach Pee Wee football for three years, which involved a lot of work and un-reimbursed expenses for the kids, most of whom were black or Hispanic. (36RT 7729-7730.)

Appellant never hit her during the time they were living together. (36RT 7730.) Appellant developed a gambling habit, and later she became aware of the fact that he was seeing other women. (36RT 7730-7731.)

Shortly after she met him, Deta became aware of the fact that appellant was a registered sex offender. (36RT 7745.) She allowed appellant to be around Briann, her daughter who was 8 years old when Deta met appellant. (36RT 7745.) She knew appellant was giving Briann crack cocaine. (36RT 7749.) Appellant stole some of Briann's college fund to buy drugs. (36RT 7754.)

It was stipulated that in 1986, appellant had been convicted of assault with intent to commit rape, in violation of section 220. (36RT 7771.)

Perry Leach is a chaplain for the Washoe County Jail, in Nevada, where he met appellant. He remembered appellant because appellant was always very polite. Appellant would often ask for a short prayer from Leach. (36RT 7773-7776.)

Beard Blain and John Hamilton were employed by the Washoe County Sheriff's Department and worked in the jail, where they met appellant. They both testified that they never had a problem with appellant, whom they described as a model inmate. (36RT 7782-7785, 7778-7779.)

Mike McCaw, a chaplain with the Washoe County jail, met appellant, who had asked for religious counseling, which McCaw then provided on a regular basis. He later baptized appellant, who then continued in his religious studies. McCaw believes that appellant is serious about his religious conversion. (36RT 7795-7798.)

It was stipulated that appellant arrived at the Alameda County Jail on October 27, 1999, and his only disciplinary matter has been for "stockpiling" medications he received. (36RT 7793.)

C. Appellant's Testimony

Appellant decided to testify partly because his religious development had taught him to accept responsibility for his crimes, which is why he accepted responsibility for being involved in the kidnap and death of Samson. (36RT 7800.) He was testifying because of the pain expressed by the Samson family, and he believed they had a right to know what happened on December 2, 1997. (36RT 7800.)

The kidnapping was a "random contact" that occurred while he and Michaud were driving around and spotted Samson. Michaud was driving, and appellant was in the back of the van. (36RT 7801.) They had previously been at

the Motel 6 in Pleasanton, where they discussed kidnapping someone. They started driving, and at one point Michaud said, "There's one." Michaud stopped the van, and when Samson walked by appellant grabbed her and pulled her into the van. (36RT 7802.)

Samson shouted "What have I done?" Appellant told her to shut up, asking if he needed to tie her up or if she would behave. She said she would behave, and Samson was not tied up at that time. (36RT 7803.)

He did not threaten her or hit her with the gun or the crossbow that were in the van because "it wasn't necessary." (36RT 7803-7804.) When appellant took over the driving and Michaud got in the back and got under some blankets with Samson. (36RT 7804.) Appellant started driving to the welfare office in Sacramento. (36RT 7804-7805.) Appellant looked back at one time and saw that Samson's head was between Michaud's legs. (36RT 7805.)

At the welfare office, Michaud got her check, while appellant remained in the van with Samson. They then went to cash Michaud's check. Michaud kept $40.00 and gave the rest to appellant. The plan was for appellant to gamble with the rest of the money. (36RT 7806-7807.)

They continued driving, stopping at Cameron Park, which appellant thought might be a good place to "get involved in what was happening," meaning having sex with Samson. However, Cameron Park was not secluded enough, so they continued driving until they got to the Sly Park exit. (36RT 7809-7810.) At that time, Samson and Michaud were both naked, and Samson was on her hands and knees. Michaud had her hand inside of Samson's vagina. (36RT 7810.) Later, before they got to Sly Park, he looked back and saw that the ball gag strap was around Samson's head. (37RT 7994-7995.)

Michaud was going to put one of the curling irons in Samson's anus, but Samson defecated, which is how the stains got on the white napkins. (36RT 7810.)

When they got to Sly Park, Michaud and Samson went to the bathroom, while appellant stood by the van and had a cigarette. After appellant saw Michael Peterson, he decided it was not a good place to have sex with Samson, so they left. (36RT 7811.)

They got a motel room and had Samson take a shower so that they could discuss what to do. (36RT 7812.) After Samson got out of the shower, they decided to get something to eat. Michaud went to McDonald's. While she was gone, appellant allowed Samson to get dressed, and he sat on the bed and did drugs. (36RT 7813-7814.)

After Michaud came back, they ate. Michaud said the tire was low, so appellant took it to the gas station to get it fixed, leaving Michaud and Samson in the motel room. (36RT 7814-7815.)

When he came back Michaud and Samson were undressed. Appellant sat on the bed, while Michaud and Samson engaged in mutual oral copulation. Michaud reached over and undid appellant's pants, and appellant put his fingers in Samson's vagina. (36RT 7815.) Michaud then orally copulated appellant until he ejaculated. They then had Samson take another shower, so they could again decide what to do. (36RT 7816.) Appellant wanted to go gamble. (36RT 7816.)

They discussed whether to let Samson go or whether to kill her. (36RT 7816.) Appellant wanted to let her go, but Michaud wanted to kill her because she thought that Samson could identify them. (36RT 7817.) (At that time, he was not aware of the fact that Aleda had described them to the police. (36RT 7817.)) After a heated discussion, they agreed to let Samson live. (36RT 7817.)

After Samson got out of the shower, they let her get dressed in everything but her shoes and socks, which were in the van. Michaud went out to the van with Samson, while appellant waited in the room. When appellant came out of the room, Michaud was standing by the van. Appellant was angry that she was not with Samson, and Michaud said that she had killed her. (36RT 7818.)

Appellant looked in the van to verify that Samson was dead. Samson was lying in the van with her hands tied together by the black rope. Appellant and Michaud then went into the motel room to decide what to do next. (36RT 7818-7820.)

Appellant and Michaud then got in the van and appellant started driving. (36RT 7820.) Eventually, he saw a pullout on the side of the road, and he pulled over and took Samson out of the van. Samson slipped, hitting her head on the ground. Appellant then slid her down the side of the hill. (36RT 7821-7822.) Michaud then threw the other items down the hill, including the back pack, the lunch pail, and the rope. (36RT 7822.) They then returned to the motel, cleaned the motel room, and left about fifteen minutes later. (36RT 7824-7825.)

Appellant told Michaud to throw away the items like the curling irons. (He was surprised when they were later found in the van. (36RT 7826.) They then went to the Lakeside Inn where they registered for the night. (36RT 7826.) Appellant then went to the casino to gamble. (36RT 7827.)

From the beginning of his relationship with Michaud, appellant discovered they had the same "depraved" interests. (36RT 7831.) They had conversations in which Michaud said she could bring people for them to have sex with, and appellant told her she would not be able to do that. It turned into a kind of a dare, "Yes-I-can-no-you-can't" kind of conversation." (36RT 7832-7833.)

The day they molested Christina, appellant knew that Michaud was going to bring her to the house. (36RT 7832.) They had been talking about Christina, who appellant knew was 13 years old, and he did not believe Michaud could get Christina to be in a "three-way" with them. (36RT 7833.) When Michaud came out of the bathroom, she said, "Christina wants to party with us." (36RT 7836.)

After Christina, appellant and Michaud had talked about other crimes to commit. The kidnap of Aleda was a mutual decision. (36RT 7838.) Aleda was first one they decided to grab off the street. (36RT 7837.)

He admitted that the motive for the crimes was sexual gratification of himself and Michaud. (36RT 7839.) Appellant also admitted that he "gets off" by violence and aggression, as does Michaud, who had worked as a dominatrix in her youth. (36RT 7839, 7845.)

Appellant testified as to several other subjects.

Appellant denied the incident with Patrician Doe, but admitted the incidents with Hope Doe and Donetta Doe (37RT 7891-892.)

Appellant bought the book "Sex Slave Murders." (37RT 7898.)

Michaud told him she had killed a bail bondsman in Sacramento, and also said she killed a black man who raped her. (37RT 7900-7901.) She also admitted to him that she had had sex with Randy, her son. (37RT 7907.)

Michaud gets off on inflicting pain, but appellant does not. (37RT 7920.)

He believed that he would have committed more crimes if he had not been caught. (37RT 7927.)

He put the slits in the carpet in the van to use for restraints, but later found out it that it would not work. (37RT 7948-7949.)

Appellant testified that the ball gag was probably his idea. (37RT 7956.)

Michaud had altered the curling irons, and appellant knew that both curling irons were used on Samson. (37RT 7884, 7998.)

Michaud told him that she had used the yellow rope to strangle Samson. Afterward, she told him that he and she were now bound together for life. (37RT 8034-8035.)

Appellant never threatened to beat or kill Michaud. (37RT 8082-8083.)

Appellant became involved with the prison ministry and has completed several Bible classes. (37RT 8086.) His only discipline in jail has been for hoarding diabetes medicine. (37RT 8087.) He did not believe that he deserves forgiveness and was truly sorry for the pain he caused. He chose to testify to help give the Samsons closure. (37RT 8089.)

D. Michaud's Penalty Phase Defense

Burdell Wulf had known Michaud for about 15 years. He met her when she was working in a massage parlor. (37RT 8094-8095.) Wulf would pay money to Michaud's parents for Michaud's "services." (37RT 8095, 8102-8103.)

Michaud used to have a healthy appearance. He did not know her to use drugs. After she got involved with appellant she had a change in her attitude and looks. (37RT 8096-8097.) On the occasions when he saw Michaud and appellant together, she was like a puppet, and she would do what ever he wanted when he "pulled the string." (37RT 8098.)

Jessie Andrews was a teacher at St. Patrick's school, where Michaud's daughter attended school. Michaud was a member of the PTA and the Altar Moms, a group of women who would take care of the church alter, wash linens, and assist with other functions. She also helped with the school's thrift shop. (37RT 8117-8121.)

Donetta Doe testified that during most of her marriage to appellant she was their sole support. Usually they took her paycheck and went to Reno, where appellant gambled it away. (38RT 8204.)

She testified that although appellant was charming with women, he could be intimidating and usually had to be in control. He never struck her. (38RT 8204- 8207.)

She said that appellant had told her that once, when he had been in jail, the jail personnel thought he was a great prisoner because he went to church and did what he was told to do. Appellant told her that he had known what to do "to get them to let him out, to get what he wanted." (38RT 8212.)[18]

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[18] In surrebuttal, appellant denied ever talking to Donetta about religion while he was in jail. (38RT 8348.)

Helga Mueller, a psychiatrist, treated Michaud's son, Randy, during the course of which she also observed Michaud for a substantial amount of time. Michaud often had bruises and welts on her arms and legs and had black eyes. [19] (38RT 8227-8230, 8236-8239.) She thought Michaud had a passive personality and that she was a battered woman. (38RT 8240-8241.)

E. Appellant's Surrebuttal

Appellant never hit, threatened, or belittled Michaud. (38RT 8351-8351.) Michaud liked sodomy which was difficult for appellant because for sodomy he needed to keep erection for a long time, which he had problems with. (38RT 8353-8554.)

Appellant originally moved in with Michaud not as boyfriend/girlfriend, but to help her because she was having problems with Randy who was hitting her. (38RT 8355.)

[19] These injuries preceded appellant's relationship with Michaud. Mueller treated Randy 13 years prior to trial. (31RT 6638.) Michaud met appellant in 1996. (16RT 3746-3747.)

GUILT PHASE ARGUMENTS

ARGUMENTS

I

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S WRONGFUL CONDUCT WITH CHRISTINA, RACHEL, AMY, AND ALEDA UNDER EVIDENCE CODE SECTION 1101. THE INCORRECT ADMISSION OF THIS PREJUDICIAL EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND ALSO VIOLATED APPELLANT'S RIGHT, GUARANTEED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO A RELIABLE DETERMINATION IN A CAPITAL CASE

The trial court erred in admitting evidence of appellant's prior wrongful conduct with Christina, Rachel, Amy, and Aleda under Evidence Code section 1101. This evidence was only superficially relevant for its purported purpose. On closer examination the logical inferences sought to be proven by this evidence fail.

As discussed in the following argument, the trial court compounded this error when it gave incorrect instructions to the jury on how the evidence of the prior misconduct could be considered.

In turn, these issues are related to the fact that the trial court also incorrectly allowed this evidence to be admitted under Evidence Code section 1108 to prove propensity and/or disposition to commit the charged crimes, and misinstructed the jury on the use of the evidence under section 1108.

Because of the relation of these issues and the fact that they were often discussed together at trial, the proffers, motions, arguments, and instructions relating to all four of these issues are discussed in this portion of Appellant's Opening Brief.

A. The Proceedings Below

Prior to trial, the prosecution filed a motion to introduce evidence under section 1108. The prosecution offered evidence of prior uncharged acts in the form of various sex offenses committed either jointly or individually by appellant and Michaud, involving fifteen individuals. (4CT 871-887.)

While granting the defense time to respond, the court initially indicated that it believed evidence relating to the following victims would be admissible under section 1108: April, Christina, Jessica, Aleda, Rachel, and Amy. However, the court reserved making a final ruling until it could consider factors that were relevant to this issue under Evidence Code section 352[20] (section 352). (1RT 91-92.)

Subsequently, the prosecution filed a motion to introduce the evidence relating to Christina, Jessica, Aleda, Rachel, and Amy under section 1101 as well as section 1108. (4CT 945.) The prosecution offered this evidence to show facts such as motive, preparation, common plan, or scheme[21]. (4CT 945-955.)

The prosecution explained that appellant's conversation with April about "hunting" people and Michaud's conversation with Rachel during the sexual

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[20] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

[21] At various times in the proceeding below, the prosecutor argued that these incidents were related to the issues other than those for which court eventually gave the jury instructions. For example, the prosecutor argued that the incident relating to Christina was relevant to force and fear, nonconsensual sex, sexual gratification, abuse, and acting in concert. (3RT 631.) These purported uses are mentioned in passing because they were part of the motions and arguments presented. However, only those uses upon which the trial court instructed the jury or which were presented in arguments to the jury are discussed in detail.

assault on Rachel confirmed that the five prior uncharged acts were not "individual, spontaneous acts, but instead were part of a broader plan to become the most famous man-woman serial murder team," a plan that ended in the kidnap/murder of Samson. (4CT 949.)

The prosecution further argued that the "striking similarities" between the sexual assaults and the admissions of the defendants "regarding their 'adventures," indicated that the assaults were not random acts, but were part of a scheme or plan, and were relevant to prove that Samson's death resulted from the execution of this plan. (4CT 949.)

The prosecutor argued that Count 4, the murder count, included the special circumstances of kidnap and rape by instrument, and therefore the prior uncharged acts were relevant to prove the intent to kidnap and rape Samson. Likewise, the fact that during some of the uncharged acts the defendants were masturbating and orally copulating each other was relevant to show the sexual gratification element of sexual penetration by a foreign instrument. (4CT 951.)

It was argued that the abduction of Aleda and Samson were "virtually identical" in that both were young women with long dark hair, both were walking alone on a sidewalk, both had backpacks, both were raped by instrument, Michaud was driving the green van, and appellant grabbed each victim and pulled them through the sliding door. (4CT 951.)

The prosecution argued that the common plan was shown by facts such as the defendants lured some of the victims, that both defendant participated actively in the sexual assaults, that all the victims were ordered to undress, and the defendants told April about their intent to go "hunting." (4CT 952-953.)

Michaud filed an opposition to the prosecution's motion to introduce evidence under section 1108[22], arguing that the introduction of evidence of

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[22] The trial court previously had stated that it would deem counsel for one defendant to have joined in all motions and objections by the other defendant

uncharged acts under section 1108 violated the right to due process of law. Acknowledging that this court had rejected a due process challenge to section 1108 in *People v. Falsetta* (1999) 21 Cal.4th 903, counsel for Michaud argued that the United States Constitution prohibited the use of uncharged acts to prove propensity to commit the charged crime because such evidence offended rules of fundamental fairness. (4CT 964.)

Michaud also argued that the evidence would be inadmissible under section 352 because its prejudicial impact outweighed its probative value. (4CT 968-979.)

Appellant also filed objections to evidence of uncharged offenses, arguing that the evidence was inadmissible under section 352 because it was unduly prejudicial and inflammatory. (4CT 974-977.)

Appellant argued that section 1108 is a narrow exception to the rule against the use of other acts to prove propensity, and that under section 1108 such evidence is only relevant to prove the defendant committed another sex offense, and should not be used to allow the jury to infer that he had the propensity to commit some other crime, such as the murder charged in Count 4. (4CT 974.) The defense further argued that if evidence of appellant's sexual abuse of family members and acquaintances were presented to the jury in its consideration of the murder charge, no instruction would be sufficient to prevent that evidence from tainting the jury's deliberations. (4CT 974-975.)

At the hearing on the evidence of prior misconduct, the court stated that it had made preliminary findings and tentatively was holding that the Aleda Doe matter was a "signature" crime under cases interpreting section 1101 and would be relevant "under any theory." (3RT 623-624.) The court held that the evidence regarding Jessica was not admissible because of a lack of similarity. (3RT 624.)

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unless otherwise indicated (1RT 32.) Thereafter, appellant expressly joined in the objections to this evidence made by counsel for Michaud. (4CT 973.)

The prosecution argued that all the crimes it would be offering related to the facts such as the sexual gratification of defendants, and aspects of aiding and abetting, intent, and common plan. (3RT 626-627.)

Regarding Christina, the prosecutor argued that this was the "first adventure," with a victim of joint sexual abuse. The incident started by what the prosecutor characterized as "lying in wait." (3RT 627, 631.)

The prosecutor specifically noted that Christina was taken for a ride in the green van, which "is the subject of the entire trial." (3RT 627-628.) The prosecutor also noted appellant's "very strong interest" in the rectum and anus, a theme which would occur though the trial. (3RT 628-629.)

The prosecutor argued that appellant putting his finger in Christina's anus was analogous to the Samson incident which involved penetration of the anus by the curling item. (3RT 628-629.)

The prosecutor explained that the incident with Christina was relevant to prove motive, opportunity, intent, preparation, plan and common design. It also related to the issues of force and fear, nonconsensual sex, sexual gratification, abuse, and acting in concert. (3RT 631.)

Regarding Rachel, the prosecutor argued that she was Michaud's daughter, and they told her that they were taking her to look for a place to live, thereby using a ruse to get her into a position of isolation as a violation of a position of trust. (3RT 631.)

The prosecutor noted that in the van, appellant started molesting Rachel, who complained to her mother, who first said she would stop appellant. However, when appellant started to molest Rachel again, Michaud told her she was Michaud's "secret lust" and appellant was molesting her because Michaud wanted him to. (3RT 632.) The prosecutor recounted how Michaud told Rachel about Christina and also about another "adventure" in Reno, the kidnap of Jessica. (3RT 632.)

Michaud then got in the back of the van, pulled down Rachel's pants and put her fingers in Rachel's vagina while appellant was holding her arms. (3RT 634.) They then took her to a motel. The next morning Michaud asked if it was okay if appellant "fucked" her. When Rachel said it was not okay, Michaud said they would do it by force, covering her mouth and binding her arms with duct tape. Appellant then orally copulated her while Michaud masturbated. (3RT 634-635.)

The prosecutor noted that this incident involved using duct tape to bind Rachel. (3RT 635.)

The prosecutor argued that this incident was probative of the plan in this case. It was also relevant to prove acting in concert, lack of consent, the use of fear and force, sexual gratification, kidnap, and lying in wait. (3RT 635-636.)

The prosecutor also argued that incident with Amy was a violation of trust, because Amy was a friend of Michaud's, and there was a ruse to get her alone in motel room where appellant was hiding in the bathroom. (3RT 636.) The prosecutor noted that appellant came out of the bathroom, hit Amy with a gun and punched her in the face, before using duct tape to bind her and then cut off her clothing. (3RT 637-638.) Appellant then had her orally copulate him while Michaud helped by sitting on Amy and holding her mouth open. (3RT 638.) The prosecutor noted that appellant raped and sodomized Amy, comparing the sodomy of Amy to the penetration of Samson with the curling iron. (3RT 639.)

The prosecutor further explained that they then cleaned up the blood from the motel room, like they did at the motel used with Samson. (3RT 639-640.)

The prosecutor explained that all three of the incidents with Amy, Christina, and Rachel used "an incredible amount of force," and included the use of a firearm with Amy and Christina. (3RT 640.)

The prosecutor explained that section 352 and the modified instruction for section 1108 would correct defects previously found in section 1108. (3RT 640.)

Responding to the defense argument that section 1108 is not applicable in murder cases, the prosecutor argued that this "defie[d] logic" because this case involved a sexual assault murder, with the kidnap alleged to have been committed for the purposes of a sexual assault, and section 1108 was applicable in cases involving a sexual assault motive. (3RT 641.)

The prosecutor argued that the case was comparable to *People v. Johnson* (2000) 77 Cal.App.4th 410, which used Evidence Code section 1109, the companion statute to section 1108 for domestic violence, to prove a murder committed in a domestic violence situation. (3RT 641-642.)

Counsel for appellant argued that there is a long history of excluding propensity evidence because it is very prejudicial. (3RT 642.) It was further argued that prior sex offenses would not be admissible to prove the murder count, but they would only be admissible to prove the charged sexual offenses. It was argued that the special circumstance is not a crime listed under section 1108, and therefore the evidence should not be used to prove propensity to prove the special circumstance of a murder committed while engaged in a sex offense. (3RT 643)

Counsel for appellant agreed that the evidence regarding Aleda was admissible, but everything else would be cumulative and prejudicial. (3RT 644.) Counsel acknowledged the fact that both Aleda and Samson were stranger abductions, but the other charged offenses were not. Furthermore, all of the other incidents, with the exception of Amy, involved drug use, and therefore there were insufficient similarities needed in order to prove plan. (3RT 644-645.)

The court stated that under *People v. Ewoldt* (1994) 7 Cal.4th 380, the least degree of similarity was needed to prove intent, which was an issue in this case. (3RT 653)

Furthermore, the court noted that the use of uncharged acts to prove plan under section 1101 does not require that the acts be distinctive. Rather, they had to only be similar enough to show that they were not spontaneous acts. (3RT 653.)

In balancing the factors of probative value versus prejudicial impact under section 352, the court held that the evidence regarding Jessica was not admissible because the court believed the prejudice outweighed the probative value. (3RT 654.)

However, as to the evidence regarding Christina, Rachel, and Amy, the court did not think that the evidence would be either cumulative or time consuming, believing that it would give jury "clearer picture" of appellants' plan and intent. (3RT 654.)

Because the court believed that murder was worse than the uncharged sex offenses, it was of the opinion that the sexual assaults were not inflammatory. (3RT 654.) Likewise, the court believed that the uncharged acts were no more inflammatory than the charged acts against April and Sharona. (3RT 654.)

As a result, the court held that the acts involving Rachel, Christina, and Amy would be admissible under section 1108 to prove propensity and under section 1101 to show intent, plan, design, and motive. In addition to these uses under section 1101, the court held that the evidence regarding Aleda would also be admissible under section 1101 to show identity, because the court believed this was a "signature" crime. (3RT 655.)

The court believed the counts were properly joined and therefore there was nothing that would require bifurcating the counts. (3RT 655.)

In a written Statement of Decision regarding section 1108, the court found that the uncharged acts contained elements and similarities needed to meet the relevancy requirement of those sections. The court stated that it had weighed the probative value of the proffered evidence against the prejudicial impact under section 352, listing various criteria[23]. (5CT 1204.)

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[23] Included in the criteria listed by the court were whether the source of the evidence of uncharged acts was independent from the source of the evidence of the charged crimes, whether there as a proximity in time to between the charged and uncharged offenses, whether there were distinct similarities between the

The court then ruled that only the uncharged acts involving both defendants would be admissible so as to avoid the prejudice to the other defendant that would result if evidence of sexual misconduct committed by only one defendant was to be admitted. (5CT 1204-1205.) As a result, the court held that the evidence regarding Christina, Aleda, Amy, and the first act with Rachel would be admissible under sections 1101 and 1108. (5CT 1205.)

The court held that the evidence regarding Christina, Aleda, Rachel, and Amy would be admissible under sections 1101 and 1108 as to Counts 1, 2, and 3. (5CT 1205.) The court found that Count 4 (murder) was an offense that fell within section 1108(d), paragraphs (A), (B), (D), and (E), thereby making the uncharged acts admissible for that count as well as the other counts. (5CT 1205-1206.)

The court further found that the evidence regarding Aleda met the highest degree of similarity and was admissible to prove identity as well as intent, motive, common plan, and design. (5CT 1206.)

The court stated that all of the charged counts were "inflammatory," and none of the counts were more inflammatory than others. (5CT 1207.) Furthermore, the court noted that this was not a situation where a weak case was being bolstered by a strong case. (5CT 1207.)

This issue was revisited prior to Aleda's testimony. At that time, appellant objected to the Aleda Doe case being retried in detail. Appellant argued that they had been convicted of that offense in federal court and the defense was prepared to stipulate to the fact of the conviction[24]. (17RT 3925.)

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charged and uncharged offenses, whether the evidence would be cumulative or inflammatory, whether the evidence focused on material aspects of the case, and whether the defendants had been convicted of any of the offenses in issues (5CT 11204.)

[24] Subsequently, the court granted appellant's request to take judicial notice of the federal conviction for the offenses involving Aleda. (17RT 3942, 3977, 3991.)

The defense anticipated that the prosecution was going to try to prove certain sexual assault aspects of incident involving Aleda to argue similarities to the current case, even though there was no evidence that those specific acts happened with Samson, such as the fact of ejaculation, which occurred with Aleda, but not with Samson. Therefore, it was argued that going into the details of the Aleda incident would only inflame jurors. (17RT 3925, 3959.)

The prosecutor further argued that in the federal trial appellant had argued an identification defense, and the prosecutor did not know if the defendants were contesting the issue in this trial. Therefore, the prosecution was obligated to prove this offense. (17RT 3928.)

The prosecutor argued that when court found Aleda incident was a "signature" crime, in that it was almost identical to the charged offenses, and could be used to prove identity, it found not only the facts of the sexual assault, but the fact of the kidnap were relevant to assist the jury in determining intent, motive, etc. It was argued that the facts underlying the incident were relevant as they relate to sexual assault and kidnap. (17RT 3952.)

The prosecutor further argued that she had promised the jury she would prove certain things before the issue of judicial notice or a stipulation as to these issues arose, and the jury was expecting to hear this evidence. (17RT 3957.)

Appellant also argued that the penetration in the incident with Aleda was with his fingers, which is very different from the offenses involving Samson. (17RT 3962.)

The court ruled that it would take judicial notice of appellant's federal conviction, with no mention of the sentence he received. (17RT 3967.) However, the court was not of the opinion that taking judicial notice impacted the admissibility of evidence under section 1101(b) to prove identity unless a further stipulation was reached. The court not did believe the testimony of Aleda regarding the ejaculation would be inflammatory in light of the charged acts. (17RT 3967-3968.)

The court further stated that the sexual penetration by the curling iron and one's finger is the same for section 1101-evidence to prove identity, intent, and motive. (17RT 3968.)

In light of the court's ruling, appellant made a continuing objection on the basis of lack of relevancy and section 352. (17RT 3968.)

Prior to Aleda's testifying, the court instructed the jury that incidents of other offenses could be used to prove motive, intent, and plan. (17RT 3989.) The jury was instructed that the incident involving Aleda could also be used to prove identity. (17RT 3989-3990.)

The jury was also instructed that evidence of prior sexual offenses could be used to prove that the defendants had a disposition to commit sexual crimes, from which it could be inferred that they committed the crimes for which they had been accused. (17RT 3990-3991.)

In her arguments to the jury the Deputy District Attorney argued the evidence of other wrongful acts could be used to prove common plan, intent, propensity. (33RT 7150-7152, 7157, 7195, 7200-7207.)

Thereafter, the court instructed the jury with a modified version of CALJIC No. 2.50, which read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he or she is on trial in this case.
> Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that either of the defendants is a person of bad character or that he or she has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:
> A motive for the commission of the crime charged, or the special circumstances alleged;
> The existence of the intent which is a necessary element of the crime charged, or the special circumstances alleged;
> A characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to

show the existence of the intent which is a necessary element of the crime charged, or the special circumstances alleged;
The defendants did not reasonably and in good faith believe that the person or persons with whom he or she engaged in a sexual act consented to such act.
As to the Aleda Doe incident only, this evidence, if believed,, may also be considered by you only for the limited purpose of determining if it tends to show:
The identity of the person or persons who committed the crime and special circumstances of which the defendants are accused in count four.
For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
Except as otherwise provided instructed, you are not permitted to consider such evidence for any other purpose.

(34 RT 7323-7324, 138 CT 36343-36344.)

B. The Relevant Law And Its Application To This Case

The starting point in analyzing any evidentiary issues is embodied in Evidence Code section 350 which provides that no evidence is admissible except relevant evidence, and Evidence Code section 210 which defines "relevant evidence" in terms of evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

In order to understand the error as to the proper use of the evidence of other wrongful conduct admitted at trial, it is necessary to understand the rules regarding the admission of this type of evidence and the purposes for which this type of evidence may be admitted.

Evidence Code section 1101, subdivision (a) bars "propensity" evidence – evidence of a person's character, including evidence of specific acts, to prove conduct on a specified occasion in conformity with the actor's character. Under subdivision (b) such evidence is admissible if relevant to establish some fact other

than propensity, such as intent or common plan. Section 1108 creates an exception to the ban on propensity evidence in cases involving sexual offenses.

In *People v. Ewoldt* (1994) 7 Cal.4th 380 and *People* v. *Balcolm* (1994) 7 Cal.4th 414 this court explained that the use of uncharged acts depends on the inference desired in relation to the degree of similarity between the charged and uncharged offenses, with different uses requiring different degrees of similarity. The least degree of similarity is required if the desired inference is to prove the intent of the defendant. A greater degree of similarity is required if the desired inference was to prove the defendant is operating pursuant to a common plan[25]. The greatest degree of similarity is needed to prove identity. (*Ewoldt* at pp. 402-404.)

Ewoldt found a sufficient degree of similarity to prove common plan in the following facts. Both victims of the uncharged and charged acts were the defendant's stepdaughters, who were residing with him; the acts occurred when the victims were of a similar age; on several occasions, the defendant molested one victim at night while she was sleeping; when discovered, the defendant asserted he was only "straightening up the covers;" in two of the charged offenses, the molestation of another victim occurred "in an almost identical fashion" with the defendant offering a similar excuse when discovered.

These common features between the charged and uncharged offense were found to be similar enough so as to support a finding of common design or plan, for the inference that the defendant committed the charged offenses in accordance with the same plan used in the uncharged offense. (*Id.* at p. 403.)

This Court has more recently echoed the concern it earlier expressed in *Ewoldt* and *Balcom* about the care with which evidence of uncharged misconduct is determined to be admissible. This Court has said, for example, that evidence of

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[25] As used herein, "common plan" also includes related uses such as modus operandi, scheme, or other related uses that depend on a similar inference of the defendant acting in a similar manner on another occasions.

other crimes may be highly inflammatory and has stated that as a result of its volatility the admission of such evidence """must not contravene other policies limiting admission, such as those contained in Evidence Code section 352."""" (*People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, internal quotations omitted.)

Because of the potential prejudice inherent in evidence of other wrongful conduct, *Ewoldt* and *Balcolm* reiterated the principle that admission of this type of evidence "requires extremely careful analysis." (*Ewoldt* at p. 404 and *Balcom* at p. 422, citing *People* v. *Smallwood* (1986) 42 Cal.3d 415 and *People* v. *Thompson* (1988) 45 Cal.3d 86, 109.) Consequently, this type of evidence should only be admitted with "caution." (*Balcom*, at p. 426.)

The need for "extremely careful analysis" is particularly important in the instant case because of the lessons of *Ewoldt* and *Balcom* that the admission of such evidence hinges on the particular inference that the prosecution wishes to create by the use of the evidence. A trial court must carefully and properly identify exactly what inference is desired. As stated in *People* v. *Thompson* (1980) 27 Cal.3d 303, at p. 316:

> In ascertaining whether evidence of other crimes has a tendency to prove a material fact, the court must first determine whether or not the uncharged offense serves "logically, naturally, and by reasonable inference" to establish that fact. [citations] The court "must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong..[citation.]..If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence would be excluded. [citations] (italics in the original.)

Furthermore, it is important to note that in applying the "extremely careful analysis" required for this type of evidence, this Court clearly indicated that the trial court should examine what issues are actually in dispute.

> For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value. In ruling upon the admissibility of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose.

(*Ewoldt*, at p. 406.)

Indeed, the failure of courts to properly determine the actual desired logical inference leads to what has been called "an invitation to specious reasoning." (*People* v. *Valantine* (1988) 207 Cal.App.3d 697, 704.)

Avoidance of specious reasoning is particularly important because the Due Process Clause, as interpreted by the United States Supreme Court, demands that even inferences be based on a rational connection between the fact proved and the fact to be inferred. (*Leary v. United States* (1969) 395 U.S. 6, 46.)

Therefore, if the desired inference in question is not logical, it is a violation of the right to due process of law.

1. Common Plan

Initially, there are two important logical considerations that must be addressed in determining whether common plan is relevant and/or provable by the evidence proffered.

First, although there was evidence of appellant and Michaud's claimed aspirations to become serial killers, there is no evidence that they actually killed anyone prior to this case. Thus, if the plan in this case involved murder, the use of other offenses, not involving murder, cannot be used to show "common plan."

Second, stranger abduction is fundamentally different from abusive sex with family, acquaintances, and friends. As a result, when it relates to common plan, Aleda and Samson stand apart from April, Sharona, Amy, Rachel, and Christina in a manner way that is incompatible with "common plan."

Likewise, even with some of the victims that appellant and Michaud knew, there is a further lack of similarity in that appellant engaged in the act with April after telling her, "You know I love you, right?" (20RT 4653-4655.) Although this is still a forcible sexual offense, the abnormal expression of "love," is a different nature of offense than a stranger abduction. Therefore, the inference of common plan becomes strained.

In this case, it must be asked initially if common plan evidence is even relevant. Thus, one must consider what factual gap the prosecution is attempting to fill once the kidnap of Samson is proven by other means.

First, if it is beyond dispute that the offense was committed, the real issue is whether appellant was the perpetrator. Thus, evidence he committed uncharged offenses to prove plan should usually be inadmissible. (*Ante*, at p. 95.) In such a case, evidence that the defendant did crimes with some similarity is actually being used to prove identity, disguised as common plan, although the evidence lacks that requisite degree of similarity to prove identity. As *Ewoldt* explained, in this situation the evidence is cumulative and the prejudicial effect of uncharged acts would outweigh its probative value. (*Ibid.*)

As applied to this case, if appellants had a plan for Michaud to lure women to an apparently safe location where they could then be molested by appellant who would be waiting there, as was the case in the incident involving Christina, that incident may be relevant to show their plan as to how they committed the offense against Amy, where a similar plan was used. However, if it is being used to show appellant had a plan to rape women, to prove the Samson offense, it is actually being used to prove identity, even though the requisite degree of similarity for that offense is not present.

The second logical flaw underlying the evidence in this case being used for common plan stems from the fact that if the desired inference is common plan, logically one cannot infer the unknown details of the charged crime from the known details of the uncharged crime, and then infer common plan from those facts.

This can be illustrated from the facts of *Ewoldt*. In that case, it was known that the defendant acted in a certain way on both occasions, namely he molested family members when they were in bed, and when caught he made the excuse that he was "straightening up the covers." In that case, the defendant's identity was a known factor. The issue was whether the touching was with lewd or innocent intent. It is incredibly unlikely that as a matter of coincidence his hands strayed in the same direction on two occasions, with a readily available excuse offered as an innocent explanation. Therefore, this shows a common plan to commit a similar crime on different occasions.

However, if the victim of the charged offense in *Ewoldt* had not testified that the defendant had given the first excuse on the second occasion, it would not be possible to infer that he gave the same excuse on the second occasion from the fact that he had done so on the first occasion. This was precisely the chain of reasoning that the prosecution was arguing, below.

In this case, the prosecution argued that the common plan was shown by facts such as the defendants lured some of the victims, that both defendants

participated actively in the sexual assaults, that all the victims were ordered to undress, and the defendants told April about their intent to go "hunting." (4CT 952-953.)

However, it is not known that both defendants participated in the sexual assault on Samson, nor is it known that she was ordered to undress, as opposed to having been undressed. Because this is not known in the Samson incident, it cannot be inferred that these facts were evidence of a common plan as to that incident.

In fact, the defense anticipated that the prosecution was going to try to prove certain sexual assault aspects of the incident involving Aleda to argue similarities to the Samson case, even though there was no evidence that those specific acts happened with Samson. Therefore, the defense argued that going into the details of the Aleda incident would only inflame jurors, without supporting any legitimate inferences. (17RT 3925.)

> In order to prove a common plan the uncharged act must demonstrate
>
> "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations. (2 Wigmore, Evidence, (Chadbourn rev. ed. 1979) § 304, p. 249.)"

(*Ewoldt*, at p. 402.)

Ewoldt and *Balcom* are peppered with the requirement of a *substantial degree of similarity* for evidence proffered as common plan. Discussing *People* v. *Lisenba* (1939) 14 Cal.2d 403, *Ewoldt* in its discussion of *Lisenba* noted that evidence in that case that the defendant's first and second wives, both of whom had life insurance policies, drowned in a bathtub after receiving injuries in unrelated incidents was "*markedly similar.*" (*Ewoldt* at 394-395, 399, italics added.) Discussing *People* v. *Ing* (1967) 65 Cal.2d 603, *Ewoldt* quoted language that the uncharged acts were admissible to prove common plan "in view of *the striking similarities.*" (*Ewoldt* at p. 396, italics added.) On the facts of *Ewoldt*

itself, the court ruled the evidence of uncharged acts admissible because the two offenses were committed in "an almost identical fashion," and when discovered, the defendant "proffered a similar excuse." Thus, the evidence shares "sufficient common features." (*Ewoldt,* at p. 404.)

In *Balcom* the court stated that the uncharged offense committed "in a *manner quite similar* to the charged offenses" was admissible to prove common plan, and that "probative value ... *stems from the similarity* between the uncharged offenses and the charged offenses." (*Balcom* at pp. 421, 427, italics added.) The court noted a similar plan in that in both instances, which occurred a short time apart, the defendant "wearing dark clothing and a cap, went to an apartment complex in the early morning, sought out a lone woman unknown to him, and gained control over her at gun point....initially professed only an intention to rob the victim, waiting until he had moved the victim to the location where the rape would occur before expressly announcing his intention to rape her, forcibly removing her clothing, and committing a single act of intercourse. In both instances, defendant stole the victim's ATM card, obtained her PIN, and escaped in the victim's automobile." (*Balcom,* at p. 423.)

As seen from *Ewoldt* and *Balcom*, in order to prove common plan it is necessary to show that a defendant's acts on the two occasions are so similar that one can infer the defendant's actions on the second occasion were in accordance with the same plan that he used on the prior occasion.

In *Balcom*, to effectuate his plan, the defendant dressed in a particular manner, found a victim by going to apartment complexes, gained control partly by professing only an intent to rob, and then committed rape after moving the victim. Having done this on several occasions, a plan becomes apparent.

However, if on another occasion the defendant happened to be walking in the park at noon and noticed a victim whom he immediately kidnapped and raped, the plan that he created would no longer apply, and the prior incidents would not be relevant to show common plan.

In *People v. Davis* (2009) 46 Cal.4th 539, the Court found the defendant's prior crimes against Frances M. and Frost sufficiently similar to provide evidence of a common scheme or plan based on the following analysis that encompassed features common to more than just an abduction. "In those offenses, as in this case, defendant abducted a stranger, a female; used a weapon; assured the victim that he would not harm her; took her to a remote location; and carried bindings with him, indicating that the behavior was planned. The sexual nature of the prior crimes against Frances M. and Frost was obvious from his attempt to force Frances M. to sexually gratify him and his statements to court-referred psychiatrists that he assumed he 'would have some fun' with Frost, and that he masturbated twice daily thinking about these victims and tying them up." (*People v. Davis*, *supra*, 46 Cal.4th at p. 603.)

In *People v. Kraft* (2000) 23 Cal.4th 978, this court found the following facts established the existence of a common design or plan within the meaning of *Ewoldt.*

The victims shared certain characteristics, all being White males between the ages of 18 and 25, all but one being single, and most being, at the time of the offense, vulnerable by virtue of lack of transportation. The method of obtaining control over the victims was similar in most of the charged offenses: Defendant generally supplied the victims with alcohol and drugs, often diazepam, to the point they could no longer resist, whereupon defendant generally bound their wrists with ligatures, frequently using shoelaces. After gaining control over the victims in such a manner, unless they were already succumbing from the effects of the drugs, defendant killed them, often by ligature strangulation. After the victims' deaths, defendant disposed of the bodies generally by dumping them from his car, usually on or near a freeway or other roadway. And each murder involved some type of arguably sexual activity or aberration, whether taking the form of sodomy, mutilation or stripping the victim of clothing. (*Id.*, at p. 1031.)

In *People v. Dancer* (1996) 45 Cal.App.4th 1677, overruled on other grounds in *People v. Hammond* (1997) 15 Cal.4th 1117, 1123, the Court of Appeal found common features supporting the inference that each incident was a manifestation of a common design or plan, rather than two unrelated spontaneous acts, in the following evidence:

> Defendant resided near the victims and was acquainted with their parents. He selected very young girls as victims; he had a history of unsupervised access to the victims and played or babysat with them. The victims knew and trusted him. In committing the molestations, he selected locations out of public view, where mattresses were located. He exposed his penis through his clothing, the victims had contact with it, and he tried to have both orally copulate him. Finally, when confronted by Janet about being alone with Emily and by Christine about molesting Tuolumne, defendant responded calmly. (*People v. Dancer*, *supra*, 45 Cal.App. 4th at pp. 1689-1690.)

Notably, the numerous common features identified by this Court in *Kraft* and *Davis* and the Court of Appeal in *Dancer* tended to span the transaction of the crimes – e.g., abduction, rape, murder – as appellant noted above was true of the common features with *Ewoldt* and *Balcom*. There is a logic to such a pattern because it is only when a court can identify salient features that span the acts comprising particular criminal conduct that a court may find that the uncharged and charged conduct were committed as part of a common plan and to infer from the existence of the common plan that the charged crime was committed in accordance with that plan. Absent such evidence, as in the instant case, evidence of the uncharged conduct is likely to function as prohibited disposition evidence.

In short, common plan requires more than that another crime of the same nature was committed to make evidence of other crimes "similar" so as to be admissible to prove common plan.

Here, the only similarities between many of the offenses were in the outcomes. Christina and Samson both may have been sexually assaulted;

however, that result does not prove a plan. Even the fact that some victims may have been bound is simply too generic an element to show a characteristic plan.

In using these prior incidents to prove "common plan," this case presents a clear example of a court accepting *Valentine's* "invitation to specious reasoning." (*Ante*, at p. 96.) Numerous examples abound of the prosecutor urging inferences of questionable logical validity. An examination of many of the facts relating to the other offenses in this case demonstrates that there is not a basis for a logical inference of common plan because those offenses were not committed in a manner that was substantially similar to the offense involving Samson.

For example, the prosecutor argued that Christina was the "first adventure," with a victim of joint sexual abuse. The real inference that the prosecutor draws is that Christina was the "first adventure" in a plan that evolved into the kidnap of Samson as another adventure. However, there are no similarities as to the actual plan, and therefore the real inference is the identity of the Samson perpetrator, not the common plan used in both cases.

Likewise, Christina was a friend of Michaud's daughter, and Michaud invited Christina to run some errands with her before tricking her into entering into a residence where appellant was waiting. The incident started by what the prosecutor characterized as "lying in wait." (3RT 627, 631.) The problem with using this as a plan for the Samson murder is that Samson did not involve lying in wait, but rather was a drive-by kidnapping of a target of random opportunity.

Thus, while Samson was forcibly abducted off the street by strangers, Christina was coaxed into a residence because she knew Michaud as the mother of her friend, and therefore trusted her. There was no similar plan utilized in the Samson incident, so the Christina incident cannot be used to prove that fact.

This reasoning appears to have been adopted by the court, "insofar as a difference between a curling iron and a finger, I don't think we need to go there. It is – rape by a foreign object is rape by a foreign object." The court believed that it went to the issue of identity, intent, and motive. (17RT 3968.)

It is submitted that both the prosecutor and the court were wrong in this regard. First, all this speaks to is a similarity of results. As noted previously (*ante*, at p. 99), the inference of common plan demands more than merely a similarity in the results. Thus, the fact that a sexual penetration of the anus was ultimately accomplished does not show a plan.

Secondly, although a violation of section 289 may be accomplished by a finger, a curling iron, or any object other than a penis, there is a substantial difference between the use of a finger as opposed to the use of some other foreign object, particularly a modified curling iron.

Excluding the forcible and non-consensual aspects of section 289, it should be fairly obvious that touching a vagina with a finger is often a "normal" sexual act, either as a precursor to intercourse or as a common form of "petting," to use a possibly archaic term. Comparatively speaking, the use of some other object is far rarer. When that object is a curling iron, it represents a mindset that is so dissimilar from digital penetration, that it is hard to imagine the logical connection between the two.

Indeed, the logical connection, expressly stated for the purposes of this case, is "On X occasion a person put his finger in a woman's vagina. Therefore, it is more likely that he had the sexual intent to insert a curling iron in another woman's anus." It is respectfully submitted that this is not a logical proposition, and that of the millions of males who have engaged in digital penetration, only a small number have engaged in inserting other objects, in the range of curling irons, in a woman's anus.

Likewise, the incident with Rachel does not reflect a common plan. Again, rather than abducting a stranger off the street, Rachel was Michaud's daughter who happened to be with appellant and Michaud voluntarily when they began to molest her.

Thus, the prosecutor argued that the assault on Rachel and other acts confirmed that the fact that these were not "individual, spontaneous acts, but

instead were part of a broader plan to become the most famous man-woman serial murder team." (4CT 949.) The questionable logic becomes apparent when one realizes that the offenses against Rachel do not prove appellant wanted to become part of a famous man/woman murder team because appellant and Michaud did not murder Rachel.

One would assume that if they were assaulting Rachel to become famous murderers they would have killed her. But there was no attempt to do so, even though it would appear that there was nothing stopping them from claiming their first victim on the way to fame.

Similarly, the prosecutor argued that the rape of Rachel showed the plan for Samson. (4CT 949.) As noted above, common plan requires more than a similarity of the results. It requires a similarity of the means by which that plan is accomplished. Other than the conclusory statement that one crime showed the plan for the other offense, because of the differences in the way the plans were carried out for each crime, there is no basis of this inference urged by the prosecution. Therefore, the plan used for Rachel's molestation was not the plan used for the Samson incident.

This flawed logic is reflected in the manner in which the prosecutor argued the incident with April. As noted above (*ante*, at p. 92), the prosecution argued that an inference of plan could be drawn from the incident with April because Michaud told April that appellant was going to have sex with April while appellant was out of the room, and when he returned he began to molest her. Therefore, this proved that they had a plan between themselves to molest April.

The fallacy with this argument is that the plan referred to in regards to section 1101 is the plan to commit the *charged* crime. If a defendant has a plan to commit the uncharged crime, in this case, the incident with April, but uses a different plan for the charged crime, the uncharged crime is not evidence of plan within the meaning of section 1101.

Similarly, Amy was not a stranger abduction, but the victim of a ruse to get her to the motel where appellant was waiting. The use of this ruse cannot be said to be part of a common plan to kidnap Samson off the street by grabbing her and throwing her into the back of the van.

With all of these victims what is present is little more than a similarity in the results, without the concurrence of common features that Wigmore has explained are necessary to create the inference of common plan. (*Ante*, at p. 99.) Indeed, as to all victims except Aleda, there was no allegation that there was any plan to kill the victims, as there was with Samson, and even as to Aleda, the plan to kill was abandoned, unlike the plan with Samson.

As such, these prior incidents cannot be found to be evidence of appellant's common plan to abduct someone off the street by force. Because these acts do not logically give rise to the inference of common plan used in the Samson incident, the desired inference is not rational, in violation of appellant's right to due process of law. (Ante, at p. 96.)

Furthermore, other details from the uncharged incidents do not support a finding of common plan. For example, the prosecution contended Samson was penetrated with the curling iron. No similar object was used on Christina, Rachel, and Amy. Nor does there appear to have been any sexual contact involving Christina, Rachel, and Amy's anus or rectum, which is the only type of conduct alleged as to Samson. Therefore, the inference of common plan fails because of a lack of substantially similar facts shared by the Samson kidnapping with these other acts of wrongful conduct.

Similarly, many of the details of the incidents involving Aleda lack substantial similarities from which a common plan could be inferred.

Aleda was abducted at night in the dark. Vanessa was abducted in the morning in daylight. Daveggio's sexual assault upon Aleda began immediately after she was pulled into the van and continued while appellant drove from Reno into California. A kidnapping for sexual purposes might be inferred from this

quickly instigated and continuous sexual assault. In contrast, the prosecution presented evidence that after Vanessa was taken, appellant stopped at the welfare office for her AFDC check and food stamps and then made a second stop and cashed the AFDC check. The prosecution produced no evidence, forensic or otherwise, that showed Vanessa was sexually assaulted when she was alive, and certainly no evidence that Vanessa was sexually assaulted immediately after she was pulled into the van. Indeed, the motive for the kidnapping of Vanessa was claimed to be that they were "hunting," and it was part of their plan to become famous killers, while with Aleda it appears to be the product of primarily sexual motivations.

Other details from the Aleda incident also differ in significant ways. For example, Daveggio told Aleda to be quiet, but there was no evidence that a gag, much less a ball gag, had been used to silence her. There was evidence that Daveggio digitally penetrated Aleda's rectum, but no evidence he used an appliance, such as a curling iron, to penetrate her rectum. Appellant also left visible scratch marks on Aleda's breasts, but no scratches were detected on Samson. (17RT 4029-4030.)

When measured against the standard articulated in *Ewoldt* and applied in *Balcom*, the evidence regarding Aleda and Vanessa did not share sufficient common features to support an inference that both were manifestations of a common design, from which a further inference might be drawn that Vanessa was abducted in pursuit of that plan. In *Balcom*, for example, the common features identified and relied upon by this Court included evidence spanning the crimes from inception to completion – that the incidents occurred six weeks apart and in both the assailant wore a cap, went to an apartment complex early in the morning, selected a lone female unknown to him, gained control at gunpoint, initially demanded only money, forcibly removed clothing, committed a single act of intercourse, stole an "ATM" card and obtained the "PIN" number, and left in the victim's car. (*People v. Balcom*, *supra*, at p. 424.)

Indeed, many of the details of what transpired with Samson are not known. As a result, it is not possible to compare the specifics of what occurred between the incident involving Samson and the incidents involving the other victims and say that they involved a common plan.

2. Lack Of Consent

As noted above, the court instructed the jury that it could use evidence of other sexual misconduct to prove that the defendants "did not reasonably and in good faith believe that the person or persons with whom he or she engaged in a sexual act consented to such conduct." (34 RT 7323-7324, 138 CT 36343-36344.)

The instructional language that the other crimes evidence could also be considered to determine whether the defendants' had a good-faith belief in the victims' consent appears to have been added at some point after the hearing and the court's ruling set forth above without objection on the record by the defense.

While it is obvious that lack of consent is an element in this case, this does not mean that the prosecution can use potentially inflammatory evidence to prove that issue. Similarly, a good faith belief in the presence of consent is a defense under *People* v. *Mayberry* (1975) 15 Cal.3d 143, and is not an element that the prosecution needs to prove.

The fact that the prosecution cannot introduce potentially prejudicial information to prove these elements stems from the fact that even accepting the fact of the not guilty plea, these issues were not in dispute in any serious manner. The evidence was as overwhelming as it gets on the issue of lack of consent. Put in its most simple terms, Samson was grabbed off of the street by two strangers while screaming for help. Although there were other items of evidence that would further support the contention that consent was not an issue, this would simply be beating a dead horse, and are therefore not recounted.

It would be equally absurd to claim that the defendants were relying on a *Mayberry* defense.

At times, the defendants may have questioned other areas of the prosecution's case, such as whether death could have been caused by hypothermia or whether she was anally penetrated by the curling iron. However, neither defendant attempted to go anywhere near the issue of consent.

Thus, the issue of lack of consent or presence of good faith belief in consent was obvious, overwhelming, and uncontested. As a result, one must balance the questionable "relevance" of evidence of other forcible rapes and oral copulations against what the prosecution claims to be trying to prove, in light of the language of Ewoldt instructing us that when

> it is beyond dispute that the charged offense was committed by someone [and] the primary issue to be determined is whether the defendant was the perpetrator of that crime.... evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. ... [I]f it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.

(Ewoldt, at p. 406.)

There is no reason to limit this principle to proving identity. By the same reasoning, if any other fact is overwhelmingly established and undisputed, to introduce what has always been regarded as inflammatory and prejudicial evidence serves no logical purpose.

In summary, to allow the jury to consider this evidence in order to prove "lack of consent" is improper, and it can only be regarded as prejudicial because its emotional impact outweighs its probative value.

3. Identity

A similar misuse of evidence of other criminal conduct involved the incident involving Aleda. As to Aleda, the trial court held that the incident could

be used not only for common plan but also to prove identity. The trial court instructed the jury that this evidence could be used for this purpose. (17RT 3989-399, 34RT 7324.)

The problem with using the incident involving Aleda for the inference of identity is that in order for identity to be a proper inference, the evidence must have such similarities with the charged incident that it is a signature-like crime. As will be shown, on a superficial level, this is an appealing inference in this case. However, when examined closely, the inference fails.

Ewoldt held that to prove identity it is required that the uncharged acts and the charged offense

> Must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (1 McCormick, supra, § 190, pp. 801-803.)

(*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.)

In *Miller*, the court found 12 similar traits, including that all the victims were homosexual; most of the crimes occurred in West Hollywood on a weekend or holiday, around midnight, shortly after the victims left gay bars; the attacks occurred near the curb on a quiet side street, with a blunt instrument blow to the head. While the court noted that none of these facts were distinctive in themselves, when combined with other facts of mutual similarity, they created a combination of facts that was distinctive enough to support an inference that the same person committed the crimes. (*People v. Miller*, *supra*, 50 Cal.3d at p. 988.)

The evidence from *Miller* allows for the following inference of identity: It is known that the defendant committed prior acts on several occasions in the manner previously described. In a case where the identity of the perpetrator is not known, the same facts re-occur. Because it is extremely unlikely that two different people were committing these offenses in this same manner, one can

infer that the defendant also was the person who committed the act on the occasion where the identity of the perpetrator is not known.

Thus, other-crimes evidence to prove identity is only logically permissible

> when the marks common to the charged and uncharged offenses...logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses.

(*People v. Haston* (1968) 69 Cal.2d 233, 245, quoted in *People v. Miller* (1990) 50 Cal.3d 954, 987.)

For this reason, admission of evidence of uncharged crimes to prove identity requires that the evidence of other crimes be so similar to the charged offense that it creates the inference that the defendant is the perpetrator, as opposed to any other individual. However, the converse is equally true.

> It is apparent that the indicated inference *does not arise*, however, from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant.

(*Id.* at p. 246, italics added.)

Haston further explained that it was not necessary that any *individual* trait be uniquely distinctive. If individual features are not distinctive in themselves, they may be sufficient to create the desired inference if they "yield a distinctive combination if considered together." (*Ibid.*)

However, the presence of a handful of *non-distinctive* traits cannot create any inference of identity. Quoting Wigmore, *Haston* explained that the combination of less common traits, when found all together, make it more probable that a single person was the actor. However, if the traits lack any true distinctiveness, then the inference fails. Thus, there would be no inference of

identity if "in both the charged and uncharged crimes the robber wore trousers, had two ears, etc. The sum of zeroes is always zero." (*Ibid*, fn. 15.)

It is illustrative to explain that Halston listed the traits that were claimed to support the inference of identity. Those traits included the facts that the charged and uncharged offenses were

> committed by two armed Caucasian men of middle height who wore handkerchiefs over their faces... the robbers entered the particular place of business by means of a door normally used as an employees' entrance and exit and during the course of the robbery forced one or more employees to lie face down on the floor. In none of the robberies was an employee physically injured, although jostling, pushing, or kicking took place, apparently for the purpose of enforcing compliance with the robbers' orders....one of the robbers seemed principally concerned with holding employees at bay, while the other appeared involved with obtaining money from the safe.

(*Id.* at p. 247.)

The *Haston* court found that these common facts were not sufficiently distinctive to raise the logical inference of identity because all of these facts were shared by many armed robberies. (*Id.* at p. 248.)

Similarly, In *People v. Gray* (2005) 37 Cal.4th 168, this Court found the charged and uncharged crimes shared the *following* distinctive common features that raised an inference of identity. In reaching this conclusion, the court noted

> defendant's 1983 crimes against J.S. and S.B. were eerily similar to the present crimes against Ruby Reed. In both crimes (1) the victim was attacked in her home, (2) the crime occurred in the late evening or early morning, (3) the victims included older women, (4) the assailant tied the victim's hands behind her back, (5) the assailant tied the victim's ankles together, (6) the assailant wrapped a towel around the victim's head, (7) the assailant pulled up the victim's nightgown, (8) the assailant beat the victim severely, (9) the assailant engaged in criminal sexual conduct, (10) the assailant left candy wrappers at the crime scene, (11) the assailant left personal property at the crime scene, (12) the assailant ransacked the bedroom, (13) the assailant took money, and (14) the assailant "made himself at home."

(*Id.*, at 203)

Gray also included the following:

> In both the 1983 crimes (against J.S. and S.B.) and the 1987 crimes (against Ruby Reed), the assailant smoked cigarettes and left ashes at the crime scene. On both occasions, the assailant also left candy wrappers around the premises. In the 1983 crimes, the victim heard her assailant using her telephone; in the 1987 crimes, cigarette ashes left by the telephone suggested the perpetrator had used the telephone. In the 1983 crimes, the assailant watched television while the victim lay on the floor, bound and helpless; in the 1987 crime, candy wrappers and ashes found near the chair in which one would sit to watch television suggested the perpetrator had watched television. In both crimes, shoe boxes were removed from a bedroom closet, opened, and then thrown on the floor. In 1983, the assailant pulled victim J.S. by her mouth; in 1987, the victim's false teeth were found near her body. We might add that in both crimes the assailant bound the victim with materials procured at the scene; in neither did he bring rope with him. In light of the distinctiveness and similarity of the characteristics the two sets of crimes shared, the trial court did not abuse its discretion in ruling the jury could legitimately infer from evidence of the 1983 crimes that the same person had committed the 1987 crimes.

(*People v. Gray*, *supra*, 37 Cal.4th at p 203.)

In this case, there was nothing unique or exceptionally distinctive about the incidents involving Samson and the other victims that would allow for this type of inference. Thus, instead of unique traits like the perpetrator hanging around and watching television and/or eating candy after the assaults, this case involves at the most generic traits, such as binding some of the victims, that occur in numerous cases.

Likewise, in *People v. Hovarter* (2008) 44 Cal.4th 983, this Court found the following constituted sufficient distinctive facts common to both the uncharged and charged misconduct to admit the uncharged misconduct for identity:

> [B]oth involved abduction, rape, and murder (or attempted murder); both involved teenage girls (Walsh was 16 years old, A.L. was 15);

> both occurred along Highway 101 under circumstances suggesting the young women were taken from along the highway; both occurred in roughly the same timeframe (Walsh was raped and killed in August 1984, the crimes against A.L. occurred in December of the same year); and both victims were moved a substantial distance [110 miles for Walsh, 169 miles for A.L.] The perpetrator of both crimes sought to dispose of the victim's body in a running body of water: Walsh was dropped off the Scotia/Rio Dell Bridge near the Eel River; A.L. was rolled into the Russian River. (*People v. Hovarter*, *supra*, 44 Cal.4th at p.1004.)

In addition to the illumination it provides in defining a distinctive common fact, this Court's acknowledgment in *Hovarter* that some other facts, relied upon by the trial court, were *not* distinctive also informs the present discussion. The trial court, for example, relied on the fact that both young women were sexually assaulted in the sleeping compartment of the defendant's truck. This Court noted that although the evidence was strong that A.L. was assaulted there, there was only speculation that Walsh was raped there. This Court also noted in *Hovarter* that a distinguishing, non-distinctive, feature is that Walsh was strangled, but A.L. was shot. In the present case, Vanessa was strangled; Aleda, on the other hand, was released.

In *People v. Nottingham* (1985) 172 Cal.App.3d 484, the court explained:

> The inference of identity arises when the marks common to the charged and uncharged offenses logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offense. [Citation.] It is the distinctiveness between any such common marks which gives logical force to the inference of identity; and, if the inference is weak, the probative value is weak, and the court's discretion should be exercised in favor of exclusion. [Citation.] (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 499.)

The *Nottingham* court found similarities in that both women were relatively casual acquaintances of the defendant, that both women resided in the same general neighborhood as the defendant, that each of the victims had force applied

to the neck area and had their clothing ripped, but the use of force was substantially different in the two offenses in that one woman was startled but not hurt while the other was strangled to death. (*Id.*, at p. 500

Nottingham noted there were some similarities between the charged and uncharged misconduct, but further noted the common marks were not distinctive to the point they gave logical force to an inference of identity. As a result, the trial court's exercise of discretion should have led to an exclusion of the uncharged misconduct. (*Ibid.*)

The analogy is self-evident. Here, the common facts between Aleda's abduction and Vanessa's abduction were not particularly distinctive. The remainder of the separate criminal transactions shared few common features. No appliance was used in the sexual assault upon Aleda; the only evidence of a sexual assault upon Vanessa involved the use of an appliance. Aleda was released; Vanessa was strangled to death.

For the same reasons that compelled the result in *Nottingham*, the trial court's exercise of discretion should have excluded the use of Aleda's evidence to prove appellant's identity as Vanessa's murderer.

Examining the facts that are known about the Aleda and Samson incidents, it is clear that there are not enough similarities of distinctive features so as to draw an inference of identity.

The fact that Aleda was abducted from the street is hardly distinctive. Every kidnap is going to involve snatching the victim. This will either be from a place like the victim's house, business, or other place of refuge, or from a public location. Because a kidnapping has to occur quickly, it is not going to occur when the victim surrounded by other people, and has to be dragged, kicking and screaming for help, to the get-away car. Thus, if not from a place of refuge, the actual taking may well be off the street when no one is around.

This is similar to saying that a robbery can occur in a house or a store, so the fact that two robberies occurred in a store is a common trait showing identity.

Appellant submits that even if you narrow down the store to a specific type of business, such as a liquor store, a convenience store, or a jewelry store, the level of similarity is too minimal to draw an inference of identity.

As a result, the fact that Aleda and Samson were grabbed off the street is not a distinctive fact from which this inference of identity may be drawn.

Likewise, the fact that there was a van involved is hardly a distinctive trait upon close examination. It is safe to say that all kidnappings will involve a car of some sort. The fact that two kidnappings involve a van, as opposed to some other type of car, is not a distinctive trait. This is akin to two robbers, both wearing trousers.

Similarly, the fact that both Aleda and Samson were kidnapped for a sex offense is also not distinctive. Indeed, kidnapping for the purpose of committing a sex offenses is so common that it is itself a type of crime.

Additionally, the prosecutor argued that similarities from which identity could be inferred include the fact that a woman with long hair and a back pack was abducted when she was walking alone. (33RT. 7152.) Again, these "similar" traits are only similarities on a superficial level. For example, the fact that the victim was walking alone is hardly a distinctive fact. This is not the type of crime where the defendant is going to grab someone who is surrounded by other people. Virtually every kidnapping of a stranger will be when the stranger is alone. That fact does not make it distinctive enough to raise an inference of identity.

Likewise, the fact that the victim had a back pack is more likely to be a coincidence rather than a fact that is of significance. There was no allegation that appellants were trying to steal the back pack or that they went through Aleda's backpack. Unless the prosecution is arguing that the back pack was one of the reasons why the victims were targeted, the fact that they had a back pack seems to be a fortuity unrelated to the events that followed.

Thus, the common features of Aleda and Samson are that they involved the kidnapping of a stranger for sexual purposes, off the street, using a van. This is

closer to knowing that a robber of a liquor store used a gun and covered his face, threatening the clerk, before driving off in a sedan. These are not signature traits from which identity can be inferred.

Another fact which argues against a degree of similarity sufficient to prove identity is whether there are other offenses with the same traits that were committed by other individuals. If two other people are committing the same crime with the same traits, the traits are obviously not distinctive enough to conclude that only one couple committed the offense.

In fact, in this case there was at least one other offense that was committed in the same manner as the Samson kidnapping, namely the kidnapping of Jaycee Dugard, who was kidnapped off the street by a couple in a car in South Tahoe, one of whom was described as a 30 year old female with long, dark hair who grabbed Dugard and pulled her into the vehicle[26]. Detective Campion explained that Michaud looked like the description of the suspect in that kidnapping. (2RT 258.)

Michaud was questioned about this incident, but apparently could not be connected with the offense. (2RT 259.) It has since been discovered that Dugard was kidnapped by a person named Phillip Garrido[27].

The fact of a stranger abduction by two people, one of whom was a woman with hair similar to Michaud's, committed by dragging the victim to a car from the sidewalk, is as similar to the Samson incident as the Aleda incident. Furthermore, the Dugard incident occurred in the South Tahoe area, which would place it in the geographical range of the incident involving Aleda.

Therefore, the incidents involving Aleda and Samson were not so distinctive so as to create an inference of identity. Because other people were committing crimes in the same manner, it cannot be said that the Aleda and

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[26] http://www.helpfindthemissing.org/forum/showthread.php?t=13564; http://www.charleyproject.org/cases/d/dugard_jaycee.html

[27] http://topics.nytimes.com/topics/reference/timestopics/people/d/jaycee_dugard/index.html

Samson case were so distinctive so as to conclude that only these two defendants were committing that type of signature crime.

In fact, in direct contrast, there are an equal number of known *dissimilarities* between Samson and Aleda, a fact made all the more striking because so little is known of the events that went on when Samson was being detained. For example, one kidnapping took place at night, the other in the morning. It was claimed that Samson's anus was penetrated, a fact that was not reported by Aleda. Likewise, the penetration of Samson was done with an object that is not part of the human body commonly used for penetration, namely a penis or finger. Rather, Samson was penetrated by a curling item.

Similarly, the prosecution claimed that Samson was bound, while Aleda did not report being bound or restrained in a similar manner.

Perhaps the greatest difference between the two incidents is that when push came to shove, Michaud and appellant were not so callous as to actually carry out the murder of Aleda, and they let her go, at great risk to themselves[28].

Just as a signature similarity creates an inference of identity, logically, when crimes are committed in a significantly different manner it is not possible to draw the inference of identity from the facts of a crime with significant dissimilar features.

In summary, the similarities between the incident involving Aleda and the Samson incident were no so distinctive so as to create an inference of identity under section 1101.

4. Intent

As noted above, the evidence of other crimes was admitted to show intent. Even though the least degree of similarity is need to prove intent, there still must be some fact which makes one believe that because the defendant committed

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[28] Aleda's description of the defendants eventually led to their capture.

Crime A he had the intent to commit Crime B. For two reasons, however, not all of the facts involved in the uncharged crimes were indicative of intent to commit the sex crimes against Samson.

First, the fact that someone engages in one sex crime does not necessarily show intent to commit another sex crime. For example, if a defendant with heterosexual tendencies was involved in a sexual assault against an adult, female victim this would hardly be relevant to show the intent involved in a sexual assault on a boy.

Likewise, as applied to this case, the fact that appellant may have engaged in digital penetration with Amy does not show intent to use a curling iron on Samson. The first act may show an intent to engage in relatively normal sexual conduct, punishable only because of the lack of consent. However, it cannot be inferred that he has the intent to engage in "kinky" sex with the second person because he had the intent to engage in relatively normal sexual conduct with the first person. Secondly, the instruction given to the jury, CALJIC No. 2.50, made no distinction between the intent needed to commit a sex crime and the intent needed for first degree murder. Rather, the instruction said that the uncharged acts could be used to prove, "[t]he existence of the intent which is a necessary element of the crimes charged, or the special circumstances alleged." (138CT 36343, 34 RT 7323.)

Indeed, saying these acts could be used to prove "crimes charged, or the special circumstances alleged" expressly tells the jury that it can use this evidence not only to prove the special circumstance of kidnap for sexual purposes, but also for malice murder.

The problem with this instruction is that one of the theories of first degree murder upon which the jury was instructed included malice when there is "manifested an intention unlawfully to kill a human being." (38RT 7355.) Likewise, the jury was told that it could find appellant guilty of murder it found

"that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill..." (38RT 7356.)

Therefore, under the instructions given, the jury could find intent to kill from the intent to commit the prior, uncharged sex crimes. Again, this is clearly an invitation to specious reasoning that leads to irrational results, in violation of the right to due process of law.

Appellant submits that one cannot logically infer intent to kill Samson from intent to rape Christina. However, holding that appellant's prior action of digital penetration was evidence of intent to kill requires exactly that chain of reasoning. This is clearly the "invitation to specious reasoning" that the Court of Appeal was concerned about it *Valentine*. It is clearly the type of illogical reasoning that is a violation of due process of law, as described in *Leary v. United States*, *supra*, 395 U.S. 6, 46.

Appellant recognizes that in *People v. Story* (2009) 45 Cal.4th 1282, this court held that evidence of other uncharged sexual acts could be used to show propensity to commit murder. However, that was permitted because the murder was alleged to have been committed during a sex offense, with the murder count predicated on felony murder based on the murder occurring during that sex offense.

Therefore, in *Story* the propensity to commit a sex offense was relevant to the propensity needed to commit the felony murder case.

That is distinguishable from the instant case. Here, in order to be convicted of murder on the theory of malice murder, appellant must have intended to kill. Intent to rape Christina cannot be a basis for intent to kill Samson.

In summary, it is not rational to conclude that the use of many of these uncharged acts created an inference of an intent to sexually assault Samson with the curling iron and kill her.

C. Prejudice

The traditional rule against character evidence, codified in California in Evidence Code section 1101, is not based on the theory that character is irrelevant, but on the view that "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson v. United States* (1984) 335 U.S. 469, 476.)

Ewoldt and *Balcolm* reiterated the caveat that this type of evidence is extremely prejudicial when misused. (*Ewoldt* at p. 404, *Balcom* at p. 422.) The prejudicial effect of such evidence has long been recognized as creating the danger that a jury will convict because of past criminality, rather than substantial evidence of guilt of the charged offense. (Bernard Jefferson, California Evidence Benchbook (3d ed.) § 33.23 p. 709.) Indeed, evidence of prior misconduct is so inflammatory that some cases have held that if the defense stipulates to the fact desired to be proven, the prosecution may be prevented from introducing such evidence to prove an otherwise relevant fact. (*People* v. *Guzman* (1975) 47 Cal.App.3d 380, 389-390 *People* v. *Perry* (1985) 166 Cal.App.3d 924, 931-932.)

At several times during the discussions regarding evidence of uncharged act the trial court stated that the proffered evidence would not be "inflammatory" in light of charged act. (*E.g.*, see 3RT 654 and 17RT 3968.) It is respectfully submitted that this is not a proper standard to measure whether the acts are inflammatory or potentially prejudicial. The reason for this is because if the determination of prejudice allowed the court to balance the seriousness of the uncharged offense against the charged offense, this standard would effectively negate the balancing required by sections 352, 1101, 1108, and 1109 in cases involving murder or manslaughter because nothing would ever be inflammatory or prejudicial in light of the charged offense where someone was killed.

The fact that a defendant engaged in a sexual assault – or any other offense - will always pale in light of the fact that the defendant killed someone. Similarly,

if the defendant is accused of a sex crime, unless the prior uncharged act involves murder, that act will never be "inflammatory" in light of the charged offense. Therefore, if this is the proper standard these sections would always be out-balanced by the nature of the charged crime, with the inevitable result of making all evidence of other crimes (short of murder) admissible. Obviously, the Legislature never intended such a result in enacting sections 352, 1101, 1108, and 1109.

Additionally, appellant was directly prejudiced in three ways.

First, it can hardly be disputed that a sex offender is the least popular figure possible. The frequency with which sex offense statutes are amended to increase sentence or modify the rules of evidence demonstrates that cracking down of sex offenders is an easy way to bolster one's legislative resume. From section 1108, to Penal Code section 667.51, 667.61, 66.71, it can be seen that the easiest way to win public support is to be tough on sex offenders.

Furthermore, one of the concerns of section 1101 is that the jury will punish the defendant because he got away with the offenses in the past. The offenses involving Rachel, Christina, and Amy were never charged and are perfect examples of how the outraged jury will be more inclined to convict for past actions rather than evidence of current guilt.

Second, although it is true that eventually, in closing argument to the jury, appellant admitted kidnapping Samson, his defense was that he kidnapped her for the purpose of murder, and therefore the kidnap was incidental to the murder, and not a special circumstance so as to trigger the death penalty. (See Argument X, below.) A slew of other sex offense incidents allowed the jury to conclude that the motive for the kidnapping was to commit a sex offense, thereby creating a sexual motive for the kidnapping apart from the murder. This would tend to disprove appellant's defense using the most inflammatory evidence imaginable.

Third, appellant's defense was clearly hamstrung by the incorrect rulings of the trial court in deciding to admit this evidence. Prejudice may be found in the

fact that appellant was unable to contest other aspects of the case, and was thereby forced to concede that he had kidnapped Samson.

In appellant's case, the evidence of uncharged misconduct against Christina, Rachel, Amy, and Aleda was undeniably prejudicial. The defendants' alleged misconduct was predatory and oftentimes brutal; the victims were vulnerable. Christina and Rachel were especially vulnerable because of their youth and even more vulnerable because Rachel was Michaud's daughter and Christina was Rachel's friend. As was said of the rape in *Guerrero*, the sexual assaults here were "brutal and abhorrent." (*People v. Guerrero* (1976) 16 Cal.3d 719, 730.) And, as was true of the defendant in *Guerrero* who found himself charged in the jury's view with the rape of Ms. Lopez as well as the murder of Ms. Santana, appellant found herself charged by the admission of this evidence with the crimes against Aleda, Amy, Christina, and Rachel.

And, significantly, where prejudice is concerned, the prosecutor substantially relied upon the improperly admitted other crimes evidence in arguing for appellant's conviction of the charged crimes. The prosecutor argued, for example, that appellant was guilty of the first degree murder of Vanessa Samson because the defendants kidnapped Vanessa just as they kidnapped Aleda (33RT 7108-7109); and because the defendants raped Vanessa by instrument just as they raped Aleda by instrument and were sexually gratified in the course of that conduct (33RT 7113-7114, 7118-7119). The prosecutor argued the abduction of Vanessa and the abduction of Aleda constituted identification evidence because both Vanessa and Aleda were walking alone, both had long hair worn loose, both carried backpacks, and both were abducted into a van driven by a woman. (33RT 7152.)

In her arguments to the jury the Deputy District Attorney argued the evidence of other wrongful acts could be used to prove common plan, intent, propensity. (33RT 7150-7152, 7157, 7195, 7200-7207.)

The prosecutor's argument to the jury recounted in detail the conduct of the

defendants in the multiple sexual assaults upon Christina (33RT 7154-7159); the multiple sexual assaults upon Aleda (33RT 7162-7167); the multiple sexual assaults upon Rachel (33RT 7168-7177); and the multiple sexual assaults upon Amy (33RT 7182-7193). The prosecutor argued that the uncharged crimes involving Rachel, Amy, Christina, and Aleda and the charged crimes involving Sharona, April, and Vanessa were carried out by the defendants in their pursuit of a common plan. (33RT 7194-7198.)

In *People v. Minifie* (1996) 13 Cal.4th 1055, this Court recognized the powerful impact a prosecutor's argument regarding the evidence may have upon the jury. "The jury argument of the district attorney tips the scale in favor of finding prejudice. . . ." (*Id.*, at p. 1071; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341.)

In appellant's case, the prosecutor exploited the erroneously admitted evidence of uncharged misconduct by devoting a substantial amount of her argument to the facts of the assaults against Michaud's daughter Rachel and her friend Christina, against Amy, and against Aleda. Under the sway of this argument, it is likely the jury's decision to convict was affected by a desire to punish the defendants for the actions they undertook in the uncharged misconduct.

As a result of the foregoing, appellant deserves a new trial based on relevant, nonprejudicial evidence.

II

THE TRIAL COURT ERRED IN THE INSTRUCTIONS GIVEN TO THE JURY REGARDING EVIDENCE OF OTHER WRONGFUL CONDUCT ADMITTED UNDER EVIDENCE CODE SECTION 1101. THE IMPROPER INSTRUCTIONS DEPRIVED APPELLANT OF THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. IT ALSO VIOLATED APPELLANT'S RIGHT TO A RELIABLE DETERMINATION IN A CAPITAL CASE, GUARANTEED BY THE EIGHTH AMENDMENT

In addition to the error inherent in the wrongful admission of the evidence discussed in the preceding section, the trial court also erred in the jury instructions given as to the permissible use of evidence of wrongful acts of appellant to prove the charged offense of the murder of Samson. These other acts of wrongful conduct included evidence of two counts of oral copulation in concert against Sharona, April, Aleda, Rachel, Christina, and Amy.

As discussed in the preceding argument, the logical inferences sought by the prosecution for much of this evidence failed for the reasons set forth above. The error in admitting this evidence was further compounded when the trial court failed to correctly instruct the jury as to the specific correct inferences that could logically be drawn from evidence

In this respect, it is important to understand that in giving CALJIC Instruction 2.50, the instruction given for Evidence Code section 1101 evidence, the trial court must be careful to limit the issues upon which such evidence is relevant and admissible by striking from the instruction those issues upon which the evidence is not admissible.

The law is settled that it is error to give an instruction that correctly states a principle of law, but which has no application to the facts of the case. (*People v.*

Rollo (1977) 20 Cal.3d 109, 123[29] (superseded by statute on other grounds); *People v. Sanchez* (1947) 30 Cal.2d 560, 572.[30]) It is the court's duty to identify the precise evidence to which the other crimes testimony relates. (*People v. Rollo*, *supra*, 20 Cal.3d at pp. 122-123 and fn. 6[31].)

In *People v. Swearington* (1977) 71 Cal.App.3d 935, 947, the Court of Appeal applied these instructional principles to an instruction on the jury's consideration of other crimes evidence.

In *Swearington*, the prosecution argued that evidence of other acts committed by the defendant was admissible on issues of (1) identity, (2) intent, and (3) a characteristic method, plan, or scheme. At trial, the defendant never disputed the issue of his identity. The trial court instructed the jury in the language of CALJIC No. 2.50, including that the evidence could be used for the purpose of determining the identity of the person who committed the crime.

The Court of Appeal reasoned that because the defendant never contested the issue of his identity, the evidence of other acts committed by him to prove his

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[29] On this point, *Rollo* held the trial court erred in giving an ambiguous instruction (modified version of CALJIC No. 2.50) that allowed the jury to use evidence of a prior felony conviction admitted for impeachment purposes to prove intent and knowledge of the charged crime where it was insufficiently supported by the evidence. (*People v. Rollo*, *supra*, 20 Cal.3d at pp. 122-123.)

[30] On this point, the *Sanchez* court stated, "The charge to the jury in a homicide case should comprise instructions on the law applicable to issues raised by the evidence, not a dissertation on all the classes of homicide known to the law. It is error to give an instruction which correctly states a principle of law which has no application to the facts of the case. [Citations.]" (*People v. Sanchez*, *supra*, 30 Cal.2d at p. 573.)

[31] This Court further stated in *Rollo*: "In the future, however, in any case in which the court has properly admitted both a prior felony conviction of the defendant for the purpose of impeachment and 'other crimes' evidence on a substantive issue, the cautionary instruction on the latter point should identify the evidence to which it relates. CALJIC instructions are properly neutral and objective, but in certain circumstances clarity requires that they be made to refer specifically to the facts of the case before the court." (*People v. Rollo*, *supra*, 20 Cal.3d at p. 123 fn. 6.)

identity was not relevant evidence, and the instruction was incorrect. "[I]t is error for a trial judge to give CALJIC instruction No. 2.50 and list four separate issues upon which the evidence is being received and which the jury may consider unless the evidence is relevant and admissible with respect to each of such four issues." (*People v. Swearington*, *supra*, 71 Cal.App.3d at p. 947.) Accordingly, *Swearington* concluded that it was error for the court to instruct the jury that such evidence could be received on the issue of identity.[32] (*Id.*, at p. 948.)

Thereafter, in *People v. Nottingham* (1985) 172 Cal.App.3d 484, the Court of Appeal relied upon *Swearington* in stating: "It is error for a trial judge to instruct as to separate issues in regard to which the evidence may be considered unless the evidence is relevant and admissible with respect to each of the issues. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 947.)" (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497.) In *Nottingham*, the trial court instructed the jury that other crimes evidence could be considered to prove motive although no such issue was raised during the trial and the prosecution had never made the equivalent claim. The court also instructed the jury that a particular uncharged crime could be used to prove identity when the court had earlier determined to the contrary. *Nottingham* concluded that the instruction was incorrect because the other crimes evidence was neither relevant nor admissible regarding the undisputed facts of motive or identity.

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[32] To the extent *Swearington* may be read to suggest that an element of the offense becomes an undisputed fact because the defense has not contested it at trial, this Court subsequently held that such is not the case. In *People v. Daniels* (1991) 52 Cal.3d 815, this Court held that a defendant's not guilty plea places the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof. (*Id.*, at pp. 857-858; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Catlin* (2008) 26 Cal.4th 81, 146.) That same year, the United States Supreme Court noted that the prosecution's burden of proving every element of the charged crime is not relieved by a defendant's tactical decision to not contest an element of the crime. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.)

Nottingham also relied upon *People v. Key* (1984) 153 Cal.App.3d 888, 899, in pointing out that the trial court has a duty to assist jurors by telling them the precise issues to which the other-crimes evidence relates and to limit their consideration of such evidence accordingly. (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497.)

Key stated that when a trial court instructs on the significance of other crimes evidence, which the court described as "this substantially prejudicial evidence," it should do so accurately. (*People v. Key*, *supra*, 153 Cal.App.3d at p. 899.)

Accordingly, the trial court is charged with instructing the jury in language tailored to inform the jury of the precise issues to which the other crimes evidence relates and with appropriately limiting the jury's consideration of the other crimes evidence.

Finally, because these errors allowed the jury to decide the case on the basis of illogical reasoning and improper inferences, it violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.)

In *McDowell* v. *Calderon* (9th Cir. 1990) 130 F.3d 833 the court stated:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions. (*Id.*, at p.836.)

As a result, when some character evidence must be admitted for proper purposes, it is imperative that the jury receives instructions as to how to use the evidence properly.

However, as discussed in the previous section, many of the prior acts introduced were not relevant for the purpose for which they were offered. Appellant incorporates the reasoning from the prior section as a portion of this argument. Rather than argument in full, a few examples will suffice to show the error in the instructions given.

As noted, the jury was told that it could use the evidence to prove common plan. However, apart from the similarity in result, which is not sufficient to prove common plan (ante, at p. 99), apart from the incident of Aleda, the other victims did not involve stranger abductions, and there are no common features in the methods used to commit the crimes.

Thus, the fact that Michaud lured Christina on the pretext of running errands, or the fact that Michaud lured Amy to the motel on the pretext of getting a telephone call, is used to show the plan appellant and Michaud employed in cruising the street for victims and grabbing Vanessa off of the street.

Likewise, the jury is instructed that the fact that Michaud told Rachel, her daughter, that they were going to Oregon to look for a place to live can be used to show the forcible abduction of Vanessa.

Similarly, the prosecution argued that the common plan involved searching for someone with a back pack as a potential victim. (33RT. 7152.) However, neither Christina, Rachel, nor Amy fit this pattern of the common plan, although the jury was told that it could consider those incidents for that purpose.

Likewise, the common plan to abduct and molest Amy and the intent involved in that offense is allowed to be used as the blue print for the plan to murder Vanessa and to prove the intent to kill that victim.

None of these inferences, or the other failures in logic discussed in the preceding section are conclusions that can be properly drawn from this evidence. However, those are exactly the inferences that the jury was being told that it could draw from this evidence.

Conclusion

Based on the foregoing, appellant submits that the trial court erred in the instructions given to the jury regarding the permissible use of evidence of other sexual offenses admitted under Evidence Code section 1101.

III

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER SEXUAL OFFENSES TO PROVE PROPENSITY TO COMMIT THE CHARGED CRIMES. THE INCORRECT ADMISSION OF THIS PREJUDICIAL EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND ALSO VIOLATED APPELLANT'S RIGHT TO A RELIABLE DETERMINATION IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT TO THE CONSTITUTION

A. Introduction

The trial court committed prejudicial error in admitting evidence of other sexual offenses under Evidence Code section 1108 to prove propensity to commit the charged crimes, thereby depriving appellant of the right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, and also violating appellant's right to a reliable determination in a capital case guaranteed by the Eighth Amendment to the Constitution.

The evidence that the court admitted for this purpose consisted of the testimony relating to Aleda, Christina, Rachel, and Amy. However, as explained in the following argument under the instructions given, the jury could also have improperly used the evidence relating to Sharona and April for the purposes of drawing an inference of propensity to commit the capital crime charged in count 4.

Appellant has discussed the motions, hearings, and arguments relating to the admission of evidence of other wrongful conduct, including the admission of evidence under section 1108, in section II of this brief, and rather than repeat them in full, appellant incorporates those references herein.

B. The Relevant Law And Its Application To This Case

The Fifth and Fourteenth Amendments to the United States Constitution guarantee defendants the right to a fair trial. Denial of due process in a criminal trial "is the failure to observe that fundamental fairness essential to the very

concept of justice." (*Lisenba v. California* (1941) 314 U.S. 219, at p. 236.) State law violates due process if "it offends some principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43; *Cooper v. Oklahoma* (1996) 517 U.S. 348, 356; *Medina v. California* (1992) 505 U.S. 437, 445-446.)

The Due Process Clause also requires proof of a criminal charge beyond a reasonable doubt. (*In re Winship*_(1970) 397 U.S. 358.) It does not permit a conviction unsupported by evidence, or based on unreliable or untrustworthy evidence. (*California v. Green* (1970) 399 U.S. 149, at p. 186 fn. 20.) And it does not permit conviction based on evidence that is unnecessarily suggestive or conducive to irreparable mistake. (*Stoval v. Denno* (1967) 390 U.S. 293, at p. 301-302.)

As noted in *People v. Fitch* (1997) 55 Cal.App.4th 172, the due process clause has limited operation beyond the specific guarantees of the Bill of Rights. Nonetheless, due process draws a boundary beyond which state rules of evidence cannot stray. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, at p. 919.) Therefore, if appellant can demonstrate that allowing the jury to use character evidence to show a disposition to commit a charged offense violates a fundamental principle of justice, then he has established a valid due process claim. (*People v. Fitch, supra*, 55 Cal.App.4th at 180.)

The test of whether a due process violation has occurred has two prongs: first, the inferences which a jury may draw from the evidence must be constitutionally impermissible and second, the evidence must be of such a quality that it necessarily prevents a fair trial. (*Jammal v. Van de Kamp, supra*, 926 F.2d at 920.)

Propensity evidence interferes with the court's obligation to ensure that the prosecution satisfies its burden of proof, because it can easily lead a jury to convict because of distaste for the prior misconduct or the character of the

accused. As Justice Jackson reasoned in *Michelson v. United States* (1948) 335 U.S. 469, 475-476:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt... The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

The Supreme Court has recognized the unanimous tendency of courts that follow the common law tradition to disallow resort by the prosecution to evidence of a defendant's evil character to establish a probability of his guilt and has strongly suggested that introduction of prior crimes evidence solely for the purpose of showing a criminal disposition would violate due process. (*Michelson v. United States* (1948) 335 U.S. 469; *Spencer v. Texas* (1967) 385 U.S. 554, 572-574, conc. and dis. opn. of Warren, C.J.)

Traditionally, propensity evidence is excluded at trial in order to "force the jury, as much as possible, to put aside emotions and prejudices raised by [other acts evidence]... and decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty *of the crime charged.*" (*McKinney v. Rees* (9th Cir. 1990) 993 F.2d 1378, at p. 1384 (emphasis added), cert. denied, 510 U.S. 1020 (1993).) The prohibition on other acts evidence is so rooted in established principles of Anglo-American jurisprudence that it is a component of fundamental fairness for purposes of due process. (*Id.* at p. 993 F.2d at p. 1380.)

In *McKinney v. Rees*, *supra*, 993 F.2d 1378, the court stated:

> The use of "other acts" evidence as character evidence is . . . contrary to firmly established principles of Anglo-American jurisprudence. In 1684, Justice Withins recalled a prior case in which the court excluded evidence of any forgeries, except the one for which defendant was standing trial. [Citation.] Similarly, in *Harrison's Trial*, the Lord Chief Justice excluded evidence of a prior wrongful act of a defendant who was on trial for murder . . . .

(*McKinney v. Rees*, *supra*, 993 F2d at p. 1380.)

Based upon its historical review, the *McKinney* court concluded:

> The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia.

(*Id.* at p. 1381 [fn. omitted].)

Appellant acknowledges that the Supreme Court has stopped short of announcing a bright-line rule prohibiting propensity evidence, because the Court has never needed to answer this precise question in order to resolve a case before it. (See, *Estelle v. McGuire* (1991) 502 U.S. 62, at p. 75 n.5.) However, the Supreme Court has clearly established the *analysis* which applies to due process claims.

For over 150 years, the U.S. Supreme Court has advanced an historical test for ascertaining what rules are protected by due process. In *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 U.S. (18 How.) 272, the Court held that if the process at issue is not in conflict with any express constitutional provisions, the court must

> look to those settled usages and modes of proceeding existing in the common and statue [*sic*] law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

Murray's Lessee, 59 U.S. at 277. This historical test was further elaborated in *Hurtado v. California* (1884) 110 U.S. 516, at p. 528 (rule embodied in due process if it can show the sanction of settled usage both in England and in this country). Over a century later, the court affirmed this definition in *Dowling v. United States* (1990) 493 U.S. 342. The Court defined due process as "those fundamental conceptions of justice which lie at the base of our civil and political institutions, and which define the community's sense of fair play and decency." (*Id.* at p. 352 (internal quotation omitted)).

The historical pedigree of the prohibition on propensity evidence is unimpeachable. The rule is rooted in England, was adopted by the colonial courts, enforced as a common-law rule throughout the history of our nation's judiciary, and codified in state and federal rules of evidence.[33] Commentators agree that the propensity ban has received judicial sanction for three centuries.[34] This historical legacy amply demonstrates that propensity evidence "offends [a] principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (See *Egelhoff*, 518 U.S. at 43.)

Moreover, the Supreme Court has repeatedly indicated that application of the historical test would result in this conclusion. (See, *Michelson*, 335 U.S. 469[35]; *Brinegar v. United States* (1949) 338 U.S. 160; *Spencer v. Texas* (1967)

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[33] See, Louis M. Natali, Jr. & R. Stephen Stigall, "Are You Going To Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause, 28 LOYOLA U. CHI. L.J. 1, 13-15 & n. 85-101 (1996) (summarizing historical record and collecting cases).

[34] See, e.g., 1A Wigmore on Evidence, § 58.2, p. 1213 (rev. 1983).

[35] In *Michelson*, the Court expressly placed its imprimatur on the common law rule barring propensity evidence. After recognizing the historical significance of the rule, the Court acknowledged its role in assuring essential fairness: "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." (*Michelson*, 335 U.S. at 475-476.)

385 U.S. 554[36].) Other Supreme Court cases have acknowledged the constitutional dimensions of the trial rights protected by the propensity ban. (See, *Boyd v. United States*, 142 U.S. 450 (1892) (prior crimes evidence impermissibly impressed upon jury the notion that defendants were "wretches" undeserving of prescribed trial protections); see also, *Estelle*, 502 U.S. at 78 (O'Connor, J., concurring) (suggesting that prohibition on propensity evidence protects proof beyond reasonable doubt standard).[37] Accordingly, clearly established federal law compels the conclusion that the propensity ban is a requirement of due process.

Moreover, at least two federal courts of appeal have explicitly held that admission of character evidence to prove the disposition of the defendant to commit the current offense violates federal due process. (*Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337; *McKinney v. Rees*, *supra*, 993 F.2d 1378.)

In *Panzavecchia*, the defendant was tried in state court for murder and unlawful possession of a firearm by a convicted felon. (*Id.* at p. 338-339.) He

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[36] *Spencer* upheld the use of other crimes evidence for purposes other than propensity, in light of limiting instructions which prohibited propensity inferences. (*Spencer*, 385 U.S. at 563-564.) The majority opinion thus supports the argument that other crimes evidence comports with due process only where inferences based on propensity are expressly forbidden. (See, *id.*) In his dissenting opinion, Chief Justice Warren expressly stated that propensity evidence as such is inconsistent with due process. (*Id.* at 573-574 (Warren, C.J., dissenting).) He noted that the ban on propensity evidence is well-established historically, and that it protects the presumption of innocence. He concluded that use of prior crimes evidence to show propensity would violate due process. (*Id.* at 572-575.) No other justice expressed disagreement with these propositions.

[37] Justice O'Connor commented that the Due Process Clause requires proof beyond a reasonable doubt, and prohibits presumptions which have the effect of relieving the prosecution of its burden of proof. Her analysis suggests that propensity evidence creates an improper presumption that the accused has committed the crime charged because he was involved in prior similar offenses. Accordingly, her opinion suggests that the use of prior bad acts offends due process. (See *Id.*)

filed a motion for severance with regard to the illegal possession of a firearm count, which was denied. At trial, the jury was allowed to hear evidence that the defendant had a prior conviction for counterfeiting. (*Ibid.*) The jury was instructed that both offenses should be considered separately, but were not given a specific limiting instruction stating that the prior conviction could not be considered in establishing guilt on the murder offense. The defendant was convicted of both murder and illegal firearm possession. (*Ibid.*) His convictions were affirmed by the state courts.

Panzavecchia then filed a petition for writ of habeas corpus in federal district court, claiming that the denial of his severance motion resulted in the admission of irrelevant and prejudicial evidence in violation of his due process right. (*Ibid.*) The federal district court granted his writ; the state then appealed. The Fifth Circuit held that the admission of Panzavecchia's prior conviction, which was irrelevant to the murder charge, may have influenced the jury's verdict in finding defendant guilty of murder, particularly since there was no limiting instruction telling the jury that it should utilize the counterfeiting conviction only for purposes of the illegal firearm possession charge. The circuit court further found that the prejudicial effect of this error denied defendant his Fifth and Fourteenth Amendment rights to due process and a fair trial, and, accordingly, that his murder conviction must be reversed. (Id. at 340-342.)

Numerous other courts have expressly reached this conclusion. (See *McKinney* 993 F.2d at 1380; see also, *Tucker v. Makowski* (10th Cir. 1989) 883 F.2d 877, 881 (acknowledging in habeas case that admission of other crimes evidence presents due process claim, and remanding for fundamental fairness analysis); *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044, cert. denied, 439 U.S. 847 (1978) (discussing bar on propensity evidence as concomitant to presumption of innocence); *People v. Zackowitz* (N.Y. 1930) 172

N.E. 466, 468 (Cardozo, C.J.) (declaring prohibition on propensity evidence to be of "fundamental importance to the protection of the innocent")[38].)

Moreover, it is established that state law evidentiary rulings and/or jury instructions will violate due process if they render a particular trial fundamentally unfair. (*Lisenba*, 314 U.S. at 236; see also, *Cupp v. Naughten* (1973) 414 U.S. 141, 147, *Donnelly v. DeChristoforo*, 416 U.S. 637, 642 (1974); *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.

Even in the absence of a bright-line rule that pure propensity evidence violates due process, the use of propensity evidence rendered appellant's trial fundamentally unfair. In this case, during jury instructions prior to deliberations, the jury was instructed with modified versions of CALJIC Nos. 2.50 and 2.50.01. This instruction told the jury that it could "infer that the defendant had a disposition to commit the same or similar type sexual offenses" and therefore that the jury could further "infer that he or she was likely to commit and did commit the crimes of which he or she is accused." (34RT 7326-7327; 138CT 36347.) The jury was further instructed that it "must not consider this evidence for any other purpose." (34RT 7326-7327; 138CT 36347.)

Admission of this evidence therefore violated "the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not who he is." (*United States v. Hodges* (9th Cir. 1985) 770 F.2d 1475, 1479.) As the *Hodges* court continued:

> Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to

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[38] See also, *United States v. Peden* (5th Cir.) 961 F.2d 517, 520, cert. denied, 506 U.S. 945 (1992) (noting that when a jury feels unsure about the government's case, it may nevertheless convict on the belief that the accused is evil); *United States v. Foskey* (D.C. Cir. 1980) 636 F.2d 517, 523 ("It is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'") (quoting *Myers*, 550 F.2d at 1044).

> the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing.

Hodges, 770 F.2d at p. 1479.

The evidence involving the other offenses invited the jury to convict on the general basis that appellant was a sex offender, rather than on the exclusive basis of evidence regarding the incident with Samson. This propensity evidence rendered the trial fundamentally unfair, in several ways.

First, as the Supreme Court has recognized, propensity evidence has the effect of "overpersuading" jurors on the question of character, so that they cannot be impartial in evaluating the evidence of the charged crime. (See, *Michelson*, 335 U.S. at p. 475-476.) Overpersuasion is particularly powerful where, as here, the evidence which was used to prove propensity included particularly emotional offenses, such as child molestation with Christina, forcible incest with April and Rachel, binding the victims with Rachel and Amy, and kidnap for sexual purposes with Aleda. This type of evidence is highly likely to arouse outrage among the jurors. Where a defendant is portrayed as so morally depraved, dispassionate evaluation of the evidence becomes so difficult that a fair trial cannot be guaranteed.

Second, the propensity evidence jeopardized the presumption of innocence. The jury was instructed, in effect, that there is an intermediate category between "presumed innocent" and "proved guilty" of the crime charged. That is "presumed guilty of being a sex offender," and therefore *more likely* to be guilty of the crime charged than someone without such a predisposition. Thus, on the basis of a finding unrelated to the facts of the charged crime, appellant was stripped of the presumption of innocence.

Because the wrongful admission of this evidence deprived appellant of the right to due process of law, it was violative of his fundamental constitutional rights. When an error at trial deprives a criminal defendant of federal constitutional rights, the error is presumed to be prejudicial, and a reversal is

required, unless the beneficiary of the error can show the error to be harmless. (*Chapman v. California* (1967) 386 U.S. 18.)

Because of the incredibly incendiary nature of this evidence of multiple rapes, child molestations, abductions, binding the victims, and other offenses of this nature, it is not possible to conclude that a jury would not have reached a different result.

Finally, because this evidence was so inflammatory, it would naturally skew the jury's deliberations. Therefore, the admission of this evidence violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans*(1982) 456 U.S. 605, 611.)

Consequently, a reversal of the conviction and death penalty is required.

IV

APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WERE VIOLATED BY THE TRIAL COURT'S INSTRUCTION THAT ALLOWED THE JURY TO FIND HE HAD A PROPENSITY FOR COMMITTING SEX OFFENSES FROM WHICH IT COULD BE INFERRED, BASED ON THE EVIDENCE OF NON-MURDER OFFENSES CHARGED IN THE CURRENT PROCEEDING, THAT HE COMMITTED MALICE MURDER

The trial court erred in the instructions to the jury as to the use of evidence of other crimes admitted to prove disposition to commit the charged offense in this case.

As will be explained, if there are *charged* counts of sexual misconduct, the evidence supporting those charges may not be used to prove disposition to commit other offenses charged against the defendant.

While the evidence of these offenses would obviously be admitted as evidence of the charged crimes, it is the use of the facts of those offenses to prove propensity, as allowed for in the instructions given to the jury, that is improper.

The flaw in the instructions in this case stemmed from the fact that they improperly allowed the jury to find disposition for the charged offense from the commission of other charged offenses. The error deprived appellant of the right to due process of law, thereby requiring a reversal of the conviction entered below.

A. The Instructions Relating to Evidence Code Section 1108.

As explained above (*ante*, at pp. 82-83, search 1101 section), the prosecution sought to introduce evidence of appellants' prior sex offenses under both sections 1101 and 1108. As to section 1108, the court ruled that evidence pertaining to the incidents involving Christina, Aleda, Rachel, and Amy would be

admissible for the purposes of proving the defendants' propensity or disposition to commit the charged crimes under section 1108. (5CT 1205.)

Prior to the testimony of Aleda, the jury was instructed with the language of CALJIC No. 2.50.1 that

> Evidence will be introduced for the purpose of showing that the defendants engaged in a sexual offense on one or more occasions other than that charged in this case.....
>
> If you find that a defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had this disposition to commit sexual offenses. If you find that a defendant had this disposition you may, but are not required to, infer that he or she was likely to commit and did commit the crimes of which he or she is accused.
>
> However, if you find beyond a reasonable doubt that the defendant committed the prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the charged crime.

(17RT 3990-3991, 138 CT 36347.)

Later, during jury instructions, prior to deliberations, the jury was instructed with modified versions of CALJIC Nos. 2.50 and 2.50.01. (34RT 7323-7324, 7326-7327; 138CT 36347.) Apart from changes in the future tense of "evidence will be introduced...." to the past tense of "evidence has been introduced," the instructions given at the end of trial were identical to those given prior to the testimony of Aleda Doe.

There were no limitations on the testimony of Sharona or April as to the proper use of evidence of the sex offenses alleged against them. As a result, it is likely that in considering prior sexual offenses as evidence of disposition, the jury considered the crimes against Sharona and April for this purpose, even though, as will be seen, those offenses cannot be used to show disposition.

The current case presents an unusual question – may the jury consider offenses to show propensity when those very offenses have been charged and (at least some of them) are being adjudicated by the jury in the *same* proceeding? It

presents a further question: if only uncharged offenses are admissible for this purpose, what instructions must be given as to any other sexual offenses that are being charged, so as to prevent confusion on the part of the jury?

B. The Relevant Law.

Evidence Code section 1108 allows evidence of prior sex offenses to be admitted in a current sex offense case to show that a defendant has a disposition or a propensity to commit the charged crimes. CALJIC No. 2.50.01 accordingly instructs jurors that they may infer from such evidence that a defendant is likely to have committed the crimes with which he is currently charged from a finding of such a disposition.

The due process clause of the Fifth and Fourteenth Amendments guarantees a defendant's right to a fundamentally fair trial. Due process prohibits the use of state procedures that offend a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental; (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105) and procedures which undermine "the ultimate integrity of the fact finding process." (*Chambers v. Mississippi* (1973), 410 U.S. 284, 295, quoting *Berger v. California* (1969) 393 U.S. 314, at p. 315.) Thus, the Due Process Clause precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) Propensity evidence has long been considered suspect on this count because of its tendency to over-persuade. (*Old Chief v. United States* (1997) 519 U.S. 172, 181; *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Falsetta* (1999) 21 Cal.4th 903, 913-915.) Once jurors learn the defendant has committed other, similar crimes, they are likely to turn the presumption of innocence on its head. "[O]ur decisions exercising supervisory

power over criminal trials . . . suggest that evidence of prior crimes, introduced for no purpose other than to show criminal disposition, would violate the Due Process Clause." (*Spencer v. Texas* (1967) 385 U.S. 554, 574-575, conc. and dis. opn. of Warren, C.J.) For example, the Ninth Circuit has recognized that improperly admitted "propensity" evidence violates the due process rights of the accused. Thus, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, evidence of the defendant's possession of a weapon that could not have been the murder weapon was irrelevant to the charged crime and was therefore improperly admitted to prove his character as a person who had the propensity to own knives. The Ninth Circuit held that the prohibition of "other acts evidence" is so firmly established in the principles of Anglo-American jurisprudence that it is a component of "fundamental fairness" for due process purposes. (*Id.*, at p. 1380.)

A related due process principle is the requirement that, in criminal cases, the state prove every factual and legal element of the offense charged beyond a reasonable doubt. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364; *People v. Roder* (1983) 33 Cal.3d 491, 497.) Jury instructions relieving prosecutors of this burden violate a defendant's due process rights, subvert the presumption of innocence and invade the truth-finding task assigned solely to juries in criminal cases. (*Francis v. Franklin* (1985) 471 U.S. 307; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Kobrin* (1995) 11 Cal.4th 416; *Roder*, 33 Cal.3d 491.) Jury instructions concerning prior crimes evidence must not abrogate the requirement of proof beyond a reasonable doubt of all of the elements of the charged offenses. Due process still requires that the jury be convinced beyond a reasonable doubt of the "ultimate fact" of the defendant's guilt of the crime for which he is currently on trial. (*People v. Medina* (1995) 11 Cal.4th 694, 763-764; see also *People v. Lisenba* (1939) 14 Cal.2d 403, 430.)

Evidence Code sections 1108 and 1109 create an exception that deviates from the general rule against propensity evidence in sex offense (section 1108)

and domestic violence cases (section 1109). Appellant acknowledges that this Court has upheld Evidence Code section 1108 against a federal constitutional challenge. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 916-919.) Appellant also acknowledges that this Court has upheld CALJIC No. 2.50.01. (*People v. Reliford* (2003) 29 Cal.4th 1007.)

However, the new provisions do not *always* render all sex offense propensity evidence admissible. "[S]ection 1108 passes constitutional muster if and only if section 352 preserves the accused's right to be tried for the current offense." (*People v. Harris* (1998) 60 Cal.App.4th 727, 733.) In order to assure that "section 352 affords defendants a realistic safeguard in cases falling under section 1108," courts must engage in a careful weighing process. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 916-918.)

Given such due process considerations, even if the constitution does not *generally* forbid sex offense propensity evidence, the instruction in this case violated appellant's due process and fair trial rights. Indeed, allowing the evidence supporting the charges involving Sharona and April in the case to be used to show propensity was a use of section 1108 and CALJIC No. 2.50.01 that has apparently not previously been contemplated by the courts.

This is because the "propensity" evidence was admitted as proof of specific charged offenses at issue in the trial. Therefore, appellant never even had an opportunity to object to the admission of the evidence under section 352 as to

these incidents, nor did the court exercise any discretion in deciding whether the evidence was admissible. Significant trial time was spent in eliciting testimony about the incidents – indeed, the prosecutor was attempting to prove beyond a reasonable doubt that appellant committed the offenses.

Likewise, as noted above (*ante*, at 82-93.), there were substantial hearings on what evidence should be admitted under section 1108. However, none of those discussions involved the evidence relating to Sharona or April.

Adding to the confusion was the fact that the court's instructions – allowing the charged offense to be used for the purpose of determining guilt on every other charged offense – were inconsistent with the instruction requiring the jury to consider each crime separately. This instruction is set forth in CALJIC No. 17.02, which was given in this case and which told the jury that "you must decide each count separately." (138C.T. 36,441) As one Court of Appeal found, "[an instruction] to the effect that the jury must consider the evidence applicable to each alleged offense as though it were the only accusation, and must find as to each count uninfluenced by its verdict as to any other count . . . is a correct statement of the law." (*People v. Bias* (1959) 170 Cal.App.2d 502, 510.) Yet in this case, the jury was explicitly told to ignore this legal principle.

In *Falsetta,* this Court relied on the trial court's discretion to exclude propensity evidence under section 352 as the crucial factor meeting due process requirements. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 917-918.) However, when the prior bad act is a charged offense, a party loses the ability to object to the evidence, and the trial court loses its discretion to exclude the evidence under section 352 because the other-crimes evidence is automatically admitted as a charged crime against the defendant. Unless there are specific and precise limitations put on how the evidence of charged crimes is to be used, the jury may consider one count to be evidence as to another count.

This is impermissible because section 352 was expressly incorporated into section 1108. Section 1108 allows such evidence "if the evidence is not inadmissible pursuant to section 352." (Evid Code § 1108, subd. (a).)

Therefore, when the evidence is not part of a charged count, a court has the inherent power to exclude the propensity evidence. This is not the case when the evidence is part of a charged count. Put simply, a trial court cannot suppress evidence of one of the charges solely because of its effect on another one of the charges.

This discretion is the saving grace of section 1108. Thus, the *Falsetta* court declared:

> [T]he trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in [*People v. Fitch* (1997) 55 Cal.App.4th 172], '[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under ... section 352. (Evid. Code § 1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (Pen. Code. § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that ... section 1108 does not violate the due process clause.*' (*Fitch, supra,* 55 Cal.App.4th at p. 183, 63 Cal.Rptr.2d 753, italics added.)"

(*People v. Falsetta, supra,* 21 Cal.4th at pp. 917-918.)

Appellant is aware of the fact that the Court of Appeal rejected a similar claim in *People v. Wilson* (2008) 166 Cal.App.4th 1034. However, as will be explained, the reasoning in *Wilson* is not applicable to this case. In *Wilson*, the court rejected the reasoning of *People v. Quintanilla* (2005) 132 Cal.App.4th 572,

33 Cal.Rptr.3d 782 (*Quintanilla*)[39] where the Court of Appeal agreed with the appellant's argument that it was error to instruct the jury that it could infer criminal propensity with regard to one offense from evidence of other *charged* offenses.

In *Falsetta*, this Court emphasized that section 1108's incorporation of a trial judge's section-352 discretion was a significant factor in saving section 1108 from a constitutional attack.

Quintanilla had stated that because of this Court's reliance in *Falsetta* on the trial judge's ability to exclude unduly prejudicial propensity evidence, it would be violative of due process to permit jury consideration of that evidence when it could not have been excluded under section 352." (*Quintanilla*, *supra*, 132 Cal.App.4th at p. 582, 33 Cal.Rptr.3d 782.)

Wilson cited three reasons rejecting the reasoning in *Quintanilla*. First, the court held that the plain wording of section 1108 does not limit its application to cases involving uncharged sex offenses. Second, permitting the jury to use propensity evidence of charged offense serves the legislative purpose behind section 1108. Third, the policy concerns described in *Falsetta* are not implicated where multiple offenses are charged in the same case because the defendant does not face an the burden of defending against both the charged offense and the other uncharged offenses; he is already required to defend against all of the charges. (*Wilson* at p. 1052.)

While the *Wilson* court stated it was not persuaded that *Quintanilla* was correct, it did not have to reach that issue because the instruction in Wilson was "narrower than and distinguishable from the instruction given in *Quintanilla*."

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[39] As explained in *Wilson*, the United States Supreme Court granted certiorari for *People v. Quintanilla*, sub nom. *Quintanilla v. California* (2007) 549 U.S. 1191 [127 S.Ct. 1215, 167 L.Ed.2d 40]. After the judgment was vacated, on remand the Court of Appeal filed an unpublished opinion July 31, 2007. (*Wilson*, at p. 1052.) As a result, *Quitanilla* is not longer citable authority. Appellant discusses *Quintanilla* herein only to the extent that *Wilson* discussed that case.

(*Wilson*, at p. 1052.) In particular, in *Wilson*, prior to giving a modified instruction, the trial court actually engaged in the weighing process that this Court found "crucial" for the admission of propensity evidence in *Falsetta*, and weighed the propriety of using evidence of one offense as circumstantial evidence to prove one of the other offenses under Evidence Code section 352. (*Id.*, at pp. 1053, citing *Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.)

This is a crucial difference between *Wilson* and the instant case. The flaw in 1108 as applied to the current case is that the trial court was deprived of its discretion to exclude the evidence, that discretion being the section's saving grace. In contrast, in *Wilson*, there was affirmative evidence that the trial court actually exercised the discretion that saves section 1108 from constitutional challenge

Other reasons *Wilson* cited for rejecting *Quintilla* are also not applicable here. As noted, *Wilson* relied on the plain wording of section 1108 and the fact that permitting the use of uncharged acts served the legislative purpose of that section. However, in its first sentence, section 1108's plain wording also includes the ability to exclude the evidence under section 352, and that discretion serves the policies of 1108, as well. Furthermore, if the ability to exclude certain uncharged acts saves section 1108 against due process challenges, then the "plain wording" of section 1108 must be considered in light of constitutional limitations.

Finally, it must be noted that the failure to exercise discretion is not reviewed in the same manner as is the case when a court actually exercises its discretion, and the challenge is based on a claim of an abuse of that discretion. Rather, the trial court's failure to exercise discretion is "itself an abuse of discretion." (*Garcia v. Santana* (2009) 174 Cal.App.4th 464, 477, *Marriage of Gray* (2007) 155 Cal.App.4th 504, 515.)

This is an important difference because while a claim of abuse of discretion is reviewed in a deferential manner, if there is a failure to exercise discretion at all, there is nothing to be deferential towards, and the error is reversible per se. (*People v. Bigelow* (1984) 37 Cal.3d 731, 742.)

Although CALJIC No. 2.50.01 was a standard CALJIC instruction, this does not provide any basis for giving it if it is an incorrect statement of the law. In an en banc decision, the Ninth Circuit has indicated that trial judges who rely solely on CALJIC face reversal for the denial of a defendant's constitutional rights. In *McDowell* v. *Calderon* (9th Cir., 1997) 130 F.3d 833 the court stated:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions.

(*Id.*, at p.836.)

The Ninth Circuit made clear that standard instructions are not always sufficient to assure that the jury will fulfill its purpose.

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of "standard" jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong.

(*Id.*, at p. 841.)

One of the most basic duties of a trial court is to correctly instruct the jury regarding the correct principles of law.

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.

(*People* v. *St. Martin* (1970) 1 Cal.3d 524, 531; see also *People* v. *Sedeno* (1974) 10 Cal.3d 703; *People* v. *Breverman* (1998) 19 Cal.4th 142, 154.)

When a judge fails in his or her duty to assure the jury's proper conduct and determination of questions of law involving "constitutional requirements," the due process clause of the Fourteenth Amendment is implicated. (*McDowell v. Calderon, supra*, 130 F.3d 833 at 839; *Estelle v. McGuire* (1991) 502 US 62.)

The failure to adequately or correctly instruct the jury lessens the prosecution's burden and allows the jury to draw impermissible inferences of guilt in violation of a defendant's state and federal constitutional right to trial by jury and due process. (California Constitution, Article 1, Sections 14 and 15, United States Constitution, Sixth and Fourteenth Amendments; *Yates v. Evatt* (1991) 500 U.S. 391; *Carella v. California* (1989) 491 U.S. 263; *People v. Roder* (1983) 33 Cal.3d 491, 498-499; *People v. Wandick* (1991) 227 Cal.App.3d 918; *Smart v. Leeke* (4th Cir. 1988) 856 F.2d 609.)

Finally, because of the inherently inflammatory nature of this type of evidence, a jury is likely to be overwhelmed by incidents of violent sex offenders, cruising the streets, preying on defenseless women. As explained above, section 1108 passes constitutional muster only because of the safety net provided by section 352, which ensures that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (*Ante*, at p. 155.) Because this safety mechanism is not present when the evidence used to prove propensity, it has a negative impact on the reliability of the truth seeking process in violation of the heightened reliability requirements of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; Gilmore v. Taylor (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

From the foregoing, it is clear that the due process clause prohibits the prosecution from using evidence of a charged offense as Evidence Code section 1108 evidence to prove another charged offense. However, as will be shown, that is what the instructions in this case allowed.

C. Application Of The Law To The Facts Of This Case.

As noted, when there are sex offenses that are charged counts, those counts should not be used for propensity evidence under section 1108.

The problem with the instructions given in this case is that they create an ambiguous situation where the jury is told in the first paragraph of CALJIC No. 2.50.01 (see 138CT 36347), that evidence of sexual offenses other than those charged in the case has been introduced.

However, the jury is then told in the seventh paragraph of CALJIC No. 2.50.01 (see 138CT 36347), if they find the defendant has committed a prior sexual offense it can infer a disposition to commit sexual offenses.

The problem with this instruction is that the language in the seventh paragraph does not limit the offenses that may be considered for this purpose to the uncharged, prior sexual offenses. Thus, the jury is told evidence of uncharged offenses was introduced, but it could use prior sexual offenses for propensity, and it was not limited to the uncharged offenses in making this inference.

In this light, it is instructive to look at the newer instructions contained in the CALCRIM series.

For example, CALCRIM No. 1191 provides in relevant part:

> The People presented evidence that the defendant committed the crime[s] of <insert description of offense[s]> that (was/were) not charged in this case.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]....
>
> If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that

> evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] <insert charged sex offense[s]>, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence.

Thus, CALCRIM No. 1191 begins by informing the jury that this instruction deals only with uncharged offenses. However, it then tells that jury that "this" evidence can only be considered if "the uncharged offense" was proven by a preponderance of evidence. Furthermore, the jury is instructed that if it believes the defendant committed the "uncharged" offense it could infer that the defendant was disposed to commit sexual offenses. Finally, the jury is told that the use of the "uncharged" offense is one factor that may be used in proving the charged offense.

From the foregoing it is clear that CALCRIM 1191 consistently directs the jury's attention to the fact that the propensity evidence relates only to uncharged acts and it is that evidence, the evidence of uncharged crimes, that may be used for the desired inference.

In contrast, CALJIC No. 2.50.01 mentions that evidence of uncharged offenses was introduced. However, it then, without referring to uncharged offenses, tells the jury that if it finds the defendant committed **a** prior sex offense it can find disposition to commit the other crimes from that fact. Nothing in the instruction tells the jury that in deciding the issue of disposition it is limited to the uncharged offenses. Rather, while evidence was introduced regarding uncharged offenses, it can find disposition from any "prior sexual offense."

This pattern of specifically referencing *uncharged* crimes for the jury's consideration is repeated in other CALCRIM instructions covering analogous provisions.

For example, CALCRIM 852, the instruction for Evidence Code section 1109, the companion statute to section 1108 which allows disposition evidence to

commit a domestic violence offense from a prior domestic violence incident, provides in relevant part:

> The People presented evidence that the defendant committed domestic violence that was not charged in this case...
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged domestic violence....
>
> If you decide that the defendant committed the uncharged domestic violence, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence and, based on that decision, also conclude that the defendant was likely to commit [and did commit] <insert charged offense[s] involving domestic violence>, as charged here. (Italics added.)

Thus, CALCRIM 852 first explains that it is dealing with uncharged offenses and the jury can consider evidence of "this evidence" for the purposes described. It then tells the jury what it may infer from the finding of the *uncharged* offense.

Similarly, CALCRIM 375, the instruction covering Evidence Code section 1101, also specifies that it applies to uncharged offenses.

Again, this instruction repeatedly reminds the jury that the evidence that may be used for the purposes listed is evidence of offenses that were not charged.

Although this case was tried before the adoption of the CALCRIM instructions, it is illustrative to consider those instructions in determining whether they give clearer instructions to the jury.

As explained in the Preface to CALCRIM, the task of the CALCRIM committee "was to write instructions that are both legally accurate and understandable to the average juror." The necessity for this undertaking was the widely held opinion, reflected by the Blue Ribbon Commission on Jury System Improvement, which had stated that, "jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror." (Preface to CALCRIM.)

The fact that CALCRIM revised the CALJIC instruction in the manner in which it did is indicative of the inherent ambiguity of that instruction, as explained above, and of a practical way or resolving the ambiguity.

Finally, as noted above, while the instruction regarding this evidence was given before the testimony of Aleda, it was not repeated before the testimony of Christina, Rachel, Amy, Sharona, or April.

The evidence of prior sexual offenses that could be used for propensity included the evidence of the offenses against Christina, Rachel, and Amy, but not Sharona or April.

However, the jury hears evidence of all these offenses with no distinction being made as to the use of the prior crimes against Sharona as opposed to the use of the prior crimes against Rachel, apart from a casual mention in the first paragraph of the instruction referring to the fact that evidence was introduced regarding an uncharged offense. A lay jury simply will not intuitively draw the distinction required by this situation to not draw a similar inference from evidence of a charged offense. Indeed, if a particular sexual offense, for example the one against Amy, is relevant for one purpose, why should not the same logic apply as to the evidence of another offense, such as the one against April?

Courts have long noted that certain situations require a form of mental gymnastics on the part of jurors that is simply not possible. The type of mental gymnastics required for this type of reasoning brings to mind the comments of Mr. Justice Cardozo:

> Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.

(*Shepard* v. *United States* (1933) 290 U. S. 96, 104.)

From the foregoing, it is clear that under the instructions given, the jury could have improperly used the evidence from Counts 1, 2, and 3 as the proof of disposition to commit Count 4.

D. Prejudice

Appellant was clearly prejudiced by the instruction allowing the jury to find a disposition to commit the current charged offense from another charged offense.

When an error at trial deprives a criminal defendant of federal constitutional rights, the error is presumed to be prejudicial, and a reversal is required, unless the beneficiary of the error can show the error to be harmless. (*Chapman v. California* (1967) 386 U.S. 18.)

When applying the federal reversibility standard in the context of an error affecting the right to a jury trial, a reviewing court cannot simply ask whether there was "overwhelming evidence" supporting the finding in question. A more rigorous form of *Chapman* analysis, focusing on what facts the fact-finder necessarily found in reaching a decision, is required and the error is not harmless if the omitted element is susceptible to dispute:

> If ... the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error–*for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding*–it should not find the error harmless. (*Neder v. United States*, *supra*, 527 U.S. at p. 19, italics added.)

In this case, the incredible inflammatory nature of these offenses was bound to overwhelm a jury. Clearly a jury that hears how appellant raped his daughter and one of her friends is going to be overwhelmed by such evidence. For the trial court to admit the evidence without having the discretion to exclude it, and then use it propensity evidence, is bound to cause the jury to convict and sentence to death, regardless of other factors.

V

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WHEN IT ERRONEOUSLY INSTRUCTED THE JURY THAT A PERSON WHO AIDS AND ABETS IS EQUALLY GUILTY OF THE CRIME COMMITTED BY A PERPETRATOR, BECAUSE THE LAW CLEARLY RECOGNIZES THAT AN AIDER AND ABETTOR MAY BE GUILTY OF A LESSER-INCLUDED CRIME

A. Background

The prosecutor argued that appellant and Michaud were guilty of the first degree murder of Vanessa Samson based upon three alternative theories of culpability – premeditated express malice murder, felony murder based on kidnapping, and felony murder based on rape by instrument. (33RT 7103-7104.)

There were no eyewitnesses to the actual killing and therefore no evidence as to which person was the actual killer. The prosecutor argued that appellant was criminally liable for the murder either because he actually killed or because he aided and abetted the actual killer. (33RT 7094-7099.)

The trial court instructed the jury on the general principles of aiding and abetting in accordance with CALJIC No. 3.00, as follows:

> Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. *Each principal, regardless of the extent or manner of participation*[,] *is equally guilty.* Principals include: [¶] 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or [¶] Those who aid and abet the commission or attempted commission of the crime.

(138CT 36382; 34RT 7347; italics added.)

Thus, the trial court expressly instructed the jury in language that is the counterpart of this language taken from CALCRIM No. 400 – a "person is equally

guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."[40]

As appellant will show below, the instruction that stated that the actual killer and the aider and abettor are equally guilty of the crime was incorrect. An aider and abettor's mens rea is personal to the aider and abettor; a fortiori, an aider and abettor of first degree murder is not always as guilty as the actual killer and may, instead, be guilty of a lesser-included crime. (*People v. McCoy* (2001) 25 Cal.4th 1111.)

Although appellant's attorney did not raise this issue, any arguable lapses in defense counsel's objections have no legal consequence, because a trial court has an independent duty to correctly instruct the jury regarding applicable legal principles.[41] Furthermore, because the facts of this case are such that the appellant's liability may not have been the same as the liability of the actual killer, the instructional error may not be said to have been harmless beyond a reasonable doubt.

B. An Aider And Abettor Of First Degree Murder Is Not Always As Guilty As The Actual Killer

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, the Court of Appeal concluded that CALCRIM No. 400's direction that "[a] person is equally guilty of

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[40] CALCRIM No. 400 states: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

[41] Furthermore, defense counsel for Michaud objected to the "principals are equally guilty" language, but did so in the context of discussions regarding the special circumstance instructions. (33RT 7063.) As noted previously, the trial court previously had stated that it would deem counsel for each defendant to have joined in all motions. (1 RT 32.)

the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it," was "generally correct," but misleading under the "exceptional" factual circumstances present in that case.[42]

The "exceptional" factual circumstances to which *Samaniego* referred are the very factual circumstances present here – specifically, the absence of any evidence as to the identity of the actual killer.

Thus, to the extent it failed to inform the jury that an aider and abettor can be guilty of a lesser crime than the perpetrator, the pattern instruction given in appellant's case (CALJIC No. 3.00) was defective for the same reason the pattern instruction given the jury in *Samaniego* (CALCRIM No. 400) was defective.[43]

In appellant's case, the prosecutor argued the actual killer committed first degree murder in one of three ways – either premeditated express malice murder or felony murder based on either kidnapping or rape by instrument. If the actual killer committed first degree murder, CALJIC No. 3.00 required the jury to convict appellant of first degree murder as an aider and abettor without regard for his individual mental state. Under the instruction the jury would have not had to make factual determinations regarding appellant's intent, willfulness, deliberation and premeditation.

This instruction is clearly wrong, as *Samaniego* recognized. An aider and abettor may be convicted of a lesser offense than the perpetrator.

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[42] The Court of Appeal stated: "Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it' (CALCRIM No. 400, italics added), while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.)

[43] In *People v. Nero* (2010) 181 Cal.App.4th 504, which appellant discusses below, the Court of Appeal (Second Appellate District, Division Three) reached the same conclusion and held that the analogous "equally guilty" language in CALJIC No. 3.00 incorrectly stated the law.

People v. McCoy (2001) 25 Cal.4th 1111 explained that in a prosecution not involving a theory of natural and probable consequence liability, the aider and abettor may not necessarily be guilty of the same crime as the perpetrator but, instead, may be guilty of crimes either more serious or less serious than the perpetrator's crime. This Court explained:

> Aider and abettor's liability is thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person "chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts. . . .'" (Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, quoted in *People v. Prettyman*, *supra*, 14 Cal.4th at p. 259.) But that person's own acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's.

(*People v. McCoy*, *supra*, 25 Cal.4th at p. 1118.)

Just as *Samaniego* recognized that the foregoing language cannot be reconciled with the "equally guilty" language of CALCRIM No. 400, it cannot be reconciled with the identical language in CALJIC No. 3.00.

In *Nero*, the defendant and his codefendant sister were charged with murder. The evidence at trial showed the defendant stabbed the victim. The prosecution theorized that the codefendant sister aided and abetted him by handing him the knife. (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 510.)

The trial court instructed the jury with CALJIC No. 3.00, which, like CALCRIM No. 400, provides: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. *Each principal, regardless of the extent or manner of participation, is equally guilty.* Principals include those who directly and actively commit or attempt to commit the acts constituting the crime, or, two, those who aid and abet the commission or attempted commission of a crime." (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 510, emphasis in the original.) During deliberations, the jury asked if they could

convict the codefendant sister of a lesser homicide-related offense. The trial court responded by rereading CALJIC Nos. 3.00 and 3.01, including the language in CALJIC No. 3.00 that each principal is equally guilty. The jury convicted both defendants of second degree murder.

Nero held the trial court misinstructed the jury. The court relied in particular on *McCoy*'s recognition that the aider and abettor's mens rea might be different than the direct perpetrator's mens rea, that the aider and abettor's mens rea was personal to the aider and abettor. (*Nero*, *supra*, 181 Cal.App.4th at p. 514.)

It is also noteworthy that where *Samaniego* qualified its conclusion (i.e., that the "equally guilty" language of CALCRIM No. 400 was incorrect in "exceptional" factual circumstances), *Nero* found CALJIC No. 3.00 to be confusing "even in unexceptional circumstances." 181 Cal.App.4th at 518. The court noted that even though the jury had received other instructions suggesting that the codefendant's mental state was not tied to the defendant's (e.g., CALJIC Nos. 3.31.5, 2.02, 17.00)[44], the deliberating jury still asked whether they could find the codefendant guilty of a greater or lesser offense than the defendant.

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[44] *Nero* said:

> We believe that even in unexceptional circumstances CALJIC No. 3.00, and CALCRIM No. 400, can be misleading. Consider what happened here. In addition to the aider and abettor instructions, the jury received instruction on murder and on manslaughter. They were also instructed about the specific intent or mental state necessary for the crimes. For example, they were told that for the "crime charged in Count 1 and lesser crimes thereto, namely, second degree murder and voluntary manslaughter, there must exist a union or joint operation of act or conduct and a certain specific intent or the mental state in the mind of the perpetrator. Unless this specific intent or the mental state exists, the crime to which it relates is not committed." (CALJIC No. 3.31.5.) The jury was also instructed that "you may not find the defendant guilty or the defendants guilty of the crimes . . . in count 1 or the crime of second degree murder and voluntary manslaughter which are lesser crimes, unless the proved

Thus, *Samaniego* and *Nero* are in agreement that the "equally guilty" language set forth in CAJIC No. 3.00 and CALCRIM No. 400 is legally incorrect. Accordingly, the trial court erred in instructing appellant's jury that "each principal, regardless of the extent or manner of participation[,] is equally guilty."

C. A Trial Court Is Obligated to Correctly Instruct the Jury on the Applicable Law

As appellant has indicated above, defense counsel did object to the "principals are equally guilty" language, but did so in the context of a discussion concerning special circumstance instructions. (33RT 7063.) Any lapses in counsel's objection, however, do not bar appellant's claim. A trial court has an independent duty to correctly instruct the jury regarding applicable legal principles.

Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review

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> circumstances are not only, one, consistent with the theory that the defendant had the required specific intent or mental state, but, two, cannot be reconciled with any other rational conclusion. [¶] Also, if the evidence as to any specific intent or mental state permits two reasonable interpretations, one of which points to the existence of the specific intent or mental state and the other to its absence, you must adopt that interpretation which points to its absence. If, on the other hand, one interpretation of the evidence as to the specific intent or mental state appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (CALJIC No. 2.02.) (*Nero, supra*, 181 Cal.App.4th at p. 518.)

In addition, the jury in *Nero* was instructed to "decide separately whether each of the defendants is guilty or not guilty." (CALJIC No. 17.00.) (*Nero, supra*, 181 Cal.App.4th at p. 518.)

> any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

In *People v. Graham* (1969) 71 Cal.2d 303, the trial court erred in failing to instruct on manslaughter due to diminished capacity. Not only was no defense request for such instruction made, but all three defense counsel acquiesced in the court's statement that "'everyone agrees that there is no evidence from which involuntary manslaughter could be found; the only type of manslaughter that could be found here would be voluntary.'" (*Id.*, at p. 317.) Despite this, this Court concluded in *Graham* that a waiver of defense counsel cannot nullify the trial court's sua sponte duty to instruct the jury on the general principles of law relevant to the case (*Id.*, at pp. 317-318.) An exception exists where "defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of a [correct] instruction." (*Id.*, at p. 318; *People v. Wickersham* (1982) 32 Cal.3d 307, 331.) In all other cases, instructions which misstate the elements of a crime or theory of criminal liability may be reviewed on appeal without need for an objection in the trial court.

One effect of the incorrect instruction was to expand liability for the aider and abettor in a circumstance where none existed. There are multiple plausible reasons to infer that Michaud, not appellant, killed Vanessa Samson. For example, in the Aleda incident, appellant deferred to Michaud's decision as to whether or not to commit a murder. Likewise, only Michaud's fingerprints were found on the curling iron, and the rope was found in Michaud's pocket.

Accordingly, the instruction given here, which misstated the elements of the theory of criminal liability, affected the substantial rights of the appellant and may be reviewed on appeal without need for an objection in the trial court.

D. The Failure to Instruct Correctly on the Elements of Aiding and Abetting Was Not Harmless Beyond a Reasonable Doubt

Failure to instruct correctly on the elements of aiding and abetting is assessed under the harmless beyond a reasonable doubt standard. (*People v. Hardy*_(1992) 2 Cal.4th 86, 185-186; *People v. Dyer* (1988) 45 Cal.3d 26, 64.) Misinstruction on elements of a crime is federal constitutional error. *(Neder v. United States* (1999) 527 U.S. 1, 144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Because there were no eyewitnesses to the actual killing of Vanessa Samson and no evidence as to whether appellant was the actual killer, there are multiple plausible inferences that can be drawn from the little that is known about the killing.

The prosecutor's argument to the jury embraced a series of plausible inferences. The prosecutor argued that appellant and Michaud were a mixture of an aider and abettor and the actual perpetrator where conduct was concerned. (33RT 7097.) The prosecutor argued appellant and Michaud acted with express malice in their stated intention to go "hunting," i.e., to "stalk someone and kill them," on the "biggest shopping day of the year," the day after Thanksgiving. (33RT 7104.) The prosecutor further argued that appellant and Michaud intended to kidnap Vanessa and intended to commit the crime of rape by instrument upon her. (33RT 7109-7113.)

However, even if it were reasonably inferred that appellant and Michaud planned to go "hunting," it is equally reasonable to infer that the actual killer made an individual decision to kill Vanessa in acts that were neither discussed

with nor conveyed to the other. Under these circumstances, the jury could have found unpremeditated or implied malice second degree murder as to the aider and abettor.

Furthermore, in the absence of evidence that both appellant and Michaud were present at the time Vanessa was killed, it is plausible to infer they were not, and that the actual killer made an individual decision to kill that was neither discussed with nor conveyed to the other. Again, under these circumstances, the jury could have found unpremeditated or implied malice second degree murder as to the aider and abettor.

The case for first degree murder committed with express malice, premeditation, and deliberation may have been strong, but it should and must be distinguished from the determination of appellant's involvement in the case. The case for first degree murder was strong for any person identified as the actual killer, but the evidence did not allow that identification. As to the other perpetrator, there is an inherent reasonable doubt whether Vanessa's killing was previously planned or represented instead an individual decision by the actual killer.

For these reasons, the first degree murder conviction must be reversed.

VI

THE PROSECUTOR COMMITTED MISCONDUCT IN STATEMENTS TO THE JURY BY IMPROPERLY APPEALING TO THE JURORS' PASSIONS AND SYMPATHIES AND ARGUING MATTERS NOT BASED ON THE EVIDENCE. THE PROSECUTOR'S MISCONDUCT DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HIS RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

Appellant here contends that various portions of the prosecutor's statements to the jury constituted misconduct.[45] These statements, some of which were unrelated to facts proven in the case, were calculated to engage the passions and sympathies of the jury for the victims and against appellant. The prosecutor's misconduct deprived appellant of his constitutional rights to due process and a fair trial under the Fifth and Fourteenth Amendments and his right to a reliable determination of the facts in a capital case guaranteed by the Eighth Amendment.

As this Court recently explained, "The standards governing review of misconduct claims are settled. A prosecutor commits misconduct under the federal Constitution when his or her conduct infects the trial with such ' "unfairness as to make the resulting conviction a denial of due process." ' (*People v. Hawthorne* (2009) 46 Cal.4th 67, 90, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under state law, a prosecutor

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[45] *In People v. Hill* (1998) 17 Cal.4th 800, this Court made clear that a showing of bad faith is not required to establish prosecutorial misconduct in argument to the jury. In so doing, this Court said of the type of error claimed here: "We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*Id.*, at pp. 822-823 and 823 fn.1.)

who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969.)'" (*People v. Parson* (2008) 44 Cal.4th 332, 359.)

A. **The Prosecutor's Statements In Issue**

From the outset of the trial process, the prosecutor, Ms. Backers, sought to influence and control the jury's view of Michaud and appellant by appealing to the jury's passions and prejudices. During her opening statement, Ms. Backers chose, by careful selection of descriptive words and incidents, to color the jury's view of Michaud and appellant as a couple who emulated the notorious serial killers Gerald and Charlene Gallego.[46] In statements that, frequently, impermissibly crossed the line into argument, the prosecutor described Michaud and appellant as a partnership of predators intent on committing depravities upon the young and vulnerable.

A representative sampling, including introductory remarks calling the jury's attention to the presence of the family and friends of murder victim Vanessa Samson, illustrates appellant's claim that the prosecutor sought by her comments to invoke the passions and prejudices of the jury by painting the defendants as despicable and vile and by eliciting the jury's sympathy for their victims. These reported comments also demonstrate the prosecutor's willingness to argue the case in opening statement, the trial court's repeated admonitions notwithstanding, when such argument better served the purpose of fomenting the jury's bias against the defendants:

> Your Honor, Ladies and Gentlemen of the Jury, the defendant James Daveggio, the defendant Ms. Michaud, counsel for the defendants, family and friends of Vanessa Samson, may it please the court:

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[46] Gerald and Charlene Gallego were a husband and wife who were convicted of multiple murders. See *People v. Gallego* (1990) 52 Cal.3d 115.)

> October 29, 1996, was a dark day, a very dark day. It was the beginning of a partnership, a partnership that would be formed between equal partners. It was a partnership that would have a mission, not a mission statement. . . . (16RT 3597:21-28.)
> []
> The mission of this partnership was to prey upon the young and vulnerable; to prey upon children, girls, and women. These two predators that sit before you today, the defendants, James Anthony Daveggio and Michelle Lyn Michaud, would select each of their victims carefully. They would select them in order to accomplish their goals that they had previously agreed upon, to ambush these young women and children by deceit, by a betrayal of trust or by sheerly overpowering them with brute force.
> Their goals were to abduct them, to terrorize them, to subdue them either by monumental fear or physical restraints, to inflict their own depraved will upon each of these victims, and then to physically and emotionally assault them to the very core of their being; to humiliate them and degrade them, to sexually assault them, to physically inflict pain on them, and to take pleasure in their victims' pain, to rape them, to sodomize then, to force objects into their young bodies, to do vile acts upon them, and then to threaten to kill them if they ever told a soul, that is, if they let you live to tell. (16RT 3598:13-28 to 3599:1-3.)[Do you mean 3598:13 to 3599:3? You don't need the line numbers.]

The prosecutor told the jurors that the defendants' activities spanned three states – California, Oregon, and Nevada – and that they would hear from Aleda, who had been kidnapped and sexually assaulted in Nevada and brought into California; from Michaud'a 12-year-old daughter, who was sexually assaulted near Lake Shasta and Klamath Falls, Oregon; then from Amy, Christina, Sharona, and April. (16RT3599-3600.)

The prosecutor moved on to a description of the charged crimes and special circumstances, and set forth the law and the jurors' obligations, as the following sample concerning the murder charge illustrates:

> As you know, count four is the murder charge. Count Four is a charge where each defendant is charged with murdering Vanessa Samson. Attached to that count are two separate and distinct special circumstances.

> The first special circumstance is kidnapping, that the victim was kidnapped while the defendant was engaged in or an accomplice in the commission of kidnapping, or that the murder was committed during the immediate flight thereafter [sic] the kidnapping, and that the murder was carried out in order to advance the kidnapping, or facilitate escape from the kidnapping, or avoid detection from the kidnapping.
>
> So that first special circumstance charges that the murder occurred during the kidnapping, during the immediate flight thereafter, or that it was done in order to facilitate the kidnapping or avoid detection.
>
> The court will instruct you that if you found that they had the intent to kidnap and the intent to kill that that special circumstance is true.
>
> The second special circumstance charged against each defendant is known as a special circumstance of rape by instrument; that the murder was committed while the defendant was engaged in or an accomplice in a rape by instrument, or the immediate flight thereafter, and that the murder was committed in order to carry out that rape by instrument, or facilitate it, or escape from it, or avoid detection.
>
> Again, if you find that the defendants had both the intent to kill and the intent to commit rape by instrument, that special circumstance is true.

(16RT 3602- 3603.)

The prosecutor described the charges against Michaud and appellant to the jury and then told the jurors that in addition to testimony from charged victims Sharona and April, they would also hear testimony from other victims of the defendants under "special laws." At this point, the trial court interrupted the prosecutor and expressly told her that she was impermissibly arguing the case.

> [The Prosecutor Ms. Backers]: Let me take a moment now to explain to you why you will be hearing from those victims even though they are not charged crimes.
>
> There are special laws that provide the court a means of allowing you to hear that evidence under 1101 and 1108. Normally there is a rule that you cannot consider character evidence.
>
> [The Court]: Excuse me, Ms. Backers, approach the side bar, please.

[Whereupon, the following proceedings were held at side bar.]

[The Court]: I think you are getting in the area of argument. You are not suppose [sic] to go over what the law is in opening statement.

[Ms. Backers]: Okay. I am explaining to them –

[The Court]: I know you are explaining, but that is for me to tell them and for argument as to why. I don't think you should go over that in opening.

(16RT 3603:24-28 to 3604:1-13.)

The prosecutor responded to the court's admonition by telling the jurors that Michaud and appellant "were completely obsessed with sexual depravity and serial murder." (16RT 3604:27-28.) The prosecutor continued:

> The defendants, Daveggio and Michaud, actually studied and discussed the planning, the preparation and the methods of famous serial killers. Both of them read books on serial murderers. In fact, the defendant, James Daveggio, would often brag about how he had studied and memorized the cases and the method of every documented serial killer, and not just studied them, but learned from their mistakes.
>
> The defendants collected trading cards, a collection of trading cards that glorified infamous serial killers. They discussed these infamous serial murderers and their tactics with many friends and relatives. And out of all of those murderers they heard of and studied, there was one pair of murderers that the defendants especially admired, it was a couple, a man and wife couple, an evil pair of serial murderers. It was the pair that became known as those who committed the sex slave murders.
>
> These two serial murderers were the defendants' personal heroes. They spoke of them often. The sex slave murders were committed by Gerald Gallego and Charlene Williams Gallego. When they met in the late '70's, it was Gerald Gallego and Charlene Williams. Soon they became crime partners and married one another, becoming the Gallegos. They committed 11 brutal murders that became known as the sex slave murders. They even called their victims disposable love slaves. The Gallegos would use their prey in every sexual perverted way, then throw them away like disposable love slaves.

(16RT 3605:3-28.)

The prosecutor expanded on the defendants' individual attempts to emulate the Gallegos (see, e.g., 16RT 3606-3608) and then turned the jurors' attention to People's Exhibit 12, on which she had affixed trading cards depicting serial killers and mass murderers. The prosecutor told the jury that the Gallegos' card was on top when the trading cards were found among the defendants' things and claimed that meant the Gallegos were the "personal heroes" of Michaud and appellant. (16RT 3608.)

The trial court once more interrupted the prosecutor's opening statement to admonish the prosecutor that she was continuing to argue the case to the jury.

> [Ms. Backers]: And what was the information in each of the defendants' head [sic] that made these defendants [the Gallegos] their personal heroes, the card they had on top, card no. 65, the front of the card has a picture of the two Gallegos covered in blood.
>
> The card reads:
>
> "Charlene Williams, born in 1958, was a gifted violinist with an I.Q. of 160, and the adored child of an affluent Stockton, California, family. In 1978, she met Gerald Gallego, then 33 years old, on a blind date, and from that point on was virtually hypnotized by the cruel and hardened man. Gallego was the son of a convicted cop killer and often boasted that he was 'touched by the devil.'"
>
> [The Court]: Excuse me. Ms. Backers, can I see you and counsel at side bar.
>
> [Whereupon, the following proceedings were held at side bar.]
>
> [The Court]: This is closing argument. This is not opening statement.
>
> [Ms. Backers]: You made a finding that this goes to their state of mind.
>
> [The Court]: I understand that, but the way you are presenting it, it is an argument, okay. You are making – the way you are doing it, it is argumentative. This is not closing argument, okay. I am giving you as much leeway as I can, but you can't read everything that is on the board. You are arguing is what you are doing.
>
> [Ms. Backers]: I know, but you made a finding this particular card was relevant to their state of mind and that is the card they had.

[The Court]: I am not objecting to what it is. I am objecting on my own to the way it is being presented. It is in an argumentative form. So now you will have to –

[Ms. Backers]: Can I finish reading the card? You made a finding.

[The Court]: I know. I know I did. It goes beyond giving an outline of what you are going to show. It is argumentative.

[Ms. Backers]: We are talking about a piece of evidence we recovered.

[The Court]: I know. But they can read the card themselves. The way you are doing it, it is argument. That is all I can tell you.

[Ms. Backers]: I am asking the court whether I am allowed to finish it.

[The Court]: I won't make you stop in the middle, but I will start interposing objections in open court if you keep presenting this like argument.

[Ms. Backers]: That is fine.

(16RT 3608-3609, 3610.)

The prosecutor resumed her remarks to the jury by reading from the Gallegos' trading card. Defense counsel thereupon objected that the remarks were argumentative, but the court overruled the objection. (16RT 3610.)

Thereafter, the prosecutor began a detailed description of the abduction and multiple sexual assaults involving Aleda, which the court had previously admitted as uncharged misconduct evidence probative of, inter alia, common plan and identity, and of appellant's disposition to commit the charged crimes.[47]

The prosecutor told the jury that Daveggio sexually "assaulted this little four-foot-ten girl for 93 miles."[48] (16RT 3617.) In a representative sampling, the prosecutor said of Daveggio's assault upon Aleda:

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[47] Appellant challenges the admission of aspects of Aleda's evidence as improperly admitted character and propensity evidence in Arguments II and III in this Opening Brief.

[48] Although the prosecutor made a point of referring to Aleda as "this little girl," Aleda testified at trial that she was 20 years old, had a boyfriend, was working as a dental assistant, and was attending college evening classes on the date Daveggio sexually assaulted her. (17RT 3993-3995, 4038.)

> Daveggio forced Aleda to touch his penis and to orally copulate his penis, to put her mouth on his penis. He forced his penis into her mouth. He forced this little girl to touch his testicles with her hands. He slapped her on the buttocks, hitting her on the buttocks. He scratched her on the back. He attempted to bite her face and neck and lips. He forcibly kissed her all over.
>
> Daveggio shoved his fingers into Aleda's vagina. He shoved them into Aleda's rectum. He raped Aleda by shoving his penis into Aleda's vagina.

(16RT 3617.)

The prosecutor also said of the Aleda incident:

> Instead, Daveggio forced Aleda to touch his testicles. And then he took Aleda's hand and forced her fingers up into his rectum while at the same time he forced his penis into her mouth.
>
> He touched her buttocks with his hand. And while she was being forced to orally copulate him, he was simultaneously forcing his fingers into her rectum. While Daveggio forced Aleda to orally copulate his penis, he kissed her on the neck. He now took his penis out of her mouth and began masturbating. Daveggio ejaculated in Aleda's face. He ejaculated on her face and in her hair.

(16RT 3619.)

The prosecutor told the jury that Michaud and appellant had a long discussion about what to do with Aleda, about whether they were going to follow their "original plan," that appellant said he would leave it up to Michaud, and that Michaud said she needed some time to think about it. (16RT 3619.)

The prosecutor then said:

> While Michaud thought about whether Aleda would live or die, Daveggio allowed Aleda to get dressed. . . .

(16RT 3620.)

At the next recess, defense counsel for both defendants objected that the prosecutor's remarks were intended to inflame the jury. Counsel specifically pointed out there was no evidence that Vanessa Samson had been subjected to the type of sexual assaults claimed by Aleda and no evidence that Vanessa had

ejaculate anywhere on her person. The trial court, in turn, personally objected to the prosecutor's continued attempts to argue the case and specifically pointed to the prosecutor's statement that Michaud had contemplated whether Aleda would live or die.

> [Defense Counsel Mr. Ciraolo]: Your Honor, I will object to some of Ms. Backers' opening comments. The detail that she is presenting on Aleda Doe is only calculated to inflame the jury. The court has allowed the Aleda Doe testimony to come in for the purpose of similar [sic] and identity.
>
> There is no evidence that I can recall that this kind of conduct occurred to the victim. There is no evidence of ejaculation on Samson, the 187 victim. The court said that it can come in because it is a similar for identity. None of this detail has been indicated to have occurred to the 187 victim. It is only calculated for the prosecution to try to have the jury be inflamed and speculate that this sort of thing might have happened to Ms. Samson.
>
> So I know what the court's ruling is on the evidence, but I want to be clear that from its inception Ms. Backers is attempting to inflame this jury.
>
> [The Court]: Mr. Karl?
>
> [Defense Counsel Mr. Karl]: We agree.
>
> [The Court]: I have a bigger problem with the way it is being presented. I mean, I have about reached the limit: As Michelle thought about whether she lives or dies? You have no damned idea of what Michelle was thinking about. That is argument. That is an inference as to what was going on as to what the initial plan was. I mean, you are arguing the case.
>
> [Ms. Backers]: Excuse me. That is what the victim is going to testify to.
>
> [The Court]: She doesn't know what Michelle Michaud was thinking about.
>
> [Ms. Backers]: She knows that the defendant Daveggio said he was leaving it up to Michelle.
>
> [The Court]: Leaving what up? That is an inference.
>
> [Ms. Backers]: That was the conversation she heard.
>
> [The Court]: That is an inference, Ms. Backers. I am putting you on notice that if this continues, I will start making objections while you are doing it. That is argument. What Michelle was thinking is argument. It is an inference that can be drawn from the facts. I will let you argue that, but you are not going to do it in opening statement. This is an opening statement. This is not closing

argument. And you are arguing the case and you know better. And I am trying to get everybody to get this thing started, but I am not a happy camper with the way this is going. So you are on notice that you better start presenting this stuff as an opening statement and not closing argument.

(16RT 3622- 3623.)

The trial court's next admonition to the prosecutor came at the point in her opening statement when Ms. Backers talked about Daveggio's Thanksgiving Day assault upon his daughter April. The prosecutor told the jurors that Michaud and appellant and appellant's daughters had spent the Wednesday night before Thanksgiving at the Candlewood Motel. She contrasted that shared experience with that of Vanessa Samson's family on Thanksgiving Eve.

> That same Wednesday night, the night before Thanksgiving in the same town of Pleasanton, a different scene was taking place in the Samson home. Vanessa Samson's family was preparing for their Thanksgiving the next day.
>
> On Thanksgiving morning, Thanksgiving Day, Jamie and April Daveggio were going to celebrate Thanksgiving with their mother and father. So Annette Carpenter [Daveggio's ex-wife] invited James and Michelle to celebrate a family meal with them at her home in Dublin.
>
> When they were in her bedroom, before Thanksgiving dinner, April was standing there with her father. She was 16. And her father was playing with his gun, fondling it in a particular way, which she'll describe for you. And he asked her if she wanted to hold it. He handed it to her and right when he handed her the gun, her mother called her down for dinner. They went down and had Thanksgiving dinner together.

(16RT 3677.)

At that point, defense counsel interrupted and asked to approach the bench. There, counsel said:

> [Mr. Ciraolo]: I can't see the district attorney's face, but from her tone of voice I don't know whether she's crying or not. I don't know if the court can observe it.
>
> [Ms. Backers]: No, I'm not.
>
> [Mr. Ciraolo]: She started breaking up.

[Defense Counsel Mr. Strellis]: If we are going to start contrasting with what happened with Vanessa –

[The Court]: I don't want to do that, Ms. Backers.

[Ms. Backers]: No.

[The Court]: I don't want anything about what's going on in the Samson home.

[Ms. Backers]: I'm talking about what happened in the Daveggio household.

[The Court]: You said something very different was going on in the Samson house and that's inappropriate, so stay away from that kind of stuff.

[Ms. Backers]: Okay. I'm talking about the Dublin household.

[Mr. Ciraolo]: You were breaking up.

[Ms. Backers]: No, not at all.

[Mr. Ciraolo]: Well, I couldn't tell.

(16RT 3677-3678:)[49]

Later in her opening statement, the prosecutor told the jury that a carpet taken from Michaud's van was found to have four cuts in it, that the district attorney's investigator created a template from the carpet which he then applied to the van floor, and on doing that the investigator learned that the four carpets cuts coincided with four seat anchor bolts in the van.[50]

> We took the template and laid it down in the van and then examined where the holes in the carpet would be and what they were in relation to if you looked through the holes. And lo and behold, they matched eyebolts where you could actually put something through there and restrain someone if they were spread eagle [sic] in the van.
>
> So that [sic] what we did, is we took exemplar rope, this is actually blue electrical rope or wire, about two feet each, and we put

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[49] Appellant discusses below why the court's failure to inquire into the defense claim that the prosecutor was crying during this portion of her opening statement demonstrates that multiple defense objections to every instance of misconduct would have been an exercise in futility.

[50] Appellant challenges the admission of the carpet cuts/restraints evidence in Argument VIII of this opening brief.

them through the hole and through the matching bolt, the anchor bolt, to see if they lined up. And they did.

And this is an illustration for you to understand where those slits are, that if there was an interpretation that someone could have put that carpet down, it could only be – it couldn't be to put the seats down, so it could only be to use those anchor bolts for some other purpose and that those slits were now in the carpet.

(16RT 3698- 3699.)

The prosecutor next spoke of the rope that was recovered in this case – including on a white towel in the van and in Michaud's pants pocket when she was arrested – and about the empty plastic rope bag found among the items Michaud and appellant left with his daughter Jamie. (16RT 3699-3700.)

I asked [district attorney's investigator] Inspector Painter to find out who this manufacturer [as indicated on empty plastic rope bag] was and order up the rope. It happens to be laying here on this board as "L." That is an exemplar rope that we packaged so you could see what originally came in the empty bag we recovered under Jaime's desk, in the defendants' belongings.

When you take the length that comes in a normal package from the manufacturer, they give you extra footage. It is about 48 feet, little bit more. It is supposed to be 45, but they always give you extra. And when you take the length of what you purchase at the store, and you take the length of the rope that was recovered on the white towel in the right, front passenger floorboard, and you take the length of the rope that was recovered in Michaud's front pocket, there is eight feet missing. And that is why when we did the exemplar restraints we used approximately two feet for each of the restraints that were at the four slits.

(16RT 3700- 3701.)

Defense counsel objected, pointing out at sidebar that there was no evidence that restraints were ever used in the manner described by the prosecutor. The trial court agreed and admonished the jury to disregard the prosecutor's reference to restraints.

[Mr. Ciraolo]: I am objecting to the use of restraints. There is no evidence that the van was used for restraints.

[The Court]: Yeah. I was going to say you have to stay away from that until you argue. That is an inference. They are going to argue it is not, and you will argue it is.

[Ms. Backers]: That is fine.

[The Court]: I will tell the jury to disregard the use of restraints. You want me to highlight that?

[Mr. Ciraolo]: Yeah. We are going too far afield

[Whereupon, the following proceedings were held in open court.]

[The Court]: All right. [¶] Ladies and Gentlemen, we are kind of going over the line into an area of argument at this time. So I will instruct you at this time to disregard Ms. Backers' choice of words in using the word "restraints" as relates to those ropes. There is no evidence of that at this point and that is an inference that may be argued later on, but opening statements are not for argument so you will disregard those terms.

(16RT 3701.)

When the prosecutor began to speak of murder victim Vanessa Samson, she began by saying:

Vanessa Samson was the youngest daughter in the Samson family. She has an older brother Vincent and older sister Nicole. At this particular time, they were all living together on Siesta Court. And back in December of 1997 her mother was working days and her father was working graveyard. And Vanessa was 22 years old. She was taking a small break from Ohlone College. She had some classes she was taking, but she took a break and was going to go back to college in January.

And during this time, her old car just went kaput on her and she needed to earn money at her new job to earn the money to get a new car. She also had this job at SCJ Insurance Company where she would walk sometimes to work. It is about a mile away. Or she would get rides from her sister or brother.

The previous summer, 1996, she met a man named Rob Oxonian.

(16RT 3703.)

Defense counsel objected to the "victim impact" aspect of the prosecutor's remarks and specifically pointed to the prosecutor's reference to boyfriend Rob Oxonian. The trial court noted it had earlier ruled that the prosecutor could state

that when Vanessa disappeared she was wearing a San Diego State University sweatshirt that her boyfriend had given to her. The court also asked that the remarks be limited: "That is why she is wearing that sweatshirt. We talked about this. [¶] Try not to get into a whole lot. She has a boyfriend who has a sweatshirt." (16RT 3704.)

The prosecutor continued, as follows:

> So since the summer of 1996, Vanessa was with Rob. He was attending school at San Diego State University. He gave her a sweatshirt. And that sweatshirt said San Diego State University. Actually it said "SDSU" in big, bold red letters and she often wore that sweatshirt.
>
> On December 1st, 1997, I indicated to you that Vanessa's car she no longer had so she was in the process of working to earn that money to get a car. So many times she would walk to work. On this particular day, she walked to work, but she got a ride home from her sister Nicole.
>
> Sometimes when she walked to work she would play her Walkman and listen to her tapes that she would carry with her.
>
> When she got a ride home on Monday, December 1st, from her sister Nicole, she ended up going grocery shopping with her Mom.

(16RT 3704-3705.)

At this point, the trial court interrupted the prosecutor and admonished her: "I don't care what happened December 1st. Go to December 2nd [the day Vanessa disappeared]." (16RT 3705.)

Later, in describing the autopsy of Vanessa Samson performed by Dr. Rollins, the prosecutor stated:

> Before I show you the findings of the autopsy, I wanted to tell you that the person who did the autopsy was a person by the name of Dr. Curtis Rollins, R-O-L-L-I-N-S. And since he performed the autopsy, which he documented and photographed, and there is an actual business record of the autopsy, since then, he has gotten into some trouble of his own with the law. He has a drug problem and ended up getting charged with some crimes involving his drug addiction.

> So what I had done is I had a separate, second, pathologist, completely independent of Dr. Rollins, review his work. I took all of the findings of the autopsy, all of the crime scene photos from Alpine County, all of the pictures from the autopsy, and had an expert, Dr. Brian Peterson review Dr. Rollins's work. And he will tell you –

(16RT 3733- 3734.)

After ruling on defense objections to these statements, the court told the prosecutor she had been testifying for the last three minutes of her statement. The court said: "You are kind of testifying, though. I am more concerned that you are sort of giving testimony: I did this, I did that. You are not a witness." (16RT 3736.) "The last three minutes was your testimony. . . ." (16RT 3736.)

When the prosecutor resumed her opening statement, she described Dr. Peterson's findings, which concluded with a description of Vanessa Samson's brother's experience at the Pleasanton Police Department:

> So Dr. Peterson will tell you that in his opinion Vanessa was strangled to death, that she was beat on the head with a very blunt, hard metal object, and that she was beat on the buttocks with some kind of an object and that she had cuts, scratches, and bruises.
>
> He will also tell you what his findings are, based on the amount of blood that he found in her neck, or that he read about in the report, and that he saw in photographs that you will see later.
>
> When Vincent Samson, on the afternoon of the 4th, was standing at the police department, he looked through the glass counter there at the Pleasanton Police Department and could see that everyone was staring at him. And then it became all too clear when Sergeant Joe Buckovic –

(16RT 3741.)

The court sustained the defense objection to these statements, which were obviously calculated to evoke sympathy for Vanessa Samson and the members of the Samson family, and admonished the prosecutor: "Ms. Backers, that is not appropriate." (16RT 3741.)

The prosecutor ended her opening statement by playing the videotape record made by the Alpine County Sheriff's Department of the recovery of Vanessa Samson's body. The prosecution described the desolation of the area; the position of the body; the array of personal belongings abandoned along with the body. (16RT 3742.) Then, the prosecutor said:

> The video will show you the black rope and it will show you both ends of the black rope. It will show you an end of the black rope that is in a twisted curved position. Then the video will take you to the other end of the black rope and you will see the clump of dark hair that is on the end of that black rope right next to Vanessa's body. And it will show you the condition of her socks, her shoes, her open zipper, and the position of her body.
>
> []
>
> Ladies and Gentlemen, James Daveggio and Michelle Michaud left Vanessa on that snowy embankment. They made sure that she couldn't tell.
>
> Thank you.

(16RT 3742-3743.)

Defense counsel objected. The trial court agreed the prosecutor's remarks were objectionable. (16RT 3743- 3744.) The court thereafter admonished the jury that "everything said in opening statements is not evidence[.]" (16RT 3744.)

Later, at the conclusion of the guilt phase of the case, in remarks that prefaced her discussion of the evidence, the prosecutor told the jury, in language calculated to appeal to the jury's feelings of prejudice and bias glossed with a rallying call to the avenging troops, that they were present in the courtroom for one reason. The reason described by the prosecutor was not the role assigned the jury by law, i.e., to determine the facts and follow the law as provided by the court. Rather, the prosecutor told the jurors they were there "for Vanessa Samson." The prosecutor elicited sympathy for the victims by characterizing Michaud and appellant as "predators of the most vile nature," whose actions had "violate[d] the young bodies" of their victims and left their victims' "souls permanently scarred." The prosecutor finished these preliminary remarks by

reminding the jurors again that they were there "for Vanessa Samson." The prosecutor said: "So what I ask you to do over the next several days is to remember why we are here. And this is why we are here; it is for Vanessa Samson. This is the murder case of Vanessa Samson."

> We are gathered here for one reason, and that is for Vanessa Samson.
>
> We are gathered here because the two people, who sit before you on trial at this counsel table, because they formed the darkest and most predatorial partnership you can have ever imagined, a partnership to prey on the young and vulnerable.
>
> James Anthony Daveggio and Michelle Lyn Michaud are predators of the most vile nature. They formulated a plan to grab girls, to use those girls for their own sick and perverted pleasure. The defendants formulated a plan to lure young girls that trusted them into a web of horrifying dimensions; they would violate the young bodies of these girls and leave their souls permanently scarred. And then, when they longed for a different taste, a different brush, they would snatch innocent young girls off the street and violate them.
>
> With all their victims they would ambush, young women and children, either by deceit, by betrayal of trust, or by overpowering them with sheer brute force.
>
> They had several goals. Their goals were:
>
> To abduct them;
>
> To terrorize them;
>
> To subdue them either by monumental fear or physical brute force;
>
> To inflict their will on these young people;
>
> To physically and emotionally assault the very core of these young people's beings;
>
> To humiliate them;
>
> To degrade them;
>
> To sexually assault them;
>
> To inflict pain on them; and
>
> To take pleasure from the very infliction of pain on them;
>
> To rape them;
>
> To sodomize them;
>
> To shove objects into their young bodies and to force these young girls and women to do vile acts to their captors, and then to threaten to kill them if they ever told a soul, that is, if they decided to let you live.

> So what I ask you to do over the next several days is to remember why we are here. And this is why we are here; it is for Vanessa Samson. This is the murder case of Vanessa Samson.
>
> James Daveggio and Michelle Michaud kidnapped, tormented, and murdered Vanessa Samson, and then dumped her body far, far away, at about the 7,000 foot elevation, like a piece of discarded trash.
>
> They snatched this perfectly innocent young girl, they beat her, they gagged her, they sodomized her with two different curling irons, and then they strangled the very life out of her, Then they dumped her down an embankment where if there had been one heavy snowfall we would have never found her.

(33RT 7080-7081.)

The other theme urged by the prosecutor during both opening and closing statements concerned the cuts made into the carpet allowing access to the seat eyebolts and the creation and use of restraints using ropes and the eyebolts, although no evidence supported the inference the defendants restrained anyone in that fashion.

> And then you have the van and the fact that all the seats are out of the back and they put this carpet down, for which there is no other explanation than to put these four little tiny razor-like one inch slits so they could tie somebody down. There is no other explanation for that piece of carpet. You can't put the seats down through it. It came up positive for P30. There's no other explanation.
>
> Then you have ropes. The van is full of ropes. She [appellant] has rope in her pocket. There is rope at the murder scene. There is eight feet of missing rope. If you take eight and divide it by four that makes four two-foot tiedowns. And the slits in the carpet aren't just slits in the carpet, ladies and gentlemen, they match the anchor bolts exactly. You take the slits and look at where those anchor bolts are and they match the four outer most anchor bolts exactly. You slip a piece of rope through there and you can tie *her* wrists and ankles.

(33RT 7089-7090; see also 33RT 7197.)

Although, as set forth above, the prosecutor argued that if "[y]ou slip a piece of rope through there[,] you can tie her wrists and ankles," the prosecution

notably presented no evidence whatsoever that Vanessa Samson's wrists and ankles had been restrained.

B. The Prosecutor Committed Misconduct By Appealing To The Jury's Sympathy And Passions, By Arguing The Case During Her Opening Statement, And By Arguing Facts Not In Evidence

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"It is the duty of every member of the bar to 'maintain the respect due to the courts' and to 'abstain from all offensive personality.' [Citation.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.] As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger v. United States* (1935) 295 U.S. 78, 88.) Prosecutors who engage in . . . intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 819-820; see also *People v. Hill* (1998) 17 Cal.4th 800, 819-820; *People v. Zurinaga* (2007) 148 Cal.App. 4th 1248, 1258.)

"What is crucial to a claim of prosecutorial misconduct is not the good faith vel non of the prosecutor, but the potential injury to the defendant. (See *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror." (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

In some of the examples set forth above in which appellant claims the prosecutor engaged in misconduct, defense counsel did not object. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal.4th 92, 159; *People v. Noguera* (1992) 4 Cal.4th 599, 638.) In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333, quoting *People v. Price* (1991) 1 Cal.4th 324, 447.) The absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green* (1980) 27 Cal.3d 1, 35 fn. 19; *People v. Pitts* (1990) 223 Cal.App.3d 606, 692; *People v. Lindsey* (1988) 205 Cal.App.3d 112, 116 fn. 1; see also *People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

The record in appellant's case is replete with the trial court's repeated efforts to rein in the prosecutor's multiple attempts at arguing the case in opening statement. Despite the warnings and admonitions issued by the trial court, which appellant has set forth above, the prosecutor continued to *argue* the case during her opening statement. This constituted multiple examples of misconduct, as appellant will explain below, and multiple demonstrations as to why any defense objection, viewed in the context of the trial court's inability to restrict the prosecutor's conduct, would have been futile.

In addition to the trial court's demonstrated inability to stop the prosecutor from arguing her opening statement, another indication that defense objections would have been futile may be found in the trial court's failure to make appropriate inquiry into defense allegations the prosecutor was crying during her opening statement.

Defense counsel's objection that the prosecutor was either crying or breaking up came at a point in time when the prosecutor was commenting upon Thanksgiving Eve events at Vanessa's home and April's home. The trial court admonished the prosecutor about discussing events in the Samson household, but made no effort to inquire into the defense claim that the prosecutor was either crying or breaking up. (See prosecutor's remarks reproduced above and also 16RT 3677:26-28 to 3678:1-18.)

It is the duty of the judge to control all proceedings during the trial and to limit the argument of counsel to relevant and material matters.[51] (Pen. Code, § 1044; see also *People v. Bell* (1989) 49 Cal.3d 502.) Here, defense counsel properly voiced a concern that the prosecutor was making an obvious emotional appeal to the jury's passions and prejudices by either crying or breaking up. The trial court summarily ignored the objection and made no attempt at inquiring as to the prosecutor's conduct. In *People v. Bain* (1971) 5 Cal.3d 839, this Court concluded that a trial court's failure to take control of the situation and reprimand counsel allowed the case to be "conducted at an emotional pitch which is destructive to a fair trial." (*Id.*, at p. 849.) Here, defense counsel's claim alleged serious misconduct on the prosecutor's part and the court's failure to properly investigate this claim indicated the futility attending multiple defense objections to

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[51] Penal Code section 1044 states: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

this experienced prosecutor's determined efforts to appeal to the passions and prejudices of the jury.[52]

Accordingly, appellant's claim should not be barred for want of a timely defense objection.

In addition, given the multiple instances in which the prosecutor *argued* the case during opening statement and given the prejudicial nature of that argument, the curative effect of any admonition is questionable. Consider, for example, the prosecutor's final, blatantly argumentative, words directed to the jury in her opening statement: "Ladies and Gentlemen, James Daveggio and Michelle Michaud left Vanessa on that snowy embankment. They made sure that she couldn't tell." (16RT 3743.)

The prosecutor's comments followed upon a law enforcement videotape depicting Vanessa Samson's abandoned body and belongings on a snowy highway embankment in an area the prosecutor termed "desolate." And, here, as set forth above, the trial court did admonish the jury that statements made in opening statement are not evidence. But the visual impact of the videotape's depiction of Vanessa Samson's body alongside her backpack and lunch bag and other belongings in combination with the prosecutor's argument make it likely the trial court's admonition did very little to mute the emotional impact of the moment upon the jurors who had been repeatedly told they were all gathered there "for Vanessa Samson."

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[52] The trial court's failure to make the proper inquiry into defendants' complaint that the prosecutor was either crying or breaking up created a silent record and thus impaired appellant's ability to pursue this claim as a further example of the prosecutor's attempts at improperly influencing the jury. Reviewing courts have found a trial court's failure to inquire into the basis of a defendant's motion for substitution of counsel made pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, results "in a silent record making intelligent appellate review of defendant's charges impossible." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 318; *People v. Hill* (1983) 148 Cal.App.3d 744, 755.) The analogous circumstance is present here.

Courts have held that a prosecutor's remarks which inflame the passions and prejudices of the jury constitute the sort of misconduct that is not curable by admonition, thus eliminating the need for defense objection in the first place to preserve the issue for appeal. (See, e.g. *People* v. *McGreen* (1980) 107 Cal.App.3d 504, 517-518 (overruled on other grounds in *People v. Wolcott* (1983) 34 Cal.3d 92, 101) [prejudice from prosecutor's effort to discredit defense expert not cured by negative answer]; *People* v. *Wagner* (1975) 13 Cal.3d 612, 621 [neither admonition nor form instruction sufficient to cure prejudicial effect of prosecutor's repeated insinuations regarding defendant's past conduct]; *People* v. *Un Dong* (1895) 106 Cal. 83, 88 [prejudice from prosecutor's examination intended to degrade defendant not cured by negative answers or sustaining of defendant's objections]; *People* v. *Duvernay* (1941) 43 Cal.App.2d 823, 828 [prejudice from prosecutor's argument that defendant fit the characteristics of a habitual narcotics user not cured by admonition].)

In addition, courts have recognized that a trial court has a particular duty to ensure a fair and constitutional trial in cases involving tragic circumstances, much public interest, and a determined prosecution. In *Gall v. Parker* (6th Cir. 2000) 231 F.3d. 265 (overruling on other grounds recognized in *Matthews v. Simpson* (W.D. Ky. 2008) 603 F. Supp.2d 960, 1038), the Sixth Circuit Court of Appeals observed:

> This is indeed a tragic case. The primary tragedy is that a young girl's life was taken in the most cruel and grisly fashion. It is also evidence that [defendant] was the man who cut her life short. And naturally, the death and [defendant]'s culpability engendered an understandably outraged and angry public as well as a prosecution determined to convict. *In these situations, it is a court's duty to ensure that amid the tragedy, anger and outrage over hideous acts perpetrated, a fair and constitutional trial takes place.*

(*Id.*, at p. 277, italics added.)

Appellant has shown above in the reproduced segments of the prosecutor's opening statement that the trial court here did make multiple, albeit unsuccessful,

attempts to stop the prosecutor from impermissibly arguing the case during her opening statement. Given the trial court's notice to the prosecutor that she was arguing the case when she should not be and the court's multiple attempts to put a stop to the improper arguing, appellant's claim should not be procedurally barred from being considered in this appeal.

It has long been established that a prosecutor may not appeal to the passions or prejudices of the jury. In *People v. Talle* (1952) 111 Cal.App.2d 650, stated:

> It hardly needs citation of authority that an argument by the prosecution that appeals to the passion or prejudice of the jury, that asks for a guilty verdict because of sympathy for the deceased, that repeatedly characterizes the defendant as a "despicable beast," . . . that engages in fanciful inferences, not warranted by the evidence, and makes them as statements of fact not warranted by the record, . . . is erroneous and prejudicial.

(*People v. Talle*, *supra*, 111 Cal.App.2d at 675.)

Appellant has pointed out the various appeals to the jury's sympathies and passions that were part of the prosecutor's remarks set forth above.

"An appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other grounds sub nom. *Stansbury v. California* (1994) 511 U.S. 318; accord, *People v. Arias* (1996) 13 Cal.4th 92, 160; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250; *People v. Fields* (1983) 35 Cal.3d 329, 362.)" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

The universally recognized rule that appeals to sympathy are a form of misconduct has been characterized by one authority as the "paradigm" of prosecutorial misconduct. (Lawless, *Prosecutorial Misconduct*, 2d ed. 1985; see also *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 711-713; *United States v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1443.)

In *Drayden v. White*, *supra*, 232 F.3d 704, the prosecutor delivered a soliloquy in the voice of the murder victim as part of his closing argument. The Ninth Circuit found the prosecutor committed several kinds of misconduct. "[T]he Prosecutor inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim. Furthermore, the prosecutor seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim and by 'testifying' in the voice of the character as if he had been a percipient witness. Finally, by testifying as [the murder victim], the prosecutor also risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve his dismal fate." (*Id.*, at pp. 711-713.)

In *Kipp*, *supra*, during closing argument for the guilt phase, the prosecutor said: "So when you think about the elements of the offense of murder, as you will when you go back to deliberate, and as we, perhaps in somewhat of a legal abstract sense, the element satisfied a human being was killed. [¶] If you would, think for a moment about what it means. A living, breathing human being had all of that taken away." (*Id.*, at p. 1129.) This Court stated: "The prosecutor's argument, inviting the jury to reflect on all that the victim had lost through her death, was an appeal for sympathy for the victim, and therefore it was improper at the guilt phase of this capital trial." (*Id.*, at p. 1130.)

Here, as appellant has shown above, the prosecutor sought from the outset of trial to color the jury's view of appellant by improperly appealing to the passions and prejudices of the jury. The prosecution repeatedly characterized the defendants as vile and depraved sexual predators and made multiple attempts to evoke the jury's sympathy for Vanessa Samson and members of her family.

Indeed, in appealing to the passions of the jury, the prosecutor carefully used rhetorical devices of repetition and building on themes to further add to the emotional impact of the arguments. This is best illustrated in Ms. Backers's

opening comments, where she explained the day Michaud and appellant met "was a dark day, a very dark day. It was the beginning of a partnership, a partnership that would be formed between equal partners. It was a partnership that would have a mission, not a mission statement." (16RT 3597:21-28.)

This was bookmarked by closing argument. While some of the arguments Ms. Backers made may have been true, the dramatic manner in which Ms. Backers recounted these events was more designed to inflame than persuade. Thus, to degrade, to sexually assault, to rape, to sodomize them, to shove objects into them are all repetitive of the same theme. But through repetition it carries a greater emotional impact. (33RT 7080-7081.) The other purposes listed are equally redundant, but made more effective by repetition: to terrorize, to subdue, to physically and emotionally assault, to humiliate them. (33RT 7080-7081.)

Other phrases were inaccurate, but the inaccuracy was equaled by their emotional strength. For example, the reference to Aleda as a "this little girl" being forced to engage in sex acts is both inaccurate and an appeal to sympathy. In fact, Aleda was not a "little girl," but was twenty-year-old woman. (17RT 3993.) Likewise, in closing argument Ms. Backers referred to appellants' plans to "snatch innocent young girls off the street." (33RT 7080.) In penalty phase arguments, Samson was also referred to as a "young girl." (39RT 8431.) The only "girls" snatched from the street were Aleda and Samson. While they are, admittedly, "young women," to refer to them as a "young girls" raises the level of revulsion and sympathy in an inappropriate manner because of its inaccuracy. Probably there is no group more feared and despised than child molesters, and to inaccurately portray this as a violation of a "young girl" only inaccurately flames passions.

Indeed, the manner in which Ms. Backers described the molestation of Aleda was calculated not to describe the events, but to portray them in the manner most likely to hit an emotional chord. Thus, the incident was described in the most graphic terms possible, with constant repetitions of "shoved" to describe the

penetrations. Appellant "shoved" his fingers into her vagina, he "shoved" them into her rectum, and he "shoved" his penis into her vagina. . (16RT 3617.)

This was echoed later in closing argument at the penalty phase, when Ms. Backers said that the curling iron was shoved up Samson "over and over again." (39RT 8522.) In fact, while there was evidence of penetration, the use of the word "shoved" is hyperbolic, in that the coroner did not detect any external trauma on the vagina or anus, as the defense explained. (32RT 6832-6834, 34RT 7227.)

Likewise, while Aleda did describe appellant penetrating her, she did not use "shove," but said that appellant "got his fingers in [her] vagina." (17RT 4015-4016.) She later again used the word "put" in describing the penetration. (17RT 4024, 4026, 4028.)

Obviously, the repeated use of the word "shove," with its connotation of a higher degree of force than that actually described by the witness, was geared to stir up anger and emotion.

In addition to the improper appeals to sympathy, passion, and prejudice appellant has pointed out above, the prosecutor also committed misconduct in her remarks during opening statement and closing argument involving the use of rope restraints and access to the van's anchor bolts. "A prosecutor may not go beyond the evidence in his argument to the jury." (*People v. Benson* (1990) 52 Cal.3d 754, 795; *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [reference to matter outside record is practice that is clearly misconduct].)

In *People v. Kirkes* (1952) 39 Cal.2d 719, the prosecutor contended in closing argument that the jury could infer that a witness who saw the murder victim ride away in the defendant's car on the date of the murder but who told no one about what she was seen until after the defendant had been indicted withheld the information because she feared the defendant would harm her. This Court concluded the prosecutor had committed misconduct. "Here, Mrs. Egan's long silence was excused by her asserted fear for her own safety if she testified against Kirkes. There is no evidence whatever upon which to base that statement. To

picture Kirkes as a murderer who would kill again to cover his crime and so bold that he had threatened those who might testify against him was entirely unjustified." (*Id.*, at p. 724.)

In appellant's case, the prosecution presented no forensic evidence that Vanessa Samson had been restrained. The prosecution presented no eyewitness evidence that Vanessa had been restrained. The prosecution presented no evidence, forensic or otherwise, that any person had been spread-eagled and restrained in the van with ropes attached to the anchor bolts as the prosecutor argued.

The prosecutor committed misconduct in arguing an inference based on facts not in evidence.

As appellant has explained elsewhere, the United States Supreme Court has recognized that improper speculative inferences have an impact on the reliability of the truth-seeking process in violation of the heightened reliability requirements of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1982) 462 U.S. 862, 879.)

C. Similar Misconduct By This Prosecutor In Other Capital Cases

There are similar examples of misconduct involving inappropriate appeals to the emotions and prejudices of the jury by this trial prosecutor in the trials of other capital cases presently before this Court, *viz.*, *People v. Ropati Seumanu* (S093803) and *People v. Keith Lewis* (S086355).[53] These examples are both illuminative and informative of this experienced trial prosecutor's methodology

[53] Contemporaneously with the filing of this brief, appellant will file a request that this Court take judicial notice of the appellate record in *People v. Seumanu* (S093803) and *People v. Lewis* (S086355).

and her determination to describe factual events in language calculated to appeal to the passions and prejudices of the jury.

In *Seumanu*, the murder victim, a bridegroom, was shot to death on his wedding day. Ms. Backers, again choosing language calculated to appeal to passion and prejudice, sought to have the jury view the events in the context of the forces of good and evil. She said:

> This case is about good and evil. It is about the joyful bliss of the anticipation of your wedding day which is replaced with sheer and unending terror; it is about Nolan, an innocent bridegroom, a son, a brother, who becomes Paki's captive. And the first day of the rest of your life never comes.
>
> It is about a bride's gift to her handsome husband that becomes a murderer's trophy. It is about a wedding that becomes a funeral, a plea for mercy which is denied with an intense explosion that rips apart your heart.
>
> The breath of life becomes bloody lungs filled with hot pellets. And you die, scared to death, begging for your life all alone on your wedding day. (Seumanu 17RT 3429.)

In *People v. Lewis*, *supra*, the defendant was convicted of killing a six-year-old girl in a case in which the defense contended that Ms. Backers cried during the trial – during opening statement, during closing guilt and penalty phase argument, and during other portions of the trial. (See Motion to Reduce Penalty to Life without Parole dated January 18, 2000, Lewis 5CT 1151-1156.) Defense counsel in appellant's case, as appellant has noted above, made the identical claim Ms. Backers appeared to be crying at a point in her opening statement.

In *Lewis*, Ms. Backers continued in her attempt to involve the passions and prejudices of the jury during her examination of first responders to the crime scene by eliciting irrelevant evidence concerning the emotional responses experienced by these individuals. Ms. Backers elicited testimony that Sergeant Kevin Traylor was reduced to tears at the crime scene. The trial court took note that Traylor either cried or was "verging on tears" during his testimony. (*Lewis* transcript 25RT 4346-4347.) Ms. Backers elicited testimony from Sergeant Fred Mestas that

Traylor lost his composure and broke down at the crime scene. (*Lewis* transcripts 26RT 4451.) Ms. Backers elicited Officer Steven Thurston's testimony that the incident was the worst in his career; elicited Officer Chris Del Rosario's testimony that it was a "hard case" for him; elicited Officer Chris Trim's testimony that he "freaked out" after he was relieved; elicited Paramedic Sean Parking's testimony and bystander Ray Starnes' testimony that police officers were crying at the scene. (*Lewis* transcripts 26RT 3992-3993, 4007-4008, 4468, 27RT 4652, 4659, 4665.)

In the context of this documented history of this experienced prosecutor's repeated efforts to appeal to a jury's passions and prejudices, these settled and familiar words bear repeating: "'Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.]'" (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) A prosecutor has a duty to prosecute vigorously. "But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Misconduct need not be intentional in order to constitute reversible error. (*People v. Bolton* (1979) 23 Cal.3d 208, 214.)

D. Prejudice

"Conduct by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) But conduct by a prosecutor that does not render a trial fundamentally unfair may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods in an attempt to persuade the trier of fact. (*Ibid.*) [¶] If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v. Benson* (1990)

52 Cal.3d 754, 793.) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*People v. Benson, supra*, 52 Cal.3d at p. 793.)" (*People v. Woods* (2006) 146 Cal.App. 4th 106, 111.)

Appellant recognizes the fact that a prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness' [citation], and he may 'use appropriate epithets ....' " (*People* v. *Wharton* (1991) 53 Cal.3d 522, 567-568.)" (*People* v. *Williams* (1997) 16 Cal.4th 153, 221.) However, it cannot be denied that the use of such terms does little to enhance a reasoned consideration of the issues.

The repeated references to young girls being abducted off of the street by the vile and depraved partners, the frequent repetition of "sex slave," "shoved," "terrorize," and all the other words and phrases designed to stir emotions, cannot be viewed as having no effect on the jury's decision. Combined with the misuse of Opening Statements to lay the ground work for prejudicial arguments, and then multiplied by the fictionalized use of the slits in the carpet to restrain the victims, the jury could not rationally and coolly reach a verdict untainted by emotion.

As explained above, the conduct of Ms. Backers was repeated and took several different forms. State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Cooper* v. *Sowders* (6th Cir. 1988) 837 F.2d 284, 284-288; *Lincoln* v. *Sunn* (9th Cir. 1987) 807 F.2d 807, 814, fn. 6; *Menzies* v. *Procunier* (5th Cir. 1984) 743 F.2d 281, 284-288; *Rose* v. *Lundy* (1982) 455 U.S. 509 531, fn.)

Here, appellant has shown above that the prosecutor's attempts to influence his jury began with the prosecutor's opening statements to the jury and were repeated in the closing argument. As the representative samples set forth above show, for example, the prosecutor spoke in language selected to evoke an emotional response rather than a reasoned consideration in the mind of the individual juror. Thus, appellant was not so much a defendant as he was a

predator, moreover a vile predator, one who committed vile acts, depraved acts. Appellant did not insert his fingers; he shoved them. Appellant did not so much seek to sexually assault as he sought to subdue the victim, induce fear in the victim. He did not so much inflict pain as he sought to inflict gratuitous pain. And, despite the absence of any evidence that anyone was shackled to the van by spread-eagled extremities, the prosecution argued that this occurred to Vanessa Samson.

In reversing a judgment of conviction, the court in *People v. Pitts* (1974) 223 Cal.App.3d 606, recognized that the strength of the evidence is not dispositive.

> Nor is it an answer to say, as respondent suggests, that this case was "sufficiently strong as to render any misconduct harmless. . . ." Assuming the evidence was sufficient to convict, it did not point unerringly to guilt. Under such circumstances, the type of misconduct involved here could reasonably have tipped the scales. Accordingly, reversal is required. (*People v. Kirkes*, *supra*, 39 Cal.2d at p. 727.) "That the jury was instructed generally to base its verdict exclusively upon the evidence does not prevent the misconduct from being prejudicial and requiring a reversal." (*Ibid.*) (*People v. Pitts*, *supra*, 223 Cal.App.3d 606.)

Appellant has also demonstrated above that the prosecutor's attempts to appeal to the jury's passions and prejudice were multiple and frequent and invidious. As such, they rendered appellant's trial fundamentally unfair so as to make appellant's conviction a denial of due process. The prosecutor's misconduct was such that it cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Moreover, under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969; *People v. Parson* (2008) 44 Cal.4th 332, 359.)

Accordingly, appellant respectfully submits that a reversal of the judgment of conviction is warranted.

VII

THE TRIAL COURT ERRED IN REFUSING TWO DEFENSE REQUESTS RELATING TO THE ADMISSIBILITY OF FINGERPRINT IDENTIFICATION EVIDENCE. THESE RULINGS DEPRIVED APPELLANT OF THE RIGHT TO PRESENT A DEFENSE, THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, AND THE GUARANTEE OF GREATER RELIABILITY IN THE DETERMINATION OF GUILT AND PENALTY REQUIRED IN A CAPITAL CASE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES

The trial court erred in refusing two defense requests relating to the admissibility of fingerprint identification evidence, thereby depriving appellant of the right to present a defense, the right to confront witnesses, and the guarantee to the greater reliability in the determination of guilt and the penalty required in a capital case under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

First, the defense sought to preclude the prosecution expert from testifying as to a "match" made from latent fingerprints and to further preclude the prosecution from arguing that there had been a match of latent fingerprints to those of the defendants.

Second, after that request was denied, the defense requested a hearing on this issue pursuant to *People v. Kelly* (1976) 17 Cal.3d 24, partially overruled on other grounds in *People v. Wilkinson* (2004) 33 Cal.4th 821, 839. That request was also denied.

A. Introduction

In order to understand why the trial court erred in denying the defense requests it is helpful to understand the history of fingerprints as evidence and the flaws underlying the theories of fingerprint identification evidence.

Fingerprint identification evidence was being admitted in criminal trials prior to the decision in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, which articulated the rule that before evidence of a new scientific technique may be admitted, it must have received general acceptance in the relevant scientific community to which the evidence belongs. As a result, this type of evidence was admissible long before the general-acceptance standard was articulated in *Frye* or that standard was later adopted in California[54].

Consequently, fingerprint identification evidence has never been subjected to the standard later adopted for scientific evidence. However, since the time that fingerprint identification evidence was routinely admitted into trials there has been substantial research that has cast doubts on the questionable nature of the theory and techniques underlying fingerprint identification evidence, including the very issue of whether a "match" should be declared. Appellant submits that in light of this new evidence, courts should re-evaluate the admissibility of fingerprint identification evidence and the manner in which experts may describe their findings.

As a result, the trial court erred in denying appellant's requests to preclude the prosecution expert from testifying as to a match of appellant's fingerprints to those found in the investigation into the case, to prevent the Deputy District Attorney from arguing that appellant's prints matched the prints found, and for a hearing pursuant to *People v. Kelly* on the admissibility of fingerprint identification evidence.

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[54] Although this rule has been traditionally referred to as the "*Kelly/Frye*" rule, the adoption of this standard in California actually predates the decision in *Kelly*. (See *Huntingdon v. Crowley* (1966) 64 Cal.2d 647, 653. Furthermore, because *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 abandoned *Frye* as the federal standard, the more accurate label of "*Kelly*" is used in this brief, rather than the more familiar label "*Kelly/Frye*" to describe the "general acceptance" standard for scientific evidence.

Finally, it is important to remember the gist of appellant's contention. Ultimately, it may turn out that fingerprint identification evidence is admissible. However, as will be shown, there is sufficient reason to question the validity of that evidence. Therefore, as part of his right to present a defense, guaranteed under right to due process of law, and his right to confront witnesses as discussed below (*post*, at 220-221), appellant should have been allowed to question the admissibility of this evidence through a *Kelly* hearing.

B. The Motion At Trial, The Evidence Introduced, And The Arguments Of The Prosecutor.

Prior to trial, the defense made a motion to preclude the prosecution from presenting experts to testify that the fingerprints of the defendants and Samson *m*atched other fingerprints found in the investigation into Samson's murder.

Counsel for appellant explained that he had presented the court with a newspaper article about a federal District Court judge in the Fourth Circuit who had concluded that fingerprint identification did not pass "Kelly/Frye muster." (15RT 3513.) Counsel explained that the article indicated that courts in t in the Fourth Circuit were allowing experts to point to areas of similarities between fingerprints, but they were not being allowed to draw the conclusion that there was a "match." (15RT 3513.)

The defense also objected to the Deputy District Attorney making the conclusory statement that there was a match, because there was no scientific evidence to support that conclusion. (15RT 3513.)

The court explained that it was bad enough that it was "saddled" with the Ninth Circuit, and that it was not going "to stretch it out to the Fourth Circuit," complaining that the problem with federal courts is that "they wander where no man has good cause." The trial court judge concluded that in his court "fingerprint evidence is still good." (15RT 3513-3514.)

The defense then asked for a *Kelly/Frye* hearing, and that request was denied. (15RT 3514.)

The defense then asked if it could inquire of the fingerprint expert as to whether he or she was aware of a study where the FBI sent various exemplars to different experts and there was no unanimity of result from those experts. The court stated it would hold a hearing pursuant to Evidence Code section 402, but if the experts were not aware of that study, the defense could not ask questions about it. (15RT 3514-3515.)

Thereafter, at trial, the fingerprint experts testified that prints matching those of Michaud, appellant, and Samson were found on a cup from an AM/PM market. (28RT 6152- 6153.) The fingerprint expert also testified that one of Michaud's prints was found on the curling iron as a "reversed" print, which makes it likely it was on the duct tape first and then transferred to curling iron. (28RT 6167-6168.)

In closing argument, the Deputy District Attorney noted that Michaud, appellant, and Samson's fingerprints were all found on the AM/PM cup found in the van. (33RT 7087.)

C. The Historical Basis for the Admission of Fingerprint Identification Evidence and Recent Developments

As will be shown, fingerprint identification evidence appears to have snuck in as admissible evidence under prior lax standards of admissibility of evidence, and this evidence has thereafter evaded scrutiny because of its pedigree.

The first case to admit fingerprints appears to be *People v. Jennings* (Ill. 1911) 96 N.E. 1077. In that case, the Illinois Supreme Court wrote that "[e]xpert testimony is admissible when the subject-matter of the inquiry is of such a character that only persons of skill and experience in it are capable of forming a correct judgment as to any facts connected therewith." (*Id.* at p. 1082.)

Interestingly, although the Illinois Supreme Court characterized fingerprint identification as a science, it did not rely on any scientific studies that would support the theories being asserted.

The next two states to allow fingerprint identification evidence, New Jersey and New York, did so on the grounds of it being a matter of weight for the jury to resolve. (*State v. Cerciello* (N.J. 1914) 90 A. 1112, 1114); *People v. Roach* (N.Y. 1915) 109 N.E. 618.) Without asking how often error occurred, *Roach* stated, "[t]he fact that error may sometimes result in effecting identification by this means affords no reason for the exclusion of such evidence." (*Ibid.*)

Thereafter, the rest of the states began to admit fingerprint identification evidence, relying primarily on these three cases. (Epstein, Robert, Fingerprints Meet Daubert: *The Myth of Fingerprint "Science" is Revealed* (2002) 75 S.Cal.L.Rev. 605, 615-616, hereinafter "Epstein.")

What is interesting to note is that *Frye* was decided in 1923, 12 years after fingerprint identification evidence started being admitted into evidence, and *Kelly* was decided in 1976, over half a century later. As a result, the admissibility was established on the grounds that all evidence should be admitted and weighed by the jury. However, the evidence then came to be justified as scientific evidence, in spite of the fact that it had never been tested for its admissibility under the standards appropriate for scientific evidence. Nonetheless, it continued to be admitted because of the precedent of the admissibility of fingerprint evidence.

In recent years, in light of the problems with fingerprint theory and techniques, some courts have begun to either question fingerprint identification evidence or re-evaluate the basis of its admissibility.

In *United States v. Llera Plaza* (E.D. Pa 2002) 188 F. Supp. 2d 549, the trial court reconsidered and modified its ruling excluding fingerprint identification evidence. Originally, in excluding fingerprint identification evidence, the court held that the expert could not express the opinion that *a particular latent print was the print of a particular person.* In reversing his early ruling, the trial court judge

did not hold that fingerprint comparison evidence had scientific reliability. Rather, the court explained it was changing the nature of the inquiry from fingerprinting as a science to fingerprinting as a technical discipline. (*Id.* at 562.) Regarding fingerprints in this manner, the court admitted the evidence under the standard of *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 141. That case governs the admission of testimony of engineers and other experts *who are not scientists*[55].

The irony and fallacy of *Llera Plaza* it that from the very outset, law enforcement has claimed that latent fingerprint identification is a science. Indeed, the first claim that fingerprint technology was a science was made in the first fingerprint case, *People v. Jennings*, *supra*, at p. 1083. The claim is still being made today. For example, the FBI's standard text in this area is entitled *The Science of Fingerprints*. Fed. Bureau Of Investigation, U.S.Dep't Of Justice, The Science Of Fingerprints (rev. ed. 1998).

However, with the traditional rationalization for the admission of fingerprint evidence (namely, the fact that fingerprints techniques are scientific),– undermined by the new questions emerging about those techniques, the evidence remains admissible.

In *United States v. Crisp* (4th Cir. 2003) 324 F.3d 261, the court rejected a challenge to fingerprint identification evidence. The defendant had argued that this

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[55] The U.S. Supreme Court held in *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, that the federal trial judge's gatekeeping obligation under the Federal Rules of Evidence – to insure that expert witness testimony rests on reliable foundation and is relevant to the task at hand – applied not only to expert scientific testimony, but to all expert testimony, including "technical" and "other specialized" knowledge. (*Id.*, at p. 147.) In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the U.S. Supreme Court articulated the standard under which scientific expert testimony was admissible and there assigned to the trial judge the task of insuring that an expert's testimony rested on a reliable foundation and was relevant to the task at hand. Appellant summarizes the *Daubert* standard in the footnote that follows.

type of evidence had not been established as admissible under the new federal standard of *Daubert*.[56]

The dissent in *Crisp* explained that the majority believed fingerprint identification is reliable because the technique had been accepted in the judicial system over time. The dissent explained that while these techniques had been accepted under the standard of *Frye*, they had never been tested under "the more careful scrutiny" of *Daubert*. (*Id.* at p. 272.) The dissent further noted that "[n]othing in the Supreme Court's opinion in *Daubert* suggests that evidence that was admitted under *Frye* is grandfathered in or is free of the more exacting analysis now required. See *United States v. Saelee*, 162 F.Supp.2d 1097, 1105 (D.Alaska 2001) ('[T]he fact that [expert] evidence has been generally accepted in the past by courts does not mean that it should be generally accepted now, after *Daubert* and *Kumho*.')." (*Ibid.*)

Thus, it was explained that rather than being admissible because fingerprint identification evidence had been proven reliable and there had been no showing to

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[56] Appellant synopsizes the *Daubert* standard here for the convenience of the reader. A more comprehensive discussion of *Daubert* in the context of appellant's claim is set forth below. *Daubert* stated: "In determining whether a theory or technique is scientific knowledge that will assist the trier of fact, so as to be the basis of admissible evidence under Rule 702 of the Federal Rules of Evidence, (1) a key question to be answered is, ordinarily, whether the theory or technique can be and has been tested; (2) a pertinent consideration is whether the theory of technique has been subjected to peer review and publication, although the fact of publication, or lack thereof, in a peer-reviewed journal is not a dispositive consideration; (3) the court should ordinarily consider the known or potential rate of error of a particular scientific technique; (4) the assessment of reliability permits, but does not require, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance of the theory or technique within that community, as (a) widespread acceptance can be an important factor in ruling particular evidence admissible and (b) a known technique that has been able to attract only minimal support within the scientific community may properly be viewed with skepticism; and (5) the inquiry is a flexible one, and the focus must be solely on principles and methodology, not on the conclusions that such principles and methodology generate."

the contrary, it appeared that courts started admitting this evidence with little scrutiny, and courts then relied on precedent, without ever subjecting the techniques to evolving scientific standards. (*Id.* at p. 277.)

The dissent further noted that, in fact, it appeared that there was not sufficient critical testing to determine the underlying scientific validity of the technique. The dissent noted several flaws with fingerprint identification evidence that failed to meet the *Daubert* standard, including but not limited to the following: there have not been any studies to establish how likely it is that partial prints taken from a crime scene will be a match for only one set of fingerprints in the world; the possible lack of peer review and publication; the fact that the error rate is not known; the lack of objective, universal standards governing the field; and the lack of safety checks. (*Id.* at pp. 274-276.)

In summary, fingerprint identification evidence became admissible in a day when there were low standards for the admission of scientific evidence. Although more restrictive standards for the admission of this type of evidence evolved, the newer standards were never applied to fingerprint identification evidence, which, as the dissent in *Crisp* noted, were being "grandfathered" in from the days of *Frye* to the era of *Daubert*.

D. The Theory Underlying the Admissibility of Fingerprints and the Developing Recognition of the Flaws in that Theory.

All forensic identification sciences and techniques involve two steps: comparing a questioned item to a known exemplar, and assessing the meaning of the comparison to declare a match. Both steps are fraught with potential problems, and, as to fingerprints, in neither area have the risks been evaluated. (Saks, Michael J. & Koehler, Jonathan J., *The Individualization Fallacy in Forensic Science Evidence*, (2008) 61 Vanderbilt L. Rev. 199, 199-200, hereinafter "Saks.")

For example, although the premise of fingerprint identification is that a fingerprint expert can detect patterns in latent prints to see if they match a known exemplar, examiners differ both in their ability to perceive pattern similarity and in their thresholds for declaring matches. (Saks, at p. 210)

As will be shown, the standards for determination of a match of fingerprints have been described as, "ill-defined, flexible, and explicitly subjective criterion for establishing fingerprint identification." (Stoney, David A. *Measurement of Fingerprint Individuality*, Advances In Fingerprint Technology 327, 329 (Henry C. Lee & Robert E. Gaensslen eds., 2d ed. 2001.)

Additionally, there are two fundamental premises that underlie fingerprint identification: 1) the theory that two or more people cannot possibly share the same basic fingerprint pattern; and 2) the claim that examiners can reliably assert absolute identification from small latent print fragments. However, neither of these fundamental premises has ever been tested. (Mears, Michael & Day, Terese, *The Challenge of Fingerprint Comparison Opinions in the Defense of a Criminally Charged Client*, 19 Ga. St. U. L. R. 705, 714, hereinafter "Mears & Day.")

The average fingerprint contains between 75 and 175 ridge characteristics. The ability to identify and compare these characteristics is the premise that underlies the technique of fingerprint comparisons and analysis. However, among fingerprint experts there is not even a single standard agreement as to actual number of characteristics nor the nomenclature of the different characteristics. (Mears & Day, at p. 714.)

An identification is made when a certain number of ridge characteristics are found to exist in the prints that are being compared. However, not only is there no agreement as to the number or precise nature of the traits, additionally, experts do not agree as to how many common characteristics should be found before an match is declared. Some examiners, including those at the FBI, believe there should not be *any* minimum number, but rather an entirely subjective judgment of

the examiner. (Mears & Day, at p.713, citing FBI, U.S. Dep't Of Justice, Law Enforcement Bulletin: An Analysis Of Standards In Fingerprint Identification 1 (June 1972) [hereinafter "FBI, Fingerprint Identification"].

Likewise, among experts and examiners working outside of the FBI, there is no agreement as to the number of common traits that must be observed before a match can be declared, with experts arguing for as low as four and as high as 36. (Mears & Day, at p. 714.) The number of common traits needed for an identification to be declared is crucial because there have been cases of different individuals having up to ten common traits. (Mears & Day, at p. 714.)

In addition, even the act of leaving the fingerprint creates problems, as there may be distortions in the unknown sample due to the pressure of touching the object on which the print is left, the shape of the object, foreign matter on the object, or other factors. (Mears & Day, at p. 714.)

Furthermore, most comparisons do not involve a print from a full tip of the finger, as the average latent print is only one-fifth of the full finger tip. Thus, even if fingerprints were truly unique, in addition to the possible distortion, the examiner is not getting a full picture of the print. (Epstein p. 607, fn. 11, 611.) As a result, this eliminates the possibility of other non-matching traits that would have been observed if the entire print were available for comparison. This creates further problems because the match is made not on the whole fingerprint, but only on a section of the finger, and there is no research indicating that partial prints are unique.

Additionally, when experts are given "contextual information" about the case, their opinion as to whether there is a match is often altered. (Saks, at p. 210, citing Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications* (2006) 156 Forensic Sci. Int'l 74, 76.)

In *United States v. Mitchell* (3rd. Cir. 2004) 365 F.3d 215, 223 -227, as part of the *Daubert* hearing, the government conducted a test, sending two latent prints along with a print card from the defendant to various agencies, including all fifty

states, the Royal Canadian Mounted Police, and the Scotland Yard, asking the agencies to have court qualified experts review the prints to see if matches could be made. (*Id.* at 224.) While three quarters of the responding agencies matched both prints consistently with the FBI's identification, one quarter failed to do so. (*Ibid.*)

While it is true that no "false positives" (i.e., a positive match that contradicted the FBI result) were made in that case (*ibid.*), as discussed below, there have been other incidents of false positives in other cases.

In fact, the very premise of fingerprint analysis is flawed. Although the technique is premised on the theory that each person's fingerprints are unique, there are no scientific studies that have attempted to examine the probabilities of fingerprints from different people having varying numbers of matching ridge characteristics. In fact, because there are no studies as to probability, latent examiners *do not offer opinions in terms of probability*, and, in fact, they are prohibited from expressing such an opinion by the rules of one of the main professional associations, the International Association for Identification. Ironically, they instead make the claim of "absolute certainty" for identifications. (David L. Grieve, *Possession of Truth*, 46 J. Forensic Identification 521, 527–28 (1996).) As a result, making an identification on the basis of a certainty is inherently misleading, because the proper standard should be based on probabilities.

Other studies also indicate that the standards appear to be so lax that examiners often reach different conclusions from comparisons of the same samples. A study from Britain had multiple experts examining the same fingerprints and making comparisons. Of the 130 participants there was tremendous variety in the responses. As to one pair of prints, the number of points of comparison reported ranged from ten to forty. For another pair the range was 14 to 56. On one pair, 44% of the examiners reached the conclusion that an identification could be made, while 56% could not. This study confirmed the

subjective nature of fingerprint analysis. (Robert Epstein, Fingerprints Meet *Daubert*: *The Myth Of Fingerprint "Science" Is Revealed*, (2002) 75 S. Cal. L. Rev. 605, 622, hereinafter "Epstein".)

In another quality control study only 58% of the participants correctly identified all of the latent prints. Furthermore, there were twenty-one erroneous identifications made by fourteen different participants. (Mears & Day, , at p. 734.)

The problems with fingerprint technique and theory has led to efforts to establish standards to address the various shortcomings. However, no such standards have yet been developed.

In 2002, the Department of Justice (DOJ) solicited studies for validations of friction ridge (fingerprint, palm prints, footprints) examination techniques. In doing so, the DOJ explained,

> The uniqueness of friction ridge patterns, be they fingerprints, palmprints [sic], or bare footprints, has long been accepted by the scientific community and by the courts. The reason for this widespread acceptance perhaps lies in the fact that fingerprints were first introduced at a time in our history when society was less demanding of proof and more trusting of authority.

(Validating Friction Ridge Examination Techniques Proposals Solicited, http://www.forensic-evidence.com/site/ID/ID_fpValidation.html)

The solicitation was the result of a meeting hosted by the FBI with latent print examiners to develop guidelines to improve the quality of examiners nationwide. The group determined that there was a need for research "to determine the scientific validity of *individuality in friction ridge* examination based on measurement of features, quantification, and statistical analysis, [and] [p]rocedures for comparing friction ridge impressions that are standardized and validated." (Ibid.) In short, the FBI and the DOJ was seeking support for the very premises that have underlined the admission of fingerprint identification evidence

for the last century, namely that examiners can detect describable ridge patterns and conclude that the patterns provide proof of the individuality of the fingerprint.

Other problems also appear to haunt fingerprint procedures. For example, latent fingerprint identifications do not have any non-judicial applications. The use of fingerprints has been "under the control of the police community rather than the scientific community" and latent prints are used by law enforcement solely as a "tool for solving crime. (Mears & Day, at p. 715.) As a result, there is no independent scientific community to evaluate and accept or reject aspects of fingerprint identification as a science or technique.

Similarly, some procedures are used in non-forensic, non-judicial settings, although they are not acceptable for forensic purposes. For example, polygraphs and hypnosis are used in medicine and physiological research, but are not "accepted" methods for courtroom use. (Mears & Day, , at pp. 719-270.)

This creates issues similar to other areas of investigative procedures. Thus, other procedures may be acceptable as an investigative tool to be used by the police in finding a suspect, but those procedures may not be admissible as substantive evidence of guilt.

For example, the fact that the police found the defendant from a comparison of DNA found at the scene of a crime to a data base or data bank of DNA profiles is a valuable investigative tool for the police to use in locating a suspect. However, the fact that the match to the defendant's DNA was found in the data base is not admissible in evidence to prove guilt, and therefore a *Kelly* hearing is not needed to determine the reliability of such evidence. (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1150.)

Similarly, drug courier profile evidence is rejected as substantive proof of guilt because the admission of such evidence is "nothing more than the introduction of the investigative techniques of law enforcement officers," and not evidence of guilt, per se. As a result, evidence of a profile of a drug courier is viewed as no more than the opinion of the investigating officers." (*United States v.*

Hernandez-Cuartas (11th Cir. 1983) 717 F.2d 552, 555; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006.) As such, it is a valid tool for investigations, but is not admissible in a trial as evidence of guilt.

More recently, in a recent study commissioned by Congress, a committee of the National Academies of Science (NAS) studied the state of forensic science in the United States. (NJC News (National Judicial College), "NAS Calls for "Overhauling" a "Badly Fragmented" Forensic Science System," Hon. Stephanie Domitrovich & Michael J. Saks, April 10, 2009, http://www.judges.org/news/news041009.html)

The Report committee called for an "overhaul of the forensic sciences in general." "The committee cautioned judges about assuming the reliability of certain forensic science methodologies before these techniques have been properly studied and accurately verified by scientific research." (*Ibid.*)

The committee found that substantial variation and a lack of standardized principles and procedures exist among different agencies and jurisdictions. (*Ibid.*)

As it relates to this issue, "The committee found some areas of forensic science (particularly those concerned with identification of the source of handwriting, fingerprints, bitemarks, toolmarks, etc.) 'have yet to establish either the validity of their approach or the accuracy of their conclusions....' " (*Ibid.*)

The committee recommended establishing standard terminology for both reporting on and testifying about results "so that triers of fact may better understand the scientific evidence offered." (*Ibid.*)

E. False Positives Resulting from Flaws in Fingerprint Techniques.

It is becoming apparent that the flaws in fingerprint techniques have led to several cases of wrongful identifications, including several convictions.

Perhaps the most prominent case of fingerprint misidentification involved a person suspected of being a participant in the Madrid subway bombings in 2004. In that case, Brandon Mayfield, a Portland lawyer, was held for two weeks as a

suspect after FBI investigators matched prints found at the scene to Mayfield, and an independent examiner verified the match. After the Spanish National Police examiners insisted the prints did not match, they eventually identified another man who matched the prints. (Real Crime 1,000 Errors in Fingerprint Matching Every Year, LiveScience, Sept 13, 2005[57].)

Other examples of wrongful identifications also have come to light. In Minnesota, a murder conviction was reversed after a trial where two experts identified the defendant from fingerprints. One expert made a positive match of the defendant's thumb print based on 11 points of similarity. The second expert, also board certified, confirmed the first examiner's opinion. (*State v. Caldwell* (Minn. 1982) 322 N.W.2d 574.)

In another case, a defendant was eventually vindicated after being convicted in a trial where the experts identified sixteen points of similarity and Scotland Yard examiners had triple-checked the prints. (Stephen Gray, *Yard in Fingerprint Blunder*, London Times, Apr. 6, 1997, at 6, cited in Mears & Day, at p. 732.)

F. The Need for a *Kelly* Hearing as the First Step in a Re-evaluation of Fingerprint Identification Evidence.

From the foregoing, it is clear that significant questions have arisen as to the validity of fingerprint identification evidence, although this type of evidence has never been submitted to a re-examination. Therefore, appellant submits that the underlying admissibility of fingerprint identification evidence and the propriety of having a fingerprint expert declare a match to the jury should be re-considered.

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[57] http://www.livescience.com/strangenews/050913_fingerprint_mistakes.html; see also http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm

While it is true *Kelly* is usually thought of as applying to "new" evidence, there is no reason why the principles underlying that case should only be limited to new types of evidence. Appellant has found no case holding that *Kelly* is limited to new evidence as part of the *ratio decidendi* of the case. At most, the word "new" appears part of unessential dicta.

Appellant submits that the gloss of "new" in *Kelly* (and *Frye*) is a result of the fact that normally no one would see fit to question the admissibility of clearly established scientific principles. Thus, no one would argue that a court should reconsider the laws of gravity to determine whether evidence that an object fell should be admitted.

However, science evolves. If there is some new reason to question previously accepted beliefs about scientific evidence, if new information is revealed that creates a doubt as to the validity of those techniques, rather than simply admit the evidence because it has always been admitted, it is appropriate to hold a hearing to determine whether that evidence should still be admissible, and *Kelly* is the proper way to test the old theory in light of new developments.

Indeed, *Kelly* itself sees the need for a re-evaluation of the admissibility of evidence in light of new developments in science. Thus, this court in *Kelly* stated:

> Moreover, once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, *at least until new evidence is presented reflecting a change in the attitude of the scientific community*.

People v. Kelly, *supra*, 17 Cal.3d at p.32, italics added.)

In *People v. Leahy* (1994) 8 Cal.4th 587, this court noted that *Kelly* applies to "new" scientific techniques. (*Id.* at p. 605.) However, that should not prohibit an examination of fingerprint identification evidence under *Kelly* standards in this case. This is so for several reasons.

First, as explained above, the process envisioned in *Kelly* is that a new technique will be offered in a trial, and, upon an objection, a hearing will be held in which the technique is tested. After a certain amount of time, after the technique has passed muster, it may become accepted so that no further objections need be entertained, but when new evidence comes to light, the process may be examined anew. (*Kelly*, at p. 32.) Thus, *Kelly* itself is premised on the recognition that, as science evolves and knowledge develops, an "old" methodology, previously accepted, may again require an examination to determine whether it still meets standards of admissibility.

In the case of fingerprints an unusual situation has occurred. Fingerprint technology had been in use for a long time prior to *Kelly*. Fingerprints have been used by law enforcement since at least 1902 when the New York Civil Service Commission began using fingerprints on civil service tests to prevent applicants from having someone else take the tests for them[58].

Thus, long before *Kelly*, fingerprints were part of the legal landscape. However, because the technique was not "new," it was never tested. Rather, it was grandfathered in, with no questions asked.

Additionally, "new" does not necessarily mean a technique that has been recently discovered. Rather, it may mean a technique that has not been tested sufficiently, regardless of chronological age. "In determining whether a scientific technique is "new" for *Kelly* purposes, long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians. (*Leahy*, at pp. 605-606.) As a result, if recent studies create questions as to the reliability of fingerprint techniques and methodology, the field may be "new" for *Kelly* purposes.

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[58] http://www.fbi.gov/hq/cjisd/ident.pdf. The first use of fingerprints in crime fiction appears to be Puddin'head Wilson, by Mark Twain.

In several areas of forensic identification, courts have begun to re-evaluate so-called "scientific" techniques, leading to the limiting of previously admissible identification evidence. Appellant submits that such a re-evaluation is over-due in relation to fingerprints.

For example, in *United States v. Starzecpyzel* (S.D.N.Y. 1995) 880 F. Supp. 1027, the defendants were charged with various counts of conspiring to steal art work from the relative of one defendant and taking the art to auction houses with authorization for the sale of the items and directions the auction houses to forward the sale proceeds to Swiss bank accounts. The defendants made a motion to exclude all expert witness testimony relating to the alleged forgery of art's true owner's signatures. The writings had been examined by a forensic document examiner, who concluded that the challenged signatures were not genuine. (*Id.* at p. 1028.)

The defense argued that the expertise of forensic document examination has never been validated as credible scientific or technical knowledge and does not comport with the requirements of evidentiary reliability articulated by the Supreme Court in *Daubert.* At a hearing on the matter the prosecution presented the testimony of two examiners employed by the City of Cleveland Police Forensic Laboratory and several other experts in forensic identification. (*Id.* at p. 1028.)

The court originally considered *Daubert* to be controlling law as to the admissibility of the forensic testimony. However, the court then concluded that *Daubert* does not apply because although forensic document examination "clothes itself with the trappings of science," in actuality it "does not rest on carefully articulated postulates, does not employ rigorous methodology, and has not convincingly documented the accuracy of its determinations." (*Id.* at p. 1029.)

Therefore, rather than label the evidence as "scientific," the court concluded that document examiners were "similar to [the skill] developed by a harbor pilot who has repeatedly navigated a particular waterway." The Court

therefore treated forensic document expertise under the "technical, or other specialized knowledge" branch of Federal Rule of Evidence, Rule 702, which is not governed by *Daubert's* standards for the admission of scientific evidence. (*Id.* at pp. 1028-1029.)

The court in this decision recited the testimony of one of the forensic examiners who explained that the much of the conclusions of a forensic document examiner were based on subjective standards that could not be articulated, that there were few published studies supporting even the underlying principles of forensic document analysis, and that there was a lack of statistical data supporting the technique. (*Id.* at pp. 1033-1034.)

Consequently, the court concluded that if the court were to apply *Daubert* to forensic document examination techniques, it would have to be excluded.

The court found the final *Daubert* factor, "general acceptance" by the "relevant scientific community," as lacking. In so holding the court noted that *Daubert* did not suggest that acceptance by a legal, rather than a scientific community, would suffice. Thus, while forensic document examiners find acceptance within their own community, that community was devoid of financially disinterested parties. If the community were expanded to include other forensic sciences, there is no indication that there would still be a general acceptance found. (*Id.* at 1038.)

As a result, the court admitted the evidence under Rule 702, which allows for the admission of expert testimony that is nonscientific in character, so long as it "assists the trier of fact."

In a similar approach in *Williamson v. Reynolds* (E.D. Okla. 1995) 904 F. Supp. 1529, the court evaluated the field of comparative hair analysis under *Daubert*. In that case, the defendant argued that the State's hair evidence presented by its expert was inadmissible due to its unreliability and inherently subjective nature. The court noted that there is a lack of consensus among hair examiners about the number of characteristics of hairs.

The court noted the lack of peer review and publication for forensic hair comparisons, a factor under *Daubert*, stating that the few available studies tend to point to the method's unreliability. Similarly, the court noted the fact that there do not appear to be uniform standards for human hair identification, and the conclusions reached are necessarily subjective. Furthermore, what studies there were revealed a high percentage of error rate, with some police laboratories having an error rate of 67%. (*Id.*, at pp. 1556-1557.) Finally, the court noted that even the standard of "general acceptance" was not met, because "any general acceptance seems to be among hair experts who are generally technicians testifying for the prosecution, not scientists who can objectively evaluate such evidence." (*Id.* at pp. 1557-1558.)

As a result, the court concluded that the introduction of expert hair testimony at the trial was "irrelevant, imprecise and speculative, and its probative value was outweighed by its prejudicial effect." (*Id.*, at p. 1558.)

G. *People V. Webb* And *People V. Farnan* Do Not Compel A Different Result.

This court has addressed the *Kelly* standard in the area of fingerprint identification evidence in two cases, *People v. Webb* (1993) 6 Cal.4th 494 (*Webb*) and *People v. v. Farnan* (2002) 28 Cal.4th 107 (*Farnan*). Neither of those cases compel a different result than the one urged by appellant.

In *Webb*, the issue in that case was the admissibility of the use of laser beams to detect latent prints. That is not the issue in this case, wherein appellant is not questioning whether the print was properly detected, but rather what conclusions can be drawn after the finding of the print. Second, the defendant in *Webb* did not appear to be challenging the admissibility of fingerprint identification evidence in general or attempting to question the reliability of that evidence. Because this was not an issue in the *Webb*, that case cannot be held to stand for the proposition that this evidence passes the tests of admissibility.

As Chief Justice Marshall explained in *Cohens v. Virginia* (1821) 19 U.S. 264:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but the possible bearing on all other cases is seldom completely investigated.

(Id. at p. 399.)

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

Webster v. Fall (1925) 266 U.S. 507, 511; quoted in *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127-128, fn. 2; *Johnson v. Bradley* (1992) 4 Cal.4th 389, 415.)

Similarly, in *Farnan*, the defendant argued on appeal that the results of a computerized database for fingerprint matching that produced a list of candidates whose fingerprints were similar to the ones found at the crime scene, including those of the appellant in that case, should not have been admitted. The objection was based on the contention that the evidence was irrelevant, confusing, and cumulative, and that it lacked the requisite scientific foundation.

This court held that the evidence was not inadmissible by reason of section 352 because that evidence was not used to make identifications, but rather it only led the police to the defendant, after which it was still necessary for a qualified expert to make the actual comparison in order to determine if there was a match. (*Id.* at pp. 159-160.)

As to the *Kelly* basis of the issue, the court noted that the evidence was only used to explain how the police were led to the defendant. (*Ibid.*) Thus, this evidence did not attempt to tell the jury that there had been a match. In this regard, the evidence of the fingerprint data base is analogous to a DNA data base which is used to locate potential matches. Such a data base is merely an "investigative tool" rather than "evidence of guilt." (*People v. Johnson* 139 Cal.App.4th 1135, 1150, citing *United States v. Scheffer* (1998) 523 U.S. 303, 312, fn. 8.) In other words, this evidence only shows how the police conducted their investigation and were led to the defendant. It is not admitted for the proof that the defendant's DNA (or fingerprint) was a "match." That fact still needs to be established by independent evidence.

As with *Webb*, because the issue presented here was not an issue in *Farnan*, that case cannot be held to be authority for the proposition that fingerprint identification evidence is established as sufficiently reliable for use at trial.

H. Fingerprint Identification Evidence Is Not Sufficiently Reliable To Declare A Match.

Applying the principles discussed above, it is clear that fingerprint techniques and practices are not sufficiently reliable so as to declare a match. Indeed, as noted before, it is not even correct to discuss fingerprint evaluations as determining a match. Rather, the results should be discussed in terms of probabilities, as is the case with DNA evidence.

The same flaws and fallacies that present problems in handwriting and hair analysis apply to fingerprint identification. For example, there are no subjective standards that govern any aspect of fingerprint identification. From the determination as to the type of trait being observed, to the determination as to how many traits are found in a latent print, to the theory that no two prints are alike, there is no underlying agreement or studies to support the conclusions being drawn.

As with other forensic "sciences," there is no scientific community apart from those who make their living testifying as to the science. Thus, apart from those with financial interests, there is no community in which to find "general acceptance." Similarly, independent studies and peer reviewed literature is lacking.

I. Other Principles Of Law Support The Conclusion That The Trial Court Erred In Denying Appellant's Requests.

As shown above, there is a substantial basis for questioning the validity and accuracy of the art of fingerprint comparisons. However, because appellant was not allowed to question whether these procedures passed the standard of *Kelly*, he was denied the opportunity to present a full and complete defense. It cannot be questioned that the right to present a defense theory is a fundamental right and an aspect of due process of law, and that all of a defendant's pertinent evidence should be considered by the trier of fact. (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599; *Davis v. Alaska* (1974) 415 U.S. 308, 317; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552.)

The United States Supreme Court has described the right of the defendant in a criminal trial to due process as "the right to a fair opportunity to defend against the State's accusations." (*Chambers* v. *Mississippi* (1973) 410 U.S. 284, 294.)

Similarly, in another context, it has been noted that absent an inquiry into a particular matter, a trial court cannot properly and intelligently exercise its discretion in ruling on the defendant's request without holding a hearing to explore the reasons for that request. (*People* v. *Marsden* (1970) 2 Cal.3d 118, 123-124 – request for new appointed counsel.)

Explaining that "There is a reason why litigants are afforded their proverbial 'day in court'" in *Mediterranean Construction Co.* v. *State Farm Fire &*

Casualty Co. (1998) 66 Cal.App.4th 257, 266-267, fn. 11, the Court of Appeal expressed its

> frustration with law-and-motion judges who "refuse to hold oral hearings on critical pretrial matters of considerable significance to the parties. . . . Fair warning: Both written and oral argument are complementary parts of good judging and elemental due process." (quoted in *Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 78.)

As the Court stated in *Spector* v. *Superior Court* (1961) 55 Cal.2d 839, 843, "A judicial determination made without giving a party an opportunity to present argument is lacking in all the attributes of a judicial determination." (Quoted in *People* v. *Marsden, supra*, 2 Cal.3d at 124.)

The denial of the right to question the validity of fingerprint techniques also denied appellant the right to confrontation, guaranteed by the Sixth Amendment to the United States Constitution. As recognized by the United States Supreme Court:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers. 5 J. Wigmore, Evidence s 1395, p. 123 (3d ed. 1940).

(*Davis v. Alaska* (1974) 415 U.S. 308, 315-316, quoted in *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1137.)

This is because cross-examination is more than a desirable rule of criminal procedure. Rather, it is implicit in the constitutional right of confrontation and is crucial to the accuracy of the truth finding process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *Crawford v. Washington* (2004) 541 U.S. 36, 74.).

This principle has long been recognized by the California courts. As the Court stated in *People v. Harris* (1985) 165 Cal.App.3d 1246, at 1256:

> The right of a defendant in a criminal prosecution to confront the witnesses against him is guaranteed by the Constitutions of California

> and the United States.... The federal provision has been incorporated within the concept of due process which is obligatory upon the states. (Cites omitted)

Furthermore, cross-examination has been recognized as "an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." (*Pointer v. Texas* (1965) 380 U.S. 400, 404). Such a right has long been considered to be at the core of the truth seeking function of trial courts. As stated by the United States Supreme Court:

> Certainly no one experienced in the trial of lawsuits would deny the value of cross-examination in exposing falsehood and in bringing out the truth in the trial of a criminal case.

(*Pointer v. Texas, supra,* at 404; *Davis v. Alaska* (1974) 415 U.S. 308, 316).

Because cross-examination is the "principle means by which the believability of a witness and the truth of his testimony are tested" (*Davis v. Alaska, supra,* at 316), the state "has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits." (*Hammerly v. Superior Court* (1979) 89 Cal.App.3d. 388,402; *People v. Hill* (1974) 10 Cal.App.3d 812, 816.) Consequently, "extensive cross-examination of a government witness designed to reveal any biases or prejudice of the witness is compelled by the confrontation clause." (*United States v. Alvarez-Lopez* (1977, 9th Cir.) 559 F 2d 1155, 1160.)

In this case, appellant was denied the right to meaningful cross-examination because he was unable to fully explore the fallacies and potential flaws underlying the testimony of the fingerprint experts who testified against him.

For example, if the criticism of fingerprint technique has merit, appellant would need to ask whether there is agreement in the field as to facts such as the different types of traits contained in a fingerprint, how many points of comparison are necessary for a "match," whether the fact of partial prints may undermine the

results, whether the material upon which the print was found could have distorted the print, and/or any other facts that may undermine the expert's declaration of a match.

The fact that appellant may be allowed to ask these facts of the witness in front of the jury is not sufficient, since the jury will hear the opinion only of the expert testifying, and will not be able to hear divergent views. Nor will appellant have the opportunity to exclude the evidence in its entirety, an opportunity that could only be the result of a *Kelly* hearing

As a result, appellant is hamstrung in his attempts to test that evidence in a manner which would reveal the weaknesses and flaws in the testimony or preclude that testimony in its entirety.

J. Prejudice

"Expert testimony, like any other testimony, may be excluded if, compared to its probative worth, it would create a substantial danger of undue prejudice or confusion." (*United States v. Schmidt* (5th Cir. 1983) 711 F.2d 595, 599.)

Expert testimony is bound to have a tremendous impact on any jury. Unaware of the "hired gun" aspect of expert witnesses, "[l]ay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Pizarro* (2003) 110 Cal.App.4th 530, 555, overruled in part on other grounds by *People v. Wilson* (2006) 38 Cal.4th 1237, 1251; quoting *People v. Kelly* (1976) 17 Cal.3d. 24, 31.) As *Kelly* further explained, "[S]cientific proof may in some instances assume a posture of mystic infallibility in the eyes of a jury...." *(Id.* at p. 32.)

Similarly, this has been recognized in other jurisdictions. (See *Reynolds v. State* (1994) 126 Idaho 24, 31, 878 P.2d 198, 205.) Indeed, it has been said that jurors could be so impressed by the "aura of reliability" of expert testimony that they might trust it more than their own perceptions. (*State v. Middleton* (1982) 294 Or. 427, 437, 657 P.2d 1215, 1221.)

On a nationwide basis, this phenomenon is increasing. Jurors have come to expect expert testimony and to rely heavily on that testimony. ("*'CSI Effect' Has Juries Wanting More Evidence*" USA Today, August 5, 2004, http://www.usatoday.com/tech/science/2004-08-05-csi-effect_x.htm.)

Many other courts have long recognized that expert testimony is extremely powerful and thus subject to extreme abuse. With regard to scientific experts, "jurors may be awed by an 'aura of special reliability and trustworthiness' which may cause undue prejudice, confuse the issues or mislead the jury." (*Williamson v. Reynolds* (E.D. Okla. 1995) 904 F. Supp. 1529, 1557 (quoting *United States v. Amaral* (9th Cir. 1973) 488 F.2d 1148, 1152); *see Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, 595 - "Expert evidence can be both powerful and quite misleading because of the difficulty of evaluating it."; *United States v. Starzecpyzel, supra*, 880 F. Supp. at 1048) -"[W]ith regard to scientific experts, a major rationale for *Frye*, and now *Daubert*, is that scientific testimony may carry an "'aura of infallibility' which may cause undue prejudice, confuse the issues or mislead the jury;" *Williamson v. Reynolds* (E.D.Okl.,1995) 904 F.Supp. 1529, 1557, quoting *United States v. Amaral* (9th Cir.1973) 488 F.2d 1148, 1152; see also Charles T. McCormick Et Al., McCormick On Evidence § 203, at 608-09 (3rd ed. 1984); *see also* John W. Strong, *Language and Logic in Expert Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form*, 71 OR. L. REV. 349, 361 n.81 (1992) - "There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect.").

The risk of undue prejudice and confusion is especially great when it comes to latent fingerprint identification because it has been uncritically accepted by the American legal system for the past eighty years. As a result, the general public has come to firmly believe that fingerprint identifications are scientifically based and that they are invariably accurate. In a recent study of jurors' attitudes toward fingerprint identification evidence, 93% of the 978 jurors questioned expressed the

view that fingerprint identification is a science, and 85% ranked fingerprints as the most reliable means of identifying a person. (Michael & Day, at p. 755.)

Fingerprints are viewed as so inherently trustworthy that they have become the epitome of reliability in identifications in the English language. For example, because of the supposed infallibility of DNA evidence, it is referred to as a "genetic fingerprint." (*United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 818; *United States v. Reynard* (S.D. Cal.2002) 220 F.Supp.2d 1142, 1153.) Thus, DNA's reliability is described in terms of fingerprints.

Indeed, the second definition of "fingerprint" is not limited to ridges and grooves on the tips of one's fingers, but is "something that identifies: as a: a trait, trace, or characteristic revealing origin or responsibility.[59]" Another dictionary gives the alternate definitions as "2. A distinctive or identifying mark or characteristic: 'the invisible fingerprint that's used on labels and packaging to sort out genuine products from counterfeits' (Gene G. Marcial). ¶ 3. a. A DNA fingerprint. ¶ b. A chemical fingerprint."[60]

Furthermore, in closing argument to the jury, the Deputy District Attorney argued the fact that appellant, Michaud, and Samson's fingerprints were found on the AM/PM cup in the van. (33RT 7087.) This adds to the prejudice from this evidence because a prosecutor's closing argument is an especially critical period of trial. (*People v. Alverson* (1964) 60 Cal.2d 803, 805.) Since it comes from an official representative of the People, it carries great weight and must therefore be reasonably objective. (*People v.* (1952) 111 Cal.App.2d 650.) Thus, when a prosecutor exploits errors from trial during closing argument, the error is far more likely to be prejudicial to the defendant. (See, e.g., *People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Brady* (1987) 190 Cal.App.3d 124, 138; *People v. Hannon* (1977) 19 Cal.3d 588, 603; *Garceau v. Woodford* (9th Cir. 2001) 275 F3d 769, 777.)

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[59] www.merriam-webster.com/dictionary/fingerprint
[60] www.thefreedictionary.com/fingerprint

Because the denial of appellant's request for a chance to fundamental constitutional rights, it must be judged under the standards of *Chapman*, which requires the prosecution to establish that it is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. 18.)

Finally, because these errors allowed the jury to decide the case on the basis of evidence the reliability of which has not been established, it violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.)

In this case, the fingerprint evidence purports to show that James Daveggio, Michelle Michaud, and Vanessa Samson were all in the van together. Given that "fact," it was virtually impossible for him to present a defense. The limited defense that he presented was dictated by the opinion of the trial court to not allow appellant to question some of the strongest evidence against him.

K. Conclusion

As a result of the problems with fingerprint theory, David Stoney, a leading scholar and fingerprint practitioner, has written: "[T]here is no justification [for fingerprint identifications] based upon conventional science: no theoretical model, statistics or an empirical validation process." (Mears & Day, , at p. 729-730.)

Similarly, other leading forensic commentators have questioned fingerprint identification evidence. For example, one such expert concluded, "A vote to admit fingerprints is a rejection of conventional science as the criterion for admission." (Saks, Michael J., "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science." 49 Hastings LJ. 1069, 1106 (1998).)

Another leading expert and one of the editors of Modern Scientific Evidence, David Fraigman, stated that he predicted fingerprint identification evidence would soon be excluded, because "[t]he research is just too thin to let it

in." (L.A. Times April 8, 2001, A1, Fingerprints' Accuracy on Trial, Malcolm Ritter.)

Whether or not fingerprint identification evidence is ultimately held to be admissible, the trial court erred in not allowing appellant to present evidence as to the flaws and weakness of that technique in order to challenge its admissibility. As discussed, the failure to allow appellant the opportunity to question this evidence denied appellant the right to present a defense in violation of the right of due process of law.

In light of the weaknesses and fallacies in fingerprint science that have come to light, the trial court committed prejudicial error denying the motion precluding the prosecution expert from testifying as to a "match" made from latent fingerprints. Furthermore, the trial court erred in denying the defense request a hearing on this issue pursuant to *People v. Kelly* (1976) 17 Cal.3d 24.

Therefore, a reversal of the judgment entered below is required.

VIII

THE TRIAL COURT ERRED IN ADMITTING VARIOUS ITEMS OF EVIDENCE WHICH WERE INADMISSIBLE UNDER EVIDENCE CODE SECTIONS 210, 350, 352 AND 1101. THE IMPROPER ADMISSION OF THIS EVIDENCE DEPRIVED APPELLANT OF THE DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION. IT ALSO VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHT TO A RELIABLE DETERMINATION IN A CAPITAL CASE

The trial court erred in admitting various items of evidence because the evidence was not relevant, or, in the alternative, the probative value of the evidence was outweighed by its prejudicial nature. The evidence was also inadmissible under Evidence Code section 1101. The wrongful admission of these items of evidence denied appellant due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution and the right to a reliable determination of the facts in a capital case, as guaranteed by the Eighth Amendment to the Constitution.

These items of evidence included the following: 1) Evidence relating to slits in the carpet from Michaud's van; 2) Evidence relating to crossbows; 3) Evidence relating to guns found in Michaud's van and the motel room in which appellant and Michaud were staying at the time of their arrest.

Because the legal principles relevant to these issues are similar, arguments relating to all of these items of evidence are presented in this Section.

A. The Evidence Introduced Relating To Slits Cut In The Carpet From Michaud's Van, The Objections Made To That Evidence, And Arguments Made To The Jury Regarding That Evidence.

Prior to the start of testimony, the prosecutor explained that she wanted to introduce photographs of a piece of carpet found in Michaud's van, Exhibit 30. (24RT 5513.) The prosecution explained that there were slits in the carpet, and the prosecution had made a template of the pattern of these slits so the template could be laid down in the van in order to determine if the slits in the carpet matched anything that could be used as a restraint. It was discovered that the slits in the carpet matched four of the anchor bolts where the seats would normally be attached. However, there were not enough slits in the carpet to allow for all of the anchor bolts to be passed through the carpet. As a result, it would not be possible to put the seats back in the van if this carpet was on the floor of the van. The prosecution's theory was that rope was tied to the anchor bolts, passed through the slits in the carpet, and used to restrain Samson. (14RT 3444-3446.)

The defense objected on the grounds that there was no evidence that Samson, or anyone else, was restrained in the van in this manner, and therefore this was "pure speculation." (14RT 3446.)

The prosecution explained that a section of rope was found in the white towel in the van, that coil of rope was missing eight feet, and that Samson's DNA was detected on the other items found on the towel. Rope was also found in the snow next to Samson's body and in Michaud's pocket. The rope in Michaud's pocket and the rope next to Samson's body totaled eight feet in length. (14RT 3446.)

As a result, the prosecutor argued that there could be no other use for the slits in the carpet, apart from using them to assist in restraining Samson. (14RT 3446.)

The defense replied that it appeared that the rope found at the scene was a different type of rope. Furthermore, it was not clear whether Samson's DNA was found on the rope or on the white towel. (14RT 3446.)

The defense further argued that it was pure speculation to assume ropes had been passed through the slits, and there was no showing that any ropes, apart from the rope she was strangled with, were actually used on Samson.[61] As a result, the defense objected to evidence relating to the use of the template or the carpet for this purpose, stating that it was "inflammatory, suggestive and is manufacturing of evidence to have photographs and completely staged." (14RT 3447.)

The prosecution acknowledged that there were no indications of the rope being used on any of Samson's limbs. (14RT 3448.)

Subsequently, the court ruled that it would allow the evidence of the template and the slits in the carpet. The court believed it was relevant on the issue of "planning, premeditation, and scheming." The court believed that it was more probative than prejudicial. The court also ruled that it would allow photographs showing the ropes passing through the slits on the templates. (15RT 3506.)

In Opening Statement, Ms. Backers went into great detail[62] explaining the discovery of the slits in the carpet, the template made of those slits, how the template matched the bolts, "where you could actually put something through and restrain someone if they were spread eagle in the van." (16RT 3698-3701.)

Tim Painter, an inspector with the District Attorney's office testified as to the carpet found in Michaud's van. (24RT 5510-5512.) Painter testified that there were four slits cut into the carpet. The locations of the slits formed a quadrangle. (24RT 5514.)

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[61] The prosecution acknowledged that there were no indications of the rope being used on any of Samson's limbs. (14RT 3448.)

[62] This portion of the prosecutor's Opening Statement took five pages. (16RT 3697-3701.)

He assigned arbitrary numbers to the slits. The distance between slits 1 and 2 was 29 inches. The distance between slits 3 and 4 was 35 inches. The line between slits 2 and 4 crossed the diagonal of the quadrangle and was 44 inches long. The distance between slits 1 and 3 was 38 ½ inches. The line between slits between 1 and 4 crossed the diagonal of the quadrangle and was 50 inches. (24RT 5514-5516.) The carpet was 73 ½ inches long. The width varied from 41 inches in its narrowest part to 46 inches in its widest part. (24RT 5516.)

Exhibit 199 was the template that Painter made out of paper showing the location of the slits. (24RT 5516-5517.) Painter placed the template on the floor of the van, and the slits matched the recess points of the brackets with anchor bolts in the floor of the van. He passed a two-foot length of rope through slits in the template and through the recess under the anchor bolt pin. (28RT 6109-6112.)

To Painter's knowledge, no one tested the slits in the carpet to see if there were hair fibers, metal particles, duct tape residue, and/or body fluids present in those areas. (24 RT 5523-5524.)

Painter took the bag that the rope appeared to have come in (Exhibit 27J) and contacted the manufacture to order an identical sample of the rope. When the rope arrived, he measured it and determined that it was 48 feet, eight inches long. (28RT 6112-6113.) The rope found in the towel in Michaud's van was 37 feet, four inches long. (28RT 6113.) A three foot, one inch piece of nylon rope was found in Michaud's pocket when she arrested. (23RT 5179, 6113.)

When the exhibits were being received into evidence, the defense renewed the objection to the photographs showing the ropes going through the slits in either the carpet or the exemplar on the grounds that there was no evidence that the brackets were ever actually used for that purpose. That objection was overruled. (32RT 6889-6890.)

At the conclusion of the guilt phase, the Deputy District Attorney argued that the slits in the carpet were used to pass four two-foot lengths of rope through

the carpet to the anchor bolts so that Samson could be tied down by her wrists and ankles. (33RT 7089-7090, 7197.) In particular, the prosecutor argued:

> And then you have the van and the fact that all the seats are out of the back and they put this carpet down, for which there is no other explanation than to put these four little tiny razor-like one inch slits so they could tie somebody down. There is no other explanation for that piece of carpet. You can't put the seats down through it. ....
>
> Then you have ropes. The van is full of ropes. She has rope in her pocket. There is rope at the murder scene. There is eight feet of missing rope. If you take eight and divide it by four that makes four two-foot tiedowns. And the slits in the carpet, ladies and gentlemen, they match the anchor bolts exactly. You take the slits and look at where those anchor bolts are and they match the four outer most anchor bolts exactly. You slip a piece of rope through there and you can tie her wrists and ankles. (33RT 7089-7090; see also 33RT 7197.)

B. The Evidence Introduced At Trial Relating To The Crossbow And Guns, The Objections Made To That Evidence, And Arguments Made To The Jury Regarding This Evidence.

The prosecution offered evidence as to various weapons that were found. The prosecution explained that one element that had to be proven as to Counts 1 and 2 was "force or fear," and "clearly" the prosecution was "entitled to show that they used force and fear in accomplishing the acts they did to Vanessa Samson as well and the gun itself. (14RT 3441.)

It was argued that two of the sexual assault victims would testify that guns were used in the assaults against them, and that they knew that appellant carried a .38 caliber gun. It was also known that Michaud carried a smaller handgun, either a .22 or .25 caliber gun. (14RT 3442.)

The prosecution explained that it was unknown what caused the bruising to Samson's buttocks, and it was unknown whether the crossbow was used at all. (14RT 3442.) When asked how one uses a crossbow to cause bruising, the

prosecutor explained that Samson was struck with a hard object, and the crossbow was made out of metal. (14RT 3442.)

The prosecutor further argued that appellant put a gun to Amy's head and pulled the trigger, but the gun jammed. The defendants also threatened to kill some of the other victims. (14RT 3443.)

Furthermore, appellant had explained to Christina and Amy that it is easier to kill someone with a crossbow because it is quieter than a .38, and this was proof that he "studied methods of killing." (14RT 3443.)

As to the crossbow, Mr. Ciralo objected, citing Evidence Code section 352 and a lack of relevancy, saying that the record indicated that Samson was not killed by a crossbow. (14RT 3443.)

The court referred to the elements of force and fear and stated that if the crossbow was found at the scene of the crime it was "certainly relevant." (14RT 3443.)

The court stated that it did not matter if it was known whether it was used to threaten Samson because of the force and fear allegation and the fact that the weapon was found at the scene. Therefore, the evidence was "as relevant as you need to get." (14RT 3444.)

Several prosecution witnesses subsequently testified regarding the crossbow. Donald Rick Boune, the boyfriend of Michaud's sister, Misty, testified that he saw a crossbow in Michaud's van. (16RT 3792.)

Detective Donald Harms of the Pleasanton Police Department testified that on December 8, 1997, he went to the Dublin house of Annette Carpenter, April's mother and appellant's ex-wife, where he found a crossbow in a box under Jamie's desk, as shown in Exhibit 13. (21RT 4779-4780, 4785, 4788.) April testified that around the week of Thanksgiving Michaud and appellant went to her mother's house where she was living and asked if they could leave some things in her room. (20RT 4596.)

Darrin Davis of the Pleasanton Police Department testified that he was present when Agent Ferrin removed a crossbow from the back of Michaud's van after appellant was arrested. (24RT 5433.)

Antonia Leal, the forensic technician from the Washoe County Sheriff's Department, also identified a photograph showing the crossbow in the back cargo area of the van. When she first observed the crossbow, it was in a cocked position. (26RT 5807-5808.)

When the exhibits were being received into evidence, the objection to the crossbow was renewed, with Mr. Berger objecting on the grounds of lack of relevance and Evidence Code section 352. (32RT 6888.)

At that time, Ms. Backers argued that the "good doctor," Dr. Collins, had testified that he was wondering what the defendants used to control Samson, and it was a reasonable inference to conclude that the weapons that had been recovered were used for that purpose. (32RT 6888.) Mr. Berger, defense counsel for appellant. pointed out that there was a difference between inferences and speculation, and that Ms. Backers was getting into speculation. (32RT 6888.)

The court overruled the objection. (32RT 6889.)

Later, the defense objected to the .38 caliber gun and ammunition found in the van and the .25 caliber gun found in the motel room on the grounds that there was no evidence that those weapons had been used in any of the charged crimes. (32RT 6951.) The prosecution argued that a .25 was used in several of the crimes and a .28 was fired off to scare Rachel and Christina. (32RT 6951.) The court overruled the objection and admitted the evidence of these guns and the ammunition. (32RT 6951.)

C. The Relevant Law.

Relevant evidence "means evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the

action." (Evid. Code § 210.) "No evidence is admissible except relevant evidence." (Evid. Code, § 350.)

"While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. . . . Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891.) "There is no discretion vested in a court to admit irrelevant evidence." (*People v. Kitt* (1978) 83 Cal.App.3d 834, 849.)

A court lacks discretion to admit evidence that is irrelevant or provides only speculative inferences. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.) "Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact. . . ." (*People v. De La Plane* (1978) 88 Cal.App.3d 223, 244.)

Furthermore, as noted above (*ante*, at p. 96), the due process clause mandates that inferences be based on a rational connection between the fact proved and the fact to be inferred.

Once evidence is considered to be relevant, it must pass the standards of Evidence Code section 352, which states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In applying this section to exclude otherwise admissible proffered evidence, the trial court is compelled to effect a weighing of the countervailing factor of probative value versus prejudicial effect. "Prejudice" refers to evidence that tends to evoke emotional bias against defendant. "Evidence is substantially more prejudicial than probative [citation] if ... it poses an intolerable 'risk to the fairness of the

proceedings or the reliability of the outcome' [citation]." (*People v. Lindberg* (2008) 45 Cal.4th 1, 49, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

For the purposes of Evidence Code Section 352, "prejudicial evidence" is evidence "`which uniquely tends to evoke an emotional bias against [a party] as an individual and which has very little effect on the issues.'" (*People v. Wright* (1985) 39 Cal.3d 576, 585; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

The court must consider "the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relative to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons cited in section 352 for exclusion." (*People v. Houston* (2005)130 Cal.App.4th 279, 304, internal citations omitted.)

Additionally, this constitutes inadmissible character evidence. It should be noted that Section 1101 refers to "a crime, civil wrong, or *other act.* It is not necessary that the act be a crime for it to come within the scope of Section 1101. (*People v. James* (1976) 62 Cal.App.3d 399, 407.) In this case, from the "act" of possession of munitions and crossbows the jury was asked to infer facts about appellant's guilt. This raises issues under Evidence Code section 1101.

The danger in this case is that the jury will view appellant as a bad person or a person with a propensity for violence because he has lethal weapons. Indeed, it was the proof of the ownership of knives not associated with the charged offense that caused the Ninth Circuit to reverse the conviction as violative of due process in *McKinney v. Rees*, *supra*, 993 F.2d 1378.

When the prosecution seeks to introduce evidence of weapons found in the defendant's possession, additional considerations arise when there is no evidence that the weapon was actually used in the charged crime.

In *People v. Riser* (1956) 47 Cal.2d 566, defendant was charged with murder in the shooting deaths of two victims. During the investigation by police at the scene of the murder, several bullets fired by the gunman were recovered, as well as fingerprints of the assailants. Witnesses testified that appellant was the shooter.

Experts testified that fingerprints recovered at the scene matched those of defendant and the bullets found in a briefcase in the accomplice's car were similar to bullets found at the scene. It was determined through the testimony of the prosecution's witness that the killing had been done with a Smith and Wesson .38 Special revolver. This gun was never recovered.

During a search of the accomplice's car, the police recovered several holsters, two leather belts and a box of .22 shells. When defendant was arrested, the police seized from his possession a loaded Colt .38 revolver. All of this evidence was shown to the jury and admitted into evidence.

This Court ruled in *Riser* that "[i]t was error . . . to admit the Colt, two of the holsters, the belts, and the box of .22 shells. The court stated that "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon." (*People v. Riser*, *supra*, 47 Cal.2d at p. 577.)

The Court continued, "When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [cites omitted]" (*Id.*, at p. 577.)

In *People v. Henderson* (1976) 58 Cal.App.3d 349, the trial court permitted the prosecutor, over defense objection, to cross-examine defendant about a loaded gun which was found in his home. There was no contention that the gun found was used by the defendant in connection with the charged offense.

The *Henderson* court stated:

> Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon.

> Evidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that the defendant is the kind of person who surrounds himself with deadly weapons - a fact of *no relevance[?]* consequences to determination of the guilt or innocence of the defendant.

(*Id.* at p. 360, italics in original.)

The *Henderson* court held that the "claimed relevance of the loaded Derringer gun on the issue of defendant's intent is without substance. The inference sought by the prosecution is purely one of *sheer speculation*--the antithesis of relevancy. The admission into evidence of this irrelevant evidence--highly prejudicial in nature--also constitutes reversible error." (*Ibid.*, italics in original.)

Similarly, guidance on the issue of relevance is provided by *People v. Sims* (1970) 10 Cal.App.3d 299, where the court found irrelevant the testimony of the arresting officer that he found on defendant's person, upon his arrest six days after a robbery, a knife which was otherwise unconnected to the crime. In *Sims*, the trial court's error in permitting that testimony was cured, however, because a percipient witness later identified the knife seized at arrest as the one used in the robbery.

In *United States v. Hitt* (9th Cir. 1992) 981 F.2d 422, the defendant was charged with possessing an unregistered machine gun. A photograph was introduced by the prosecution to establish that the gun was not dirty, worn or defective, thus negating the argument asserted by the defense that such was the reason the government's test of the gun produced a rapid fire per trigger pull. However, the photograph also depicted "about a dozen other weapons -- nine other guns, including three that looked like assault rifles, . . . all belonging to [defendant's] housemate." (*Id.*, at p. 423.)

The circuit court reversed the conviction, holding that the photograph's probative value was small while at the same time the photograph was fraught with the twin dangers of unfairly prejudicing the defendant and misleading the jury.

> Once the jury was misled into thinking all the weapons were Hitt's, they might well have concluded Hitt was the sort of person who'd illegally own a machine gun, or was so dangerous he should be locked up regardless of whether or not he committed this offense. Rightly or wrongly, many people view weapons, especially guns, with fear and distrust. Like evidence of homosexuality [citations], photographs of firearms often have a visceral impact that far exceeds their probative value.

(*Id.*, at p. 424; citations omitted.)

Finally, because of the speculative inferences created by this evidence, it has an impact on the reliability of the truth seeking process in violation of the heightened reliability requirements of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, (1976) 428 U.S. 280, 305; Gilmore v. Taylor (1993) 508 U.S. 333, 334; *Johnson v. Mississippi*, *supra*, 486 U.S. 578, 584-85; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

D. Application Of The Law To The Facts Of This Case

1. The Speculative Nature Of The Evidence Of The Slits In The Carpet

Initially, it must be understood that it is pure speculation that appellant and/or Michaud ever used the bolts and slits in the carpet for the purpose of actually restraining any victim, much less Samson, the victim in this case.

While some victims described some means of restraint, none of the victims who were molested in the van ever described being tied down in the manner suggested by the Deputy District Attorney. Indeed, none of them ever described being bound to any portion of the van in any manner.

Even Aleda never testified as to anything close to this type of restraint. This is an important fact in itself, since under the prosecution's theory of the case, the crime against Aleda was a crime so similar to the one involving Samson that it was a "signature" offense that could be used to prove identity. As noted above (*ante*, at p. 94.), for an offense to be used for purposes of proving identity under

Evidence Code section 1101, the uncharged offense must have an exceptionally high degree of similarity to the charged crime.

In fact, when the defendants grabbed Aleda they could have had no intention of restraining her in this manner because the middle row of seats was in the van, and the slits could not be used when that row of seats was in the van. (16RT 3626, 3697, 17RT 4006.)

In fact, the prosecution argued that the incident involving Aleda was so similar to the incident with Samson that it qualified for the signature-like similarity required to use that evidence as proof of identity under Evidence Code section 1101. As noted previously (*ante* at p. 94), this requires an extremely high degree of similarity so that it can be said that only the same person or people operate in the same way. If the Aleda incident is so similar that it can be used for proof of identity, the fact that appellant did not bind Aleda precludes the speculative inference that he bound Samson.

Furthermore, no abrasions or marks were found on Samson's wrists or ankles that would indicate she had been bound in this or any other manner. (23RT 5326.)

The trial court believed that the slits in the carpet were relevant on the issue of "planning, premeditation, and scheming." (15RT 3506.) However, the focus of a trial should be on what the defendant *did* in the crime for which he is being charged. Rather, the trial court was in error in that there was no logical inference of "planning" that could have been drawn from the evidence. While there is some tangential relevance to the issue of intent to show another plan that was never carried out, it clearly becomes a side issue that is of minimal importance so that its probative value is outweighed by it prejudicial impact.

As noted above, in resolving issues under Evidence Code section 352, a court must consider 'whether the evidence is relative to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons cited in section 352 for exclusion." (*Ante*, at p. 237.)

While appellant's fantasies and plans that were never acted upon may provide some basis to infer he intended to commit this related crime, which may provide a further inference that he *did* commit this crime, the chain of reasoning required to reach that result is rather tenuous. Likewise, any plans that he never put into action are very collateral to the main issues.

Furthermore, the evidence was not being used to show his intent which was never fulfilled. Rather, the Deputy District Attorney argued that the slits in the carpet were used to bind Samson. However, there was no evidence of that specific fact.

In contrast, this evidence is hardly crucial to any legitimate part of the prosecution's case, given other evidence connecting appellant with the crime. Therefore, its probative value is minimal.

On the other hand, as discussed more fully in the section on prejudice below (*post*, at p. 250), this evidence is very likely to provoke an emotional response on the part of the jury trying to imagine the terror the victim felt tied down in a spread eagle fashion after being abducted by strangers.

In short, appellant contends that the evidence was purely speculative, and was therefore irrelevant and inadmissible. In the alternative, if there is some arguable relevance, the tenuous nature of the inferences created are outweighed by the incredibly inflammatory nature of the images this evidence invokes.

2. Application Of The Law In Relation To The Evidence Of The Crossbows And Guns

In order to evaluate the relevance of the guns and/or crossbows to the charges against appellant it is necessary to recount the evidence introduced at trial relating to these weapons.

(a) Evidence Relating To The Crossbows

Apart from the evidence that the crossbows were found in the van and at April's house, no one testified that the crossbows were used for anything. There was some evidence that Samson was bruised and had been hit with a blunt object. However, there was no evidence from which one could infer that the crossbow was the item used to cause that injury. In fact, there was no evidence to infer that bruise was caused in the van, as opposed to the motel room. Therefore, to assume that the blunt object that caused the injury was the crossbow, as the prosecutor argued, is just speculation. The evidence that she was hit with something is not a basis to admit any object found in the van several days later.

Furthermore, it is undisputed that one of the crossbows could not possibly have caused the bruise, or been in any way connected with the offense against Samson. Appellant had left one of the crossbows at April's house the week before the murder, it was still there when the police found it after his arrest, and appellant had not returned to that house between the murder and his arrest. (21RT 4779-4780, 4785, 4788, 4898-4899.)

Clearly, the probative value of that crossbow is zero, and of the crossbow in the van, nearly so.

(b) Evidence Relating To The Guns And Ammunition

During the trial, there were several references to guns. These included the following:

Sharona testified that after the sexual offenses appellant showed her a gun when they dropped her off, threatening to kill her if she reported them. (20RT 4539-4540.)

Christina testified that when she and Michaud arrived at the house where she was later molested, Michaud pulled a gun out from her pants pocket, and put it on the counter. (18RT 4181-4182.)

Christina also testified that on the way back from Santa Cruz with Rachel, Michaud, and appellant, appellant pulled off the side of the road, took out a gun and fired it out the window. Although he did not say anything, Christina took it as a threat. (18RT 4259-4260.)

Amy testified that she was hit from behind with hard object she did not see. She testified that it felt like when she had previously been hit on the head with a gun. (19RT 4451-4453.) Later, she felt a gun being put against her head and heard a click. Appellant said, "Damn, it jammed." (19RT 4469-4470.)

Finally, one time appellant pulled out a gun, pointed it at Michaud's head and threatened to kill her. (16RT 3787-3788.)

3. The Evidence Was Not Relevant To Bolster The Testimony Of Amy, Sharona, Or Christina

The fact that Amy, Sharona, and Christina testified to a particular fact regarding a gun does not mean that everything appellant may have done in relation to some other firearm is admissible to bolster their testimony. It must be remembered that none of these witnesses were cross-examined or impeached as to the testimony they gave in this area. There was no need to corroborate every detail in contravention of other rules of evidence.

The rules relating to impeachment and rehabilitation do not allow the prosecution to present irrelevant evidence solely to prove the truth of that evidence for other purposes, such as rehabilitation of the witness.

As this court stated in *People* v. *Lavergne* (1971) 4 Cal.3d 735, 744, "[a] party may not cross-examine a witness upon collateral matters for the purpose of eliciting something to be contradicted. [Citations] This is especially so where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's questions."

In *People v. Luparello* (1986) 187 Cal.App.3d 410, a witness had testified that someone had written graffiti associated with the "F-Troop Gang" on the

witness's van. This was determined to be "marginally relevant" to credibility. (*Id.* at p. 422.) A subsequent witness then identified one of the parties, and described him as wearing clothing associated with the F-Troop. (*Id.* at p. 423.) The prosecutor then used this to "open the door" to get in a body of evidence about the F-Troop gang that otherwise would have been inadmissible. (*Id.* at pp. 424-246.)

This tactic was disapproved of by the Court, which stated:

> In this manner, the prosecutor used a relatively innocuous description of a type of head gear . . . and began a foray based consistently on leading questions in which he attempted to inform the jury by innuendo not only that F-Troop was a street gang whose members were suspected of committing homicides and other violent attacks on persons, but also that the gang was likely connected to the case in such a way that its members had threatened a material witness.

(*Id.* at p. 426.)

In *Luparello*, had it not been for the earlier innocuous references to the gang graffiti and the clothing, this lurid evidence would not have been admitted. Consequently, it was error to bootstrap this information into evidence by the use of the prior testimony. (*Id.* at pp. 426-247.)

From the foregoing, it is clear that a party is not allowed to examine a witness/party on a marginally relevant subject, solely for the purpose of bringing in otherwise inadmissible evidence to rebut or corroborate the information elicited. The admission of such prejudicial and irrelevant evidence violates the right to due process of law. In *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, the court explained that while one of the items of evidence complained of was "faintly relevant" to a material issue (*id.* at p. 1384, fn. 7), several of the items of evidence introduced were not relevant to any fact other than the defendant's character and the inference that he acted in conformity with that character. (*Id.* at pp. 1381-1884.) Because the other acts evidence gave rise to no permissible inferences, and because the exclusion of such evidence is "an historically grounded rule of Anglo-American jurisprudence," the admission of such evidence may result in a violation

of due process. (*Id.* at p. 1381, citing *Jammal v. Van de Kamp* (1991, 9th Cir.) 926 F.2d 918, 920 and *Dowling* v. *United States* (1990) 493 U.S. 342, 352.)

In summary, the fact that these witnesses testified to some act putting a gun in the hands of one of the defendants is not relevant to prove appellant used a gun when he abducted Samson, particularly when his "signature-like" prior abduction did not involve the use of a firearm.

4. The Evidence Was Not Relevant For Other Purposes.

The evidence of the guns and crossbows was not relevant for other purposes.

In resolving this issue several facts must be kept in mind. First, appellant never used the guns in order to induce any of the victims to do anything. He used a gun on one occasion to tell the victim not to report the offense. He used it on a second occasion to strike Amy from behind. He used it on another occasion in a much more ambiguous manner, firing the gun out the window of a car without speaking about it, although Christina took it to be a threat not to say anything.

Michaud also took a gun out of her pocket once, but did not point it at anyone or threaten anyone.

Finally, appellant may have tried to shoot Amy, although it is not at all clear that he wanted to kill her (if he did, why did he not do so after the gun jammed?). In fact, the more logical inference is that he intended to scare her.

More importantly, there is no claim that appellant used the gun with Samson in any manner at all, let alone one that was in any way similar to the manner in which it was used with other victims.

As noted above, the prosecution contended that the crime against Aleda was so similar to the crime against Samson that it could be used to prove appellant's identity as the person who abducted Samson. As with the lack of restraints of any kind being used on Aleda, if these crimes are so strikingly similar to qualify for proof of identity under Evidence Code section 1101, it is

inconsistent for the prosecution to argue that appellant did not use a gun in one offense and did use a gun in the second offense.

In short, the evidence was pure speculation that the gun was been used in any manner with Samson.

Likewise, this evidence of weapon use may not be admitted to prove common plan. Apart from the incident where appellant fired a gun out of the car window without saying anything (18RT 4259-4260), the threats to the victims, such as Sharona, were not made with a gun present.

As noted, in order to prove a common plan, there must be a "concurrence of common features." (*Ante*, at p. 99.) Therefore, one cannot use a gun to prove common plan in the incident involving Samson when a gun was not used in the other incidents involving prior bad acts.

As noted above, one of the uses that the prosecution offered for the evidence as to various weapons was that the element of force or fear had to be proven. (14RT 3441.)

While it is true that the prosecution had to prove force and/or fear, as explained above (*ante*, at pp. 237, 241), it is important to determine the relationship of the evidence to the actual inferences sought and determine whether the evidence is merely relative to a collateral issue. Likewise, it is important to consider the necessity of the evidence to the proponent's case.

The undisputed evidence is that Samson was walking down the street when she was grabbed and tossed into a van driven by strangers. Other evidence indicates that she was gagged with a ball gag and kept as a hostage for a substantial period of time. There were numerous other details of how the crime *actually* happened that would make it sufficiently clear that there was force and fear involved. Indeed, the defense never questioned those elements.

Clearly, these elements were so strongly proven that the use of the guns or the crossbows to prove these elements is in the class of coals to Newcastle. Because there was no serious dispute as to the evidence of force or fear in the

Samson case, the additional probative value is minimal. However, as noted previously, the prejudicial effect of evidence of lethal weapons is extremely strong and likely to provoke an emotional response on the part of the jury. (*Ante*, at p. 142-143.)

In direct contrast to the lack of necessity of further proof of these elements stands the questionable nature of the inferences urged, stemming from the speculative nature of the inference due to the fact that *it is not even known* if these items were used for this purpose.

However, without proof as to whether these weapons were used, it is inferred that they were the implements used to instill fear. Clearly, the probative value of the evidence is minimal.

In a similar manner in arguing for the admission of the crossbow, the prosecution explained that it was unknown what caused the bruising to Samson's buttocks. (14RT 3442.) If it was unknown, though, it is speculative, if not far-fetched, to assume it was the crossbow.

Likewise, at another point, Ms. Backers argued that the coroner testified that he had been wondering what the defendants used to control Samson, and that it was a reasonable inference to conclude that the weapons that had been recovered were used for that purpose. (RT 32 6888.)

It is submitted that this is a non sequitur. If the coroner was wondering what caused the bruising, this means he did not know. To introduce a weapon *because* the coroner did not know what caused the bruising only adds to the confusion and speculation surrounding the item.

Similarly, the prosecution argued that appellant had explained to Christina and Rachel that it is easier to kill someone with a crossbow because it is more quiet than a .38, and this was proof that he "studied methods of killing." (14RT 3443.).

It is respectfully submitted this rationale is rather strained. Anyone instinctively knows that a bow and arrow is more silent than a gun. To reach this

conclusion does not prove that the person doing so "studied" methods of killing. Thus, the desired inference is very tenuous.

In contrast, showing someone "studied methods of killing" transforms the person into a psychotic killer, prowling the streets, looking for prey.

Again, the minimal relevance is overwhelmed by the prejudice caused by showing someone is a student of murder.

E. Prejudice

Although erroneous admission of evidence typically is evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818, appellant submits that stricter scrutiny is required here. As noted above, this error cannot be viewed in isolation because of its synergistic impact in conjunction with other errors. Thus, in the dynamics of this case, this error contributed to a lightening of the prosecution's burden of proof in violation of the Fourteenth Amendment, and prejudice therefore should be evaluated under the federal standard of *Chapman v. California*, *supra*, 386 U.S. 18. (See *People v. Tewksbury* (1976) 15 Cal.3d 953.)

The overall image created by these various items of evidence is one of appellant as a psychotic killer armed with guns and crossbows and touring the country in a mobile torture chamber.

The admission of character evidence involving the use of weapons and the physical restraints rendering a victim spread-eagled and helpless depicted appellant in a particularly heinous way and allowed the jury to regard him as someone capable of committing atrocities. As appellant has explained above, the evidence had no relevance to the killing of Vanessa Samson because forensic and other evidence established her death was not produced by either bolts fired from a crossbow or shots fired from a gun. Forensic and other evidence also failed to establish that either crossbow or gun was used upon her person. Forensic and other evidence failed to establish that rope restraints passed through the carpet cuts and secured to the anchor bolts were used with Vanessa or any other individual.

As noted above, in *McKinney v. Rees*, *supra*, 993 F.2d 1378, it was the proof of the ownership of knives not associated with the charged offense that caused the Ninth Circuit to reverse the conviction as violative of due process. The court explained:

> [T]he evidence in this case is emotionally charged. The prosecution used evidence of the Gerber knife, which could not possibly have been used to commit the murder, to help paint a picture of a young man with a fascination with knives and with a commando lifestyle. ... The jury was offered the image of a man with a knife collection, who sat in his dormitory room sharpening knives, scratching morbid inscriptions on the wall, and occasionally venturing forth in camouflage with a knife strapped to his body.

(*McKinney v. Rees*, *supra*, 993 F.2d at p. 1385.)

In light of the evidence in this case, the introduction of this evidence paints a far more grisly and emotional picture than that in *McKinney v. Rees*.

Clearly, this evidence creates the most damning image of appellant imaginable. The image of an innocent victim being tied down in the back of a van is not an image that can lightly be brushed aside. If there is not serious evidence to support this as the manner in which the crime was committed, it is bound to unduly affect the jury in an emotional manner.

The mere fact of restraining the victim is considered an extremely aggravating fact, by itself. It is for this reason that restraining a victim of a sexual offense elevates the seriousness of sexual offenses from ranges of three to eight years, under Penal Code section 264, to fifteen years to life in prison under section 667.61, subdivision (e)(6).

The dramatic nature in which the van has been portrayed by the media in this case shows the power of the images created by this evidence.

For example, a synopsis of the book *Rope Burns*, a "true crime" recounting of this case by Robert Scott, explains that "[a]fter customizing Michaud's green

minivan into the ultimate mobile torture chamber, the predatory pair hit the road to hell."[63]

The "mobile torture chamber" motif also caught the eye of another crime buff from the Department of Psychology at Radford University in Virginia.[64] It was similarly used in reporting this crime in the Berkeley Daily Planet.[65]

It is hard to imagine an image more terrifying than Samson being tied down, spread eagle, in the mobile torture chamber.

Moreover, the prosecutor deftly used the evidence challenged here to argue for appellant's conviction. In arguments to the jury, the prosecutor incorporated evidence of the gun use and the cuts in the carpet allowing access to the anchor bolts in urging the jury to find a common plan from which the appellant's commission of the charged crimes might be inferred and from which the premeditation necessary to support a first degree murder conviction might be inferred. (See, e.g., 33RT 7194-7198, 7200-7206, 7213-7216.) In *People v. Minifie* (1996) 13 Cal.4th 1055, this Court recognized the powerful impact a prosecutor's argument regarding the evidence may have upon the jury. "The jury argument of the district attorney tips the scale in favor of finding prejudice. . . ." (Id., at p. 1071; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341.)

Finally, appellant is then driving around with crossbows and guns, further cementing the image of the psychotic killer on the loose. Clearly, the images created by the evidence discussed above were bound to overwhelm the jury's passions.

Therefore, reversal is required.

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[63] http://search.barnesandnoble.com/Rope-Burns/Robert-Scott/e/9780786011957

[64] http://maamodt.asp.radford.edu/Psyc%20405/serial%20killers/Daveggio-,%20James%20_fall,%202007_.pdf

[65] http://www.berkeleydailyplanet.com/issue/2002-01-22/article/9678?headline=Trial-starting-for-couple-accused-of-torturing-killing-woman

IX

THE TRIAL COURT ERRED IN REFUSING APPELLANT'S REQUESTED MODIFICATION FOR CALJIC NO. 8.81.17, REGARDING KIDNAPPING AS AN "INCIDENTAL" CRIME TO THE MURDER. THIS ERROR DEPRIVED APPELLANT OF THE RIGHT TO A TRIAL BY JURY, THE RIGHT TO A RELIABLE DETERMINATION OF THE FACTS, AND THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES

Introduction

The prosecution alleged that appellant committed felony murder special circumstances based on the underlying crimes of kidnapping and rape by instrument. During the colloquy between court and counsel regarding jury instructions, counsel for appellant requested that the court modify the felony murder special circumstance instruction (CALJIC No. 8.81.7) to include language counsel had taken from *Ario v. Superior Court* (*Alameda County*) (1981) 124 Cal.App.3d 285 that would have made clear that the kidnapping/murder special circumstance was not established if the kidnapping was committed for the purpose of committing the murder. (33RT 7025-7026.)

The trial court declined to give the requested instruction on the ground that the defense proffer incorrectly stated the law. (33RT 7053-7054.)

As appellant will show below, the language proposed by the defense was, in fact, a correct statement of the law and the trial court erred in refusing the proffered clarification. As a result of its action, the court denied appellant the right to a trial by jury, the right to a reliable determination of the facts in a capital case, and the right to due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

A. The Requested Instructions And The Proceeding, Below

At the end of the trial, Mr. Ciraolo requested that the court modify CALJIC No. 8.81.17, the instruction for the finding of a special circumstance based on the killing occurring during the commission of a felony.

The proffered defense special instruction read:

> If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established. (7CT 1779.)

The defense explained that the language was based on the case of *Ario v. Superior Court* (1981) 124 Cal.App.3d 285. (33RT 7025-7026.)

The prosecution objected, stating that the proposed instruction was a misstatement of the law, and that an accurate statement of law would be "if you find that the kidnapping was solely for the purpose of intent to kill." The prosecution explained that this concept was addressed in the second paragraph of CALJIC No. 8.81.17, which explained if the kidnapping was incidental to the murder the special circumstance is not true. (33RT 7026.)

After considering the matter, the court stated that it believed that the language of the requested instruction was incorrect, although the defense explained that the language was taken "right out of the footnote," referring to a footnote in CALJIC 8.81.7. (33RT 7053-7054.)

Referring to *Ario*, the court stated, "Says right here: The kidnapping special circumstances allegation here may be sustained only if the evidence will support a reasonable inference that a kidnapping was for some purpose other than merely to facilitate the primary crime of murder. Period." (33RT 7054.)

Although the court concluded that the defense special instruction did not say what the court's quotation from *Ario* said, both the proffered instruction and the court's chosen quotation in fact stated different facets of the same law.

This seeming paradox concerning a correct statement of the law regarding the felony murder special circumstance serves to illustrate the point made by defense counsel at the outset – the instruction required clarification.

Moreover, when the defense-proffered language and the court's chosen language are viewed together, the defense special instruction is direct and clear – the special circumstance is not established if the kidnapping was for the purpose of murder – whereas the court's language is obscure – the special circumstance may be sustained only if the evidence supports a reasonable inference that the kidnapping was for some purpose other than to merely facilitate the primary crime of murder.

Ultimately, the trial court chose to instruct the jury in the language of a third alternative –the pattern instruction. As read to the jury, it states:

> To find that the special circumstance, referred to in these instructions as murder in the commission of Kidnapping in violation of Penal Code section 207, or Rape by Instrument, in violation of Penal Code section 289, is true, it must be proved:
>
> 1. The murder was committed while a defendant was engaged in or was an accomplice in the commission or attempted commission of a Kidnapping, or Rape by Instrument; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of Kidnapping, or Rape by Instrument, or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely incidental to the commission of the murder.

(34RT 7366-7367, 138CT 36428.)

Subsequently, in argument to the jury, appellant's counsel explained that the defense being presented was that the special circumstance of kidnapping and rape by instrument had not been proven. (34RT 7226.) The defense later admitted the murder, but argued that because appellant's primary purpose was to kill, the special circumstance had not been established. (34 RT 7231.)

Likewise, his second counsel argued that Samson was kidnapped, but if the kidnap was for purpose of murder, the special circumstances did not apply, and that the comment made to April about hunting showed they intended to kill and the kidnapping was for the purpose of the murder. (34RT 7253-7256.)

B. The Relevant Law

1. The Law Regarding Special Circumstances.

In *Ario v. Superior Court*, *supra*, 124 Cal.App.3d 285, the defendant/petitioner sought to restrain the superior court from trying him on a special circumstance allegation, contending that the evidence did not support the allegations that the two murders were committed while petitioner was "engaged in" the act of kidnapping. (*Id.*, at p. 288.)

The evidence from the preliminary hearing showed that the defendant and two other men visited the residence one of the victims, where one of the men, Dyer, got into an argument with one of the people there, claiming that the person stole some jewelry from him. He announced he was going to kill one of the people, and the petitioner pointed out if he did that, he would have to kill the three other people who were there.

Petitioner and Dryer ordered the victims into the car and drove to an isolated location where they shot all four people, two of whom survived. (*Ibid.*)

Petitioner was charged with two counts of murder, two counts of attempted murder, and two counts of kidnapping in violation of Penal Code section 207. As to the murders, it was alleged that the murder "was committed while the defendant was engaged in ...[a] [k]idnapping." The petitioner contended that under *People v. Green* (1980) 27 Cal.3d 1 and *People v. Thompson* (1980) 27 Cal.3d 303, he was not subject to the special circumstance allegation because the purpose of the kidnapping was to kill the victims, and therefore the kidnapping was incidental to the murder. (*Ibid.*)

In *Green*, the court first determined that substantial evidence supported the conclusion that a robbery had taken place when the defendant made his victim remove her clothes before the killing and removed her rings and purse after the killing, all with the purpose of destroying them as evidence. However, the *Green* court concluded as a matter of law that the murder had not taken place "during the commission of a robbery" within the meaning of the death penalty statute.

The *Green* court noted that the 1977 death penalty legislation was enacted to comply with the mandate of *Furman v. Georgia* (1972) 408 U.S. 238 and *Gregg v. Georgia* (1976) 428 U.S. 153 that the states provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. Green held that the Legislature's goal

> is not achieved ... when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder ... because its sole object is to facilitate or conceal the primary crime .... To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive "the risk of wholly arbitrary and capricious action" condemned by the high court plurality in *Gregg*. [Citation.]

(*People v. Green*, *supra.*, 27 Cal.3d at pp. 61-62.)

People v. Thompson, *supra.*, 27 Cal.3d at 321-322, suggested in dicta that the *Green* interpretation applied to other specified felonies in section 190.2, subdivision (c)(3).

Subsequent to *Green*, the Court of Appeal considered whether *Green*'s interpretation of "during the commission of" was in any way affected by the change in the relevant death penalty provision, which included, as it did at the time of the charged crimes, murder in the commission of a kidnapping, the terminology, "while the defendant was engaged in . . . the commission of, attempted commission of, or the immediate flight after committing or attempting to commit" the specified felonies, including kidnapping in violation of section 207

(Pen. Code, § 190.2, subd. (a)(17)). (*Ario v. Superior Court*, *supra*, 124 Cal.App.3d at p. 289.)

Ario explained that the language of the current death penalty provision, "while the defendant was engaged in ... the commission of the specified felonies," is substantially similar and therefore should carry the same meaning as the former statute in issue in Green.

The *Ario* court concluded: "It seems clear, however, that the terms, 'while . . . engaged in' and 'during the commission of,' should carry the same meaning." (*Ibid.*)

As a result, *Ario* concluded that the kidnapping special circumstance can only be sustained "only if the evidence will support a reasonable inference that the kidnapping was for some purpose other than merely to facilitate the primary crime of murder. If it were merely incidental to the murder or ancillary to it, with no separate purpose, the rationale of *Green* prevents a determination that the murder was committed while the defendant was engaged in kidnapping." (*Ario* at p. 289.)

The court explained that the evidence showed that the murder plan was settled at the house, and the asportation was done solely for the purpose of committing the murder, and therefore the kidnapping was incidental to the murders. (*Ario* at pp. 289-290.)

Ario further explained

> In light of the foregoing, the kidnapping special circumstance allegations here may be sustained only if the evidence will support a reasonable inference that the kidnapping was for some purpose other than merely to facilitate the primary crime of murder. If it were merely incidental to the murder or ancillary to it, with no separate purpose, the rationale of *Green* prevents a determination that the murder was committed while the defendant was engaged in kidnapping.

(*Ario v. Superior Court*, *supra*, 124 Cal.App.3d at p. 289.)

In short, *Green* and *Ario* held that if the defendant intended to commit a murder and kidnapped for the purpose of committing the murder, then the rationale of *Green* prevents a determination that the murder was committed while the defendant was engaged in kidnapping and the special circumstance of murder in commission of kidnapping is not established.

This is what the defense-proffered instruction, repeated here for purposes of this discussion, in fact stated.

> If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established. (7CT 1779.)

2. Other Relevant Principles Of Law

Appellant's right to have the jury instructed in the manner that was requested by the defense is also supported by the general rules guaranteeing a defendant the right to appropriate instructions that address his particular defense, including the right to pinpoint instructions or instructions detailing his specific defense.

The due process and trial by jury clauses of the Fifth, Sixth and Fourteenth amendments to the federal constitution mandate that "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63, citing *Stevenson v. United States* (1896) 162 U.S. 313 (refusal of voluntary manslaughter instruction in murder case where self-defense was primary defense constituted reversible error); see also *Keeble v. United States* (1973) 412 U.S. 205, 213; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-02.) "...[T]he principle [is] established in American law ... that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support that theory...[citations].";

United States v. Kenny (9th Cir. 1981) 645 F.2d 1323, 1337 ["jury must be instructed as to the defense theory of the case".)

The reason for this stems from the fact that the "right to submit a defense for which he has an evidentiary foundation is fundamental to a fair trial and has been considered protected under both the Fifth and Sixth Amendments." (*Whipple v. Duckworth* (7th Cir. 1992) 957 F.2d 418, 423 overruled on other grounds in *Eaglin v. Welborn* (7th Cir. 1995) 57 F.3d 496.) Therefore, not including instructions on the defense theory of the case denies a defendant the right to due process of law and a fair trial. (*United States v. Douglas* (7th Cir. 1987) 818 F.2d 1317, 1320-1321.)

A criminal defendant is entitled upon request to an instruction pinpointing the theory of the defense. (*People v. Wharton* (1991) 53 Cal.3d 552, 570.) Such an instruction may direct attention to evidence or amplify legal principles from which the jury may conclude that guilt has not been established beyond a reasonable doubt. (*People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1137.)

This court has explained the importance of pinpoint instructions, stating:

> Ordinarily, the relevance and materiality of circumstantial evidence is apparent to the trier of fact, but this is not always true, and the courts of this state have often approved instructions pointing out the relevance of certain kinds of evidence to a specific issue.

(*People Guerrero*, *supra*, 16 Cal.3d at p. 730.)

People v. Wright, *supra*, clarified this rule, holding that the defendant has no right to direct the jury's attention to specific evidence or testimony. Nevertheless, *Wright* specifically held that CALJIC 2.91 (regarding eyewitness testimony) and CALJIC No. 4.50 (regarding alibi) are proper pinpoint instructions. Each of those instructions calls attention, in a generic form, to the evidence upon which the defense theory is based and admonishes the jurors that if they have a reasonable doubt after considering such evidence, they must acquit. (See Evid.

Code, § 502; *People* v. *Simon* (1996) 9 Cal.4th 493, 500-501 [as to defense theories, the trial court is required to instruct on who has the burden and the nature of that burden].)

People v. Saille (1991) 54 Cal.3d 1103 explained that a defendant is entitled to a pinpoint instruction upon request. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*Id.* at p. 1119; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1019, Brown, J. concurring.)

California courts have long recognized the importance of focusing the jury's attention on their task through such pinpoint instructions, as the discussion of the following cases illustrates. In *People v. Roberts* (1967) 256 Cal.App.2d 488, the defendant was convicted of oral copulation. The evidence in that case showed that the police, who had received complaints of a public bathroom being used for sexual purposes, had used a peep-hole in that bathroom to observe several incidents of various individuals engaging in oral sex over a period of several days. The lighting conditions at the time of the observations were less than ideal, and the initial identification of the defendant was "tentative." There was no corroboration of the identification, but the court had held it to be sufficient. (*Id.* at p. 491.)

The defendant in Roberts had requested an instruction to the effect that if the jury had a reasonable doubt, based on the ability of the officers to identify the defendant from their place of concealment, the jury should acquit him. (*Id.* at p. 492.) The trial court refused the instruction and the defendant was convicted. The court reversed the conviction, holding that it was prejudicial error to refuse an instruction directing the jury's attention to the potential weaknesses of the identification, which were the core of the defense. (*Id.* at p. 494; see also *People v. Guzman* (1975) Cal.App.3d 380, 388 [it is error to refuse a defendant's request for an instruction relating identification to reasonable doubt].)

For the purposes of determining whether additional instructions on identification are needed, the court should consider whether the case may be considered to be a "close case." Part of this inquiry focuses on whether the identification has "any substantial corroboration." If there is no substantial corroboration, the refusal to give this type of pinpoint instruction is more likely to be regarded as prejudicial. *(People* v. *Gomez* (1972) 24 Cal.App.3d 486, 490.)

In *People v. Hall, supra*, 28 Cal.3d 143, 159, the court held that the trial court erred in not giving a tailored version of a proposed instruction on identification that was found to be too long and argumentative. However, the error was not prejudicial since the trial court did read to the jury CALJIC No. 2.91 that related the concept of reasonable doubt to identification testimony. (*Id.* at pp. 159-160.)

In *McDowell v. Calderon* (9th Cir., 1990) 130 F.3d 833, the court stated:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions.

(*Id.* at p. 836)

The Ninth Circuit made clear that standard instructions are not always sufficient to assure that the jury will fulfill its purpose:

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of 'standard' jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong.

(*Id.* at p. 841.)

As the Ninth Circuit indicated in *McDowell*, CALJIC instructions are not immutable words of wisdom that should never be modified. Rather, the weight of the law clearly holds that modification is often advisable when such changes would clarify the law for the jury.

Indeed, the recent wholesale revamping of the entire set of jury instructions from CALJIC to CALCRIM shows that the state judiciary officially recognized that CALJIC had substantial room for improvement and required a complete review and revision. As explained in the Preface to CALCRIM, the task of the CALCRIM committee "was to write instructions that are both legally accurate and understandable to the average juror." The necessity for this undertaking was the widely held opinion, reflected by the Blue Ribbon Commission on Jury System Improvement, which had stated that, "jury instructions as presently given in California and elsewhere are, on occasion, simply impenetrable to the ordinary juror." (Preface to CALCRIM, 2007 2d. ed., p. 1)

Fairness dictates that the court must also give instructions directing the jury's attention to those items of evidence that support the defense's case. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6 the Supreme Court noted that state trial rules that provide for non-reciprocal benefits violate the due process clause. (See also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377.) Although *Wardius* was concerned with reciprocal discovery rights, the same principle should apply to jury instructions. (*People v. Moore* (1954) 43 Cal.2d 517, 526-527.)

Finally, unless the jury is properly instructed that if the kidnapping was for the purpose of murder the special circumstance was not established, the jury is likely to reach its verdict based on an incorrect understanding of the law, thereby undermining the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305; *Gilmore v. Taylor*, *supra*, 508 U.S. 333, 334; *Johnson v.*

Mississippi, *supra*, 486 U.S. 578, 584-585; *Zant v. Stephens*, *supra*, 462 U.S. 862, 879.)

C. Application Of The Law To The Facts Of The Case.

In this case there was sufficient evidence to support a finding that the kidnapping of Samson was for the express purpose of killing her, and therefore the jury should have been clearly instructed as to that crucial principle of law.

This evidence stems from the fact that appellant asked April if she want to go "hunting" with them, explaining that "hunting" was when you stalked someone in order to kill that person. (20RT 4634-4635.) From this evidence, the jury might well conclude that appellant planned to kill someone, and that he kidnapped Samson to fulfill that goal.

Likewise, the prosecution produced evidence that appellant had a fascination with serial killers, collecting "trading cards" of serial killers and literature about them. Again, the jury may believe that appellant wanted to become a serial killer, and that kidnapping the various victims was the way in which this goal would be met.

As a result, the jury should have been properly instructed so that they clearly understood the crucial principle involved.

It is true that the last sentence of CALJIC No. 8.81.17 informed the jury that "the special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely incidental to the commission of the murder." (138CT 36428.) However, it is apparent that this sentence is not as clear as the version requested by appellant.

Appellant submits that the normal juror will not clearly grasp what it means to say that the kidnapping was "incidental" to the murder. Indeed, it is highly unlikely that a lay jury would understand this arcane and esoteric concept.

Looking at some of the common definitions of "incidental" and applying them to the instruction given demonstrates this fact.

These definitions of "incidental" include the following: 1. "Occurring or likely to occur as an unpredictable or minor accompaniment"[66]; 2) "being likely to ensue as a chance or minor consequence ....**2 :** occurring merely by chance or without intention or calculation[67]; 3) less important than the thing something is connected with or part of[68].

Substituting these definitions for "incidental" in the instruction given to the jury results in the following instruction:

1) "the special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely occurring or likely to occur as an unpredictable or minor accompaniment to the commission of the murder;"

2) "the special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely being likely to ensue as a chance or minor consequence to the commission of the murder;"

3) "The special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely occurring merely by chance or without intention or calculation to the commission of the murder;"

4) "The special circumstance referred to in these instructions is not established if the Kidnapping, or Rape by Instrument, was merely less important than the thing something is connected with or part of to the commission of the murder."

Clearly, an instruction to determine whether the kidnapping was "a minor consequence," or "less important" is not the correct meaning of this instruction.

The need for this instruction is similar to the requirement that a court define technical or specialized meaning. (*People v. Friend* (2009) 47 Cal.4th 1, 70-71.)

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[66] www.thefreedictionary.com/incidental

[67] www.merriam-webster.com/dictionary/incidental

[68] www.dictionary.cambridge.org/define.asp?key=39860&dict=CALD

The obligation to define a term arises when a statutory term "does not have a plain, unambiguous meaning, has a particular and restricted meaning." (*People v. Roberge* (2003) 29 Cal.4th 979, 988, internal quotations and citations omitted..) Rather, a term must be defined when it "has a technical meaning peculiar to the law or an area of law." (*People v. Howard* (1988) 44 Cal.3d 375, 408.)

Here the meaning of "incidental" in law clearly diverges from the common meanings that the jurors may have for this word, and therefore the meaning of this term should have been explained so that the jury would understand what the crucial issue was in this case.

Appellant's requested instruction comes closer to the legal meaning by not using the word "incidental," and therefore, the court should have instructed using the proposed instruction.

In this light, it is illustrative to consider how this issue is handled by the new CALCRIM instructions. CALCRIM 730 covers the special circumstance of murder committed during a felony. The pertinent portion of this instruction reads as follows:

> [In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit <insert felony or felonies from Pen. Code, § 190.2(a)(17)> independent of the killing. If you find that the defendant only intended to commit murder and the commission of <insert felony or felonies from Pen. Code, § 190.2(a)(17)> was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved.]

Thus, CALCRIM informs the jury that if the defendant only intended to commit murder, and the killing was "merely part" of the commission of that offense, the special circumstance is not established. Clearly, this is closer to the meaning of instruction requested by appellant.

As noted above (*ante*, at p. 163), the CALJIC instructions were replaced by CALCRIM because of the belief that the old instructions were not understandable to the average juror. The word "incidental" may accurately reflect the proper standard

in the world of legal jargon, and most attorneys might understand the meaning of this term. However, as explained above, the non-legal, common meanings of the word do not convey the proper meaning of the term.

Therefore, the instruction was likely to unintentionally mislead the jury as to this crucial issue in this case.

D. Prejudice

Appellant was profoundly prejudiced by the refusal of the trial court to give this instruction. Because this error adversely impacted appellant's right to have a jury determine every material element of guilt and his right to due process of law, it must be evaluated under the standard of *Chapman v. California*, *supra*, 386 U.S. 18, which mandates that the conviction must be reversed unless the beneficiary of the error can show that the error was harmless beyond a reasonable doubt.

Appellant's entire defense at trial was that the kidnapping was merely incidental to the murder and that the plan was to find a victim to kill. Out of the entire trial, after all the evidence of other sex offenses introduced under Evidence Code sections 1101 and 1108, and after the evidence of Counts 1 through 3, to which appellant plead guilty, his defense came down to a basic premise which the jury needed to clearly understand.

As shown above, the wording of CALJIC No. 8.81.7 has already been recognized as flawed and improvable by the CALCRIM version which comes closer to the instruction that appellant requested than it does to the CALJIC instruction given..

To say that the defense was free to argue this theory ignores the well-established fact that counsel's arguments are not a substitute for a proper jury instruction. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1111.) It is submitted that criminal defense attorneys are not viewed in high regard by the general public, from which the jury is drawn. Arguing this type of defense is bound impress the

jury as the type of "technicalities" and "loop holes" that pettifoggers are likely to argue to confuse the jury.

This is in direct contrast to the status of the prosecutor who is allowed to argue the contrary arguments. Unlike a defense attorney, the arguments of the prosecutor come from an official representative of the People, and is likely to carry great weight and must therefore be reasonably objective. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.)

Finally, because these errors allowed the jury to decide the case without having a clear understanding of the law relating to appellant's defense, it violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.)

Because the jury was not allowed to determine this issue under the proper instruction, appellant's conviction must be reversed.

X

THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST FOR ADDITIONAL TIME TO REBUT ARGUMENTS MADE ON BEHALF OF MICHAUD, THEREBY DENYING APPELLANT THE RIGHT TO DUE PROCESS OF LAW, THE RIGHT TO AN ATTORNEY, THE RIGHT TO A JURY TRIAL, AND THE RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES.

After the attorneys for Michaud presented their guilt phase arguments to the jury, counsel for appellant requested that he be given an extra five minutes to rebut portions of those arguments. After the attorney for Michaud objected, the court took the matter under submission, prior to denying the request. (34RT 7272, 7383.)

The denial of this request had the effect of denying appellant the right to present a defense, the right to due process of law, the right to an attorney, the right to a jury trial, and the right to a reliable determination of the facts in a capital case.

A. The Arguments Of Michaud's Attorneys And The Request By Appellant's Counsel.

During his argument on behalf of Michaud, her attorney, Mr. Karl, argued that although Michaud was a prostitute, she had been trying to be good mother, doing things like volunteering at her church, and that she had not gotten into drugs until she became involved with appellant, after which her personality changed. (34RT 7262.)

Mr. Karl argued that Michaud had helped a 12-year old neighborhood girl who had run away from home. (34RT 7262.)

He also argued that Michaud's looks had changed after she met appellant, turning her into "a ghost person." (34RT 7263.)

Mr. Karl further argued that appellant was the "muscle" of the team. (34RT 7267.) He also repeatedly argued that appellant was the major participant, and Michaud was submissive to him. (34RT 7264, 7267, 7270-7271.)

Additionally, after recounting Michaud's history as an abuse victim, Mr. Strellis, Michaud's other attorney, argued that Michaud had been doing well until she met appellant. (35RT 7483- 7484.)

B. The Relevant Law.

The underlying principle that should govern this issue is the principle that a trial court judge is charged with the authority, power, and duty to control the proceedings "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (Penal Code § 1044.) This includes the responsibility to guard against "any conduct calculated to obstruct justice." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 883.)

A trial court has the authority to regulate the order of proof. (Evid.Code § 320.) Similarly, a court has control over the conduct of arguments of counsel to the jury. For example, if other counsel are associated with the District Attorney, the court may, in its discretion, allow the associate counsel to conclude the arguments for the prosecution. (*People v. Murphy* (1873) 47 Cal. 103; *People v. Strong* (1873) 46 Cal.302.)

Likewise, under section 1094, the trial court has the discretion to vary the normal order of trial proceedings if there is good cause to do so, including varying the time limits imposed on counsel arguing the case and the order of argument. (*People v. Haun* (1872) 44 Cal. 96, 100; *People v. Murphy* (1936) 17 Cal.App.2d 575, 588.)

Similarly, a trial court has discretion to refuse a defendant's request to defer argument until following day. (*People v. Jones* (1955) 136 Cal.App.2d 175, 197)

In summary, it cannot be denied that a trial court has the discretion to control and vary the normal order of events in the interests of justice, including the order of arguments of counsel.

With these principles firmly in mind, the question becomes whether the court abused its discretion in not allowing appellant's counsel an opportunity to rebut the arguments of Michaud's attorneys.

Even more than in non-capital cases, a trial court must cautiously be on guard to protect the interests of a capital defendant. For example, this is why the rules relating to joinder and severance of cases receive heightened scrutiny for potential prejudice in capital cases. (*People v. Keenan* (1988) 46 Cal.3d 478, 500.)

Even when joinder is proper for reasons of judicial and economic efficiency, joinder laws must never be used to deny a criminal defendant's right to due process of law and a fair trial. (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452.)

> Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, at p. 1082; accord *Zafiro v. United States* (1993) 506 U.S. 534, at p. 544, fn. 3, Stevens, J., concurring.)

Following the principle that "the direction of a blow is less important than the wound inflicted," the law recognizes that the conduct of counsel for a co-defendant can violate a defendant's constitutional rights. (see *People v. Hardy*, *supra*, 2 Cal.4th 86, 157; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095-1096 [co-defendant reference to facts not in evidence and defendant's failure to testify at preliminary hearing requires reversal]; *People v. Jones* (1970) 10 Cal.App.3d 237, 243-244.)

Apropos of the instant case, in discussing the danger of joinder of cases, the court in *Tootick* explained,

> The presentation of the codefendant's case becomes a separate forum in which the defendant is accused and tried. Closing arguments allow a final opening for codefendant's counsel to portray the other defendant as the sole perpetrator of the crime. ¶ Joinder can provide the individual defendants with perverse incentives. Defendants do not simply want to demonstrate their own innocence, they want to do everything possible to convict their codefendants.

(*United States v. Tootick*, *supra*, 952 F.2d at p. 1082.)

The law has long recognized the danger of accusations by one accomplice against another. In fact, the need for cautionary instructions regarding accomplice testimony stem from the recognition that accomplices are distrusted because they have an overwhelming motive to shift blame to their co-perpetrators to save their own skin. (*People v. Guiuan* (1998) 18 Cal.4th 558, 574-575 (conc. opn. of Kennard, J.) See also *Williamson v. United States* (1994) 512 U.S. 594, 601 (1994) (noting that an accomplice's strong motivation "to implicate the defendant and to exonerate himself," makes his "statements about what the defendant said or did . . . less credible . . .") (citing *Lee v. Illinois* (1986) 476 U.S. 530, 541; see also *People v. Duarte* (2000) 24 Cal.4th 603.)

This is exactly what happened here. In order to mitigate her relative culpability, Michaud's counsel attempted to shift the blame to appellant. The fact that the accusations come from Michaud's attorney in argument does not mean that it is less harmful to appellant than it would have been had they come from Michaud in testimony.

Ironically, in this case, Michaud was able to get an instruction informing the jury that in so far as appellant's testimony implicated her in the crime it had to be corroborated. (39RT 8616-8117, 139CT 36511-36512, instructing the jury pursuant to CALJIC Nos. 3.16 and 3.18.) However, while the arguments of

Michaud's counsel were not "evidence," appellant was unable to rebut the arguments that shifted the blame to him.

In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. Although the need for reciprocity at trial mandated by the Fourteenth Amendment's Due Process Clause is normally discussed in ensuring the balance between the prosecution and the defense, there is no reason why similar concerns are not applicable to cases where one co-defendant tries to shift the blame to another co-defendant.

Just as Michaud was able to get a prophylactic device, in the form of jury instructions, protecting her from appellant's accusation, so does appellant need and deserve a means of defending himself against the claims of her attorney. An opportunity to address those accusations is a simple and reasonable method of doing so.

In other contexts it is recognized that a joint trial presents special problems relating to possible abridgment of the rights of one of the defendants. For example, while a criminal defendant has the right to argue his waiver of his right to remain silent as part of his defense, he or she may not do so at the expense of a co-defendant by drawing a comparative inference to the co-defendant's assertion of his right to be silent, even when that comparison is implied rather than express. (*De Luna v. United States* (5th Cir. 1962) 308 F. 2d 140.)

Similarly, a criminal defendant has an absolute right to represent himself under *Faretta v. California* (1975) 422 U.S. 806 if that right is asserted in a timely manner. However, that right may create special problems in a case involving a second defendant, and a trial court has to make accommodations to protect the right of the other defendant. (*United States v. Oglesby* (7th Cir. 1985) 764 F.2d

1273 *State v. Caruthers* (Tenn. 2000) 35 S.W.3d 516, quoting *United States v. Veteto* (11th Cir. 1983) 701 F.2d 136.)

In such a situation, protecting the right of one co-defendant from conflicts with the other may require the granting of a severance. (*Thomas v. Superior Court* (1976) 54 Cal.App.3d 1054, 1059, fn. 6.) It would seem that this may be necessary even absent the normal requirements of conflicting defenses.

As previously noted (*ante*, at p. 221.), the right to present a defense theory is a fundamental right and an aspect of due process of law. The right to a jury trial is meaningless without the right to present a defense. A necessary corollary of the right to present a defense is the right to rebut allegations and arguments made against a defendant regardless of where those accusations originate.

Limitations on the substance of defendant's closing argument may violate the right to effective assistance of counsel, the right to present a defense, and the right to have the prosecution prove its case beyond a reasonable doubt. (See, e.g., *Conde v. Henry* (9th Cir.1999) 198 F.3d 734, 739 (trial court's refusal to permit defense counsel to argue the defense theory of the case -- that the state failed to prove robbery or intent to rob -- violated the defendant's rights to the effective assistance of counsel and to present a defense and improperly lightened the prosecution's burden of proof).

Here, Michaud's counsel was allowed to argue appellant's culpability and cast the blame on appellant from a perspective that was different from that of the prosecution.

In this case, the inability of appellant's counsel to address the issues raised by Michaud's counsel stems from the fortuitous fact that appellant's counsel argued his case first, and Michaud's counsel argued next.

Obviously, if the order of oral argument had been different and Michaud's counsel had presented the same argument that he had presented, appellant would have been allowed to address the issues raised by Michaud's counsel. However,

by reason of the fact that his attorney argued second, appellant is deprived of the chance to address arguments made against him.

In fact, there were areas where appellant's counsel could have attempted to rebut the allegations made by counsel for Michaud. For example, as noted, counsel argued that Michaud was a good mother who became involved with drugs only after she met appellant. However, there was testimony that Rachel, Michaud's daughter, taught Michaud how to smoke methamphetamine, and that previously Michaud had snorted but not smoked methamphetamine. (19RT 4285-4286.)

Finally, this error deprived appellant of the right to a reliable determination of the facts in a capital case. (*Ante*, at p. 136.) Obviously, if a defendant is not allowed to argue his side of the case, including the chance to rebut allegations made against him, it cannot seriously be said that the jury had the chance to consider all evidence and arguments necessary for a proper determination of the case.

Because the denial of appellant's request for a chance to rebut his co-defendant's argument denied his fundamental constitutional rights, it must be judged under the standards of *Chapman*, which requires the Court to determine whether there is a reasonable possibility the error contributed to the verdict. (*Chapman v. California*, *supra*, 386 U.S. 18.)

Such a determination is not possible in this case where the jury had to attribute blame between the defendants. In his testimony, appellant claimed that they had agreed to let Samson live, as they had done with Aleda, but Michaud killed Samson when appellant was in the motel room and Michaud and Samson were alone in the van.

By having a chance to portray herself as a pawn who was overwhelmed by appellant, Michaud effectively disputed the testimony of appellant as to how the killing occurred. However, appellant was not allowed to rebut her argument.

In capital cases, the actual death verdict is a highly "moral and ... not factual" determination. (*People v. Brown* (2004) 33 Cal.4th 382, 400; *People v.*

Rodriguez (1986) 42 Cal.3d 730, 779.) Thus, the relative culpability of the defendants may be a factor in deciding who gets death and who lives. Under section 190.3, subdivision (g), in deciding whether to impose death, the jury may consider "Whether or not defendant acted under ...the substantial domination of another person." Likewise, subdivision (K), the jury may consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Obviously, the converse of these principles is equally true. It mitigates the offense if the defendant kills while under the domination of another. It aggravates the culpability of the other defendant if he is the one dominating the other defendant and causing the submissive one to kill.

By portraying appellant as the dominant figure, counsel for Michaud made him more culpable and more deserving of death.

Because one cannot say what effect it would have had if appellant had been allowed to counter these arguments, it is not possible to say that the error was harmless beyond a reasonable doubt, and therefore reversal of the guilt determination is required.

XI

THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND REQUIRES A REVERSAL OF THE JUDGMENT OF CONVICTION AND DEATH SENTENCE

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 (cumulative errors may result in an unfair trial in violation of due process); accord *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; see also *People v. Hill, supra,* 17 Cal.4th 800, 845-847 (cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution); *Donnelly v. DeChristoforo,* supra, 416 U.S.637, 642-43 (cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process").

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Furthermore, when errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. In *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59, the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, was not harmless error.

(Id., at p. 58, see also *Harrington v. California* (1969) 395 U.S. 250, 255.)

A cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. This is because of the recognition that the curative effect of any instruction is uncertain and lingering prejudice can remain even after an admonition. Thus, if there are errors which individually may have been cured by instruction or admonition, the trace of prejudice may remain and be a factor in an analysis of cumulative prejudice. (*United States v. Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; *see also United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

In this case, the cumulative effect of these errors requires a reversal. This is especially so because the errors were so heavily interrelated that the prejudice is geometrically. Therefore, they must be evaluated together and the prejudicial effect of each should not be considered separately from the prejudicial effect of the other.

For example, many of the errors complained of above were designed to portray the defendants in a manner that would evoke the most inflammatory image possible, an image whose emotional force would compel to jury to decide the case on non-rational grounds.

This started with the emotional appeal made by the prosecutor, when the jury got its first exposure to what the case would entail with an introduction to appellants. As recounted, the prosecutor used great rhetorical skills to create the most emotional picture possible of two depraved predators, idolizing serial murders as they preyed on young girls, inflicting torture with their vile acts. The frequent repetition of those themes set the stage of an emotional roller coaster. (See Argument VI.)

This toxic image of appellant was compounded when the prosecutor mis-used Opening Statements to argue her case and frequently argued facts which were not supported by the record. (*Ante*, at p. 193.) Indeed, the facts that were argued by the prosecutor that were not in the record were facts that were likely to further inflame the jury, such as the alleged use of the anchor bolts in the van to convert the vehicle into the mobile torture chamber.

Having started the portrayal of appellant in a manner designed to guarantee a verdict rendered on emotion, the prosecution proceeded to introduce a huge body of evidence relating to prior sex offenses. Prior bad acts have always been looked on with caution because of the danger such evidence presents to a fair trial. In this case, propensity evidence, for centuries excluded as the most damaging, least probative evidence, was introduced.

Likewise, the propensity evidence involved violent sexual offenses, which is the most emotional type of evidence imaginable. However, in this case this was exceeded by the fact that this evidence involved sexual assaults against the defendants' own children.

In turn, this was compounded by flaw in the wording of the jury instruction given as to the jury's ability to consider prior charged sexual offenses as evidence of appellant's propensity to commit murder as well as his propensity to commit sex offenses.

Similarly, the jury was allowed to use prior sexual offenses to prove facts such as common plan or identity, when the facts of those prior offenses would not support such inferences. (See Argument II.)

These prior wrongful acts were compounded by the evidence of the crossbows and guns when those items played no role in the charged offense, and could only further the image of the defendants as murderers on the rampage.

Furthermore, all of these errors were filtered through a jury that initially received improper instructions that the reasonable doubt standard would be met by the jurors' use of their common sense, a standard that clearly dilutes the correct standard of beyond a reasonable doubt. (See Argument I.)

In a similar manner, the misconduct in the emotional appeal from the prosecution's argument and the emotional impact of evidence of prior sex offenses, for which the jury received incorrect instructions, would allow the jury to find that the kidnapping was for sexual purposes, as opposed to a kidnap for the purpose of murder. Not being properly instructed that the special circumstance is

not proven if the kidnap was for the purpose of murder, the jury would naturally, but incorrectly, find the special circumstance to be true. (See Argument X.)

Finally, being incorrectly informed pursuant to CALJIC No. 3.00 that all principals were "equally guilty" allowed the jury to convict, even if the jury had doubts about appellant's actual culpability in light of his testimony that the actual killing of Samson was done by Michaud. (See Argument I.)

In such a situation, it is clear that the errors are inter-connected and that the cumulative effect of the errors described above requires a reversal of appellant's conviction.

XII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code §190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE §190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> "To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238 [conc. opn. of White, J.]; accord, *Godfrey v. Georgia* (1980) 446 U.S. 420, 427[plur. opn.].)"

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> "Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty."

(*Zant v. Stephens* (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[u]nder our death penalty law, ... the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo*_(1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained twenty-one special circumstances[69] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not

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[69] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-two.

receive the death penalty. Why? *Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would.*" (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [italics added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon*_(1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[70] It is quite clear that these theoretically possible noncapital first degree

[70] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, *supra*, 72 N.Y.U. L.Rev. at 1325.)

murders represent a small subset of the universe of first degree murders (*Ibid.*) Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53. Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, *supra*, 465 U.S. at p. 52, fn. 14.)

The United States Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death

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This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law. (See *post*, at p. 334.)

B APPELLANT'S DEATH PENALTY IS INVALID BECAUSE PENAL CODE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[71] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[72] or having had a "hatred of religion,"[73] or threatened witnesses after his arrest,[74] or disposed of the victim's body in a manner that precluded its recovery[75].

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[71] *People v. Dyer* (1988) 45 Cal.3d 26, 78; *People v. Adcox* (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[72] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn.10, 765 P.2d 70, 90, fn.10, *cert. den.*, 494 U.S. 1038 (1990).

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988, it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue as a "circumstances of the crime" aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[76] or that the defendant killed with a single execution-style wound.[77]

b. That the defendant killed the victim for some purportedly aggravating

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[73] *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, *cert. den.*, 112 S. Ct. 3040 (1992).

[74] *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S. Ct. 498.

[75] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, fn.35, *cert. den.* 496 U.S. 931 (1990).

[76] See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 [defendant inflicted many blows; *People v. Zapien*, No. S004762, RT 36-38 [same]; *People v. Lucas*, No. S004788, RT 2997-98 [same; *People v. Carrera*, No. S004569, RT 160-61 [same].

[77] See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 [defendant killed with single wound]; *People v. Frierson*, No. S004761, RT 3026-27 [same].

motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[78] or that the defendant killed the victim without any motive at all.[79]

C. That the defendant killed the victim in cold blood[80] or that the defendant killed the victim during a savage frenzy.[81]

d. That the defendant engaged in a cover-up to conceal his crime[82] or that the defendant did not engage in a cover-up and so must have been proud of it.[83]

e. That the defendant made the victim endure the terror of anticipating a violent death[84] or that the defendant killed instantly without any warning.[85]

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[78] See, e.g., *People v. Howard*, No. S004452, RT 6772 [money]; *People v. Allison*, No. S004649, RT 968-69 [same]; *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-60 [sexual gratification; *People v. Ghent*, No. S004309, RT 2553-55 [same]; *People v. Brown*, No. S004451, RT 3543-44 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge].

[79] See, e.g., *People v. Edwards*, No. S004755, RT 10,544 [defendant killed for no reason]; *People v. Osband*, No. S005233, RT 3650 [same]; *People v. Hawkins*, No. S014199, RT 6801 [same].

[80] See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 [defendant killed in cold blood].

[81] See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

[82] See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

[83] See, e.g., *People v. Adcox*, No. S004558, RT 4607 [defendant freely informed others about crime]; *People v. Williams*, No. S004365, RT 3030-31 [same]; *People v. Morales*, No. S004552, RT 3093 [defendant failed to engage in a cover-up].

[84] See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

f. That the victim had children[86] or that the victim had not yet had a chance to have children.[87]

g. That the victim struggled prior to death[88] or that the victim did not struggle.[89]

h. That the defendant had a prior relationship with the victim[90] or that the victim was a complete stranger to the defendant.[91]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

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[85] See, e.g., *People v. Freeman*, No. S004787, RT 3674[(defendant killed victim instantly]; *People v. Livaditis*, No. S004767, RT 2959 [same].

[86] See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) [victim had children].

[87] See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 [victim had not yet had children].

[88] See, e.g., *People v. Dunkle*, No. S014200, RT 3812 [victim struggled]; *People v. Webb*, No. S006938, RT 5302 [same]; *People v. Lucas*, No. S004788, RT 2998 [same].

[89] See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 [no evidence of a struggle]; *People v. Carrera*, No. S004569, RT 160 [same].

[90] See, e.g., *People v. Padilla*, No. S014496, RT 4604 [prior relationship]; *People v. Waidla*, No. S020161, RT 3066-67 [same]; *People v. Kaurish* (1990) 52 Cal.3d 648, 717 [same].

[91] See, e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 [same].

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[92]

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[93]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[94]

d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed

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[92] See, e.g., *People v. Deere*, No. S004722, RT 155-56 [victims were young, ages 2 and 6]; *People v. Bonin*, No. S004565, RT 10,075 [victims were adolescents, ages 14, 15, and 17]; *People v. Kipp*, No. S009169, RT 5164 [victim was a young adult, age 18]; *People v. Carpenter*, No. S004654, RT 16,752 [victim was 20], *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 [26-year-old victim was "in the prime of his life"]; *People v. Samayoa*, No. S006284, XL RT 49 [victim was an adult "in her prime"]; *People v. Kimble*, No. S004364, RT 3345 [61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 [victim was 77]; *People v. Bean*, No. S004387, RT 4715-16 [victim was "elderly"]

[93] See, e.g., *People v. Clair*, No. S004789, RT 2474-75 [strangulation]; *People v. Kipp*, No. S004784, RT 2246 [same]; *People v. Fauber*, No. S005868, RT 5546 [use of an ax]; *People v. Benson*, No. S004763, RT 1149 [use of a hammer]; *People v. Cain*, No. S006544, RT 6786-87 [use of a club]; *People v. Jackson*, No. S010723, RT 8075-76 [use of a gun]; *People v. Reilly*, No. S004607, RT 14,040 [stabbing]; *People v. Scott*, No. S010334, RT 847 [fire].

[94] See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 [same]; *People v. Belmontes*, No. S004467, RT 2466 [eliminate a witness]; *People v. Coddington*, No. S008840, RT 6759-61 [sexual gratification]; *People v. Ghent*, No. S004309, RT 2553-55 [same]; *People v. Brown*, No. S004451, RT 3544 [avoid arrest]; *People v. McLain*, No. S004370, RT 31 [revenge]; *People v. Edwards*, No. S004755, RT 10,544 [no motive at all].

in the middle of the night, late at night, early in the morning or in the middle of the day.[95]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[96]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[97]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, ... were enough in themselves, and without some narrowing principles to apply to those facts, to

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[95] See, e.g., *People v. Fauber*, No. S005868, RT 5777 [early morning]; *People v. Bean*, No. S004387, RT 4715 [middle of the night]; *People v. Avena*, No. S004422, RT 2603-04 [late at night]; *People v. Lucero*, No. S012568, RT 4125-26 [middle of the day].

[96] See, e.g., *People v. Anderson*, No. S004385, RT 3167-68 [victim's home]; *People v. Cain*, No. S006544, RT 6787 [same]; *People v. Freeman*, No. S004787, RT 3674, 3710-11 [public bar]; *People v. Ashmus*, No. S004723, RT 7340-41 [city park]; *People v. Carpenter*, No. S004654, RT 16,749-50 [forested area]; *People v. Comtois*, No. S017116, RT 2970 [remote, isolated location].

[97] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia*_(1980) 446 U.S. 420].)

C. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH FACTUAL DETERMINATION PREREQUISITE TO A SENTENCE OF DEATH; IT THEREFORE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296 [hereinafter *Blakely*].

In *Apprendi*, the High Court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at 478.)

In *Ring*, the High Court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona*

(1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Id.* at 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Later, in *Blakely*, the High Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 542 U.S. 296.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at 296.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, **any** fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant `statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Id.* at 295-296, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*, and violates the federal Constitution.

a. **In The Wake Of *Apprendi*, *Ring*, And *Blakely*, Any Jury Finding Necessary To The Imposition Of Death Must Be Found True Beyond A Reasonable Doubt.**

In this case, in addition to the instructions given regarding the lack of reasonable doubt needed to find aggravating factors, as discussed below, in the introductory remarks to the panels of the prospective jurors, the court included an explanation of the fact that in the penalty determination there would be no burden of proof requirement. (4RT 683, 714, 746, 780, 814, 838, 871, 5RT 904, 934, 968, 972.)

Additionally, in her arguments to the jury at the conclusion of the penalty phase, the Deputy District Attorney explained that there was no burden of proof as to the determination of whether the death penalty should be imposed. (39RT 8434-36.) As noted previously, the arguments of the prosecutor are likely to carry great weight with the jury. (Ante, at p. 189.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[98] Only California and four other states

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[98] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

(Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, **do** require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[99] As set forth in California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (139CT

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az., 2003) 65 P.3d 915.)

[99] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448.)

36525, 39RT 8622) an aggravating factor is *any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself."* (CALJIC No. 8.88; italics added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[100] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[101]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis in *People v. Snow* (2003) 30 Cal.4th 43 [hereinafter *Snow*], and *People v. Prieto* (2003) 30 Cal.4th 226 [hereinafter *Prieto*]: "Because any finding of aggravating factors during the penalty phase

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[100] In *Johnson v. State* (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* 59 P.3d at 460)

[101] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I)* (1985) 40 Cal.3d 512, 541.)

does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), *Ring* imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto*, *supra*, 30 Cal.4th at 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[102] indicates, the maximum penalty for **any** first degree murder conviction is death.

Arizona advanced precisely the same argument in *Ring*. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorized by the jury's verdict. The Supreme Court squarely rejected it:

> "This argument overlooks *Apprendi's* instruction that 'the relevant inquiry is one not of form, but of effect.' 530 U.S., at 494, 120 S.Ct. 2348. In effect, 'the required finding [of an aggravated circumstance] expose[d] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict.'" *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151.

(*Ring*, 536 U.S. at 586.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

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[102] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[103] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating circumstances.[104] There is no meaningful difference between the processes followed under each scheme.

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[103] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

[104] Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) In *Blakely*, the High Court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Id.* 238; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*Snow*, *supra*, 30 Cal.4th at 126, fn. 32; citing *Anderson*, *supra*, 25 Cal.4th at 589-590, fn.14.) The Court has repeatedly sought to reject *Ring's* applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*Prieto*, 30 Cal.4th at 275; *Snow*, 30 Cal.4th at 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are *no* facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states,

the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury **merely** weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* (1994) 512 U.S. 967, 972.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*Prieto*, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See, *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring*, *supra*, 65 P.3d 915, 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."]; accord, *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003); *State v. Ring*,

65 P.3d 915 (Az. 2003); *Woldt v. People*, 64 P.3d 256 (Colo.2003); *Johnson v. State*, 59 P.3d 450 (Nev. 2002).[105])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 543 U.S. at 305.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[106]

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[105] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

[106] In *People v. Griffin* (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in *Prieto* and *Snow*. The Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424,

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any

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432, 437 [hereinafter *Leatherman*], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (*Griffin*, *supra*, 33 Cal.4th at 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

"Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

Leatherman, *supra*, 532 U.S. at 429.

This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. *Id.* 532 U.S. at 437, 440. *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*Prieto*, 30 Cal. 4th at 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> "Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents 'no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.' [Citation.] The notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.'"

(*Ring*, *supra*, 536 U.S. at p. 587, quoting with approval Justice O'Connor's *Apprendi* dissent, 530 U.S. at p. 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].)[107] As the High Court stated in *Ring*, *supra*, 536 U.S. at pp. 2432, 2443:

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[107] The *Monge* court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed *Ring*, and expressly stated that the *Santosky v. Kramer* ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v.*

> "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death."

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements Of Jury Agreement And Unanimity.

In addition to the instructions given to the jury regarding the fact that unanimity was not required, the Deputy District Attorney emphasized this principle in her arguments to the jury at the conclusion of the penalty phase, telling the jury that it need not unanimously as to why death would be an appropriate penalty nor did the jury need to be unanimous as to the finding of any particular factors. (39RT 8437.)

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; accord, *People v. Bolin* (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing

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Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at p. 732 (emphasis added).)

scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefore – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[108] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The United States Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (*Ring*, *supra*; *Blakely*, *supra*.)

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[108] See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Den ex dem. Murray v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.[109]) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, *supra*, 524 U.S. at p. 732;[110] accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732;

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[109] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (*Johnson v. Louisiana* (1972) 406 U.S. 356; *Apodaca v. Oregon* (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[110] The *Monge* court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358 (1977). Because the death penalty is unique 'in both its severity and its finality,' *id.*, at 357, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington*, 466 U.S. 668, 704 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (*Monge v. California*, *supra*, 524 U.S. at 731-732.)

Harmelin v. Michigan (1991) 501 U.S. 957, 994), and certainly no less (*Ring*, 536 U.S.. at p. 589).[111] (See Section D, poIst. at p. 328.)

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[112] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The High Court's reasons for this holding are instructive:

> "The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. *The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement*

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[111] Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

[112] The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

> *among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.*"

(*Richardson, supra*, 526 U.S. at p. 819 (italics added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne, supra*; *People v. Hayes* (1990) 52 Cal.3d 577, 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations.

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition Of Life Or Death.

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*Winship*, *supra*, 397 U.S. at 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 743, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," *Speiser*, *supra*, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra* (adjudication of juvenile delinquency); *People v. Feagley* (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); *People v. Burnick* (1975) 14 Cal.3d 306 (same); *People v. Thomas* (1977) 19 Cal.3d 630 (commitment as narcotic addict); *Conservatorship of Roulet* (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the

individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" *Santosky*, *supra*, 455 U.S. at 755, the United States Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. The stringency of the beyond a reasonable doubt standard bespeaks the weight and gravity of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755; internal citations and quotation marks omitted.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky*, *supra*, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a

specific case." (*Woodson, supra*, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake; see *Monge v. California, supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([*Bullington v. Missouri*,] 451 U.S. at p. 441 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (*Monge v. California, supra*, 524 U.S. at 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See *People v. Griffin* (2004) 33 Cal.4th 536, 595; *People v. Rodriguez* (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the

weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> "We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment."

(*State v. Rizzo* (2003) 266 Conn. 171, 238, fn. 37 [833 A.2d 363, 408-409, fn. 37].)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond A Reasonable Doubt Were Not The Constitutionally Required Burden Of Persuasion For Finding (1) That An Aggravating Factor Exists, (2) That The Aggravating Factors Outweigh The Mitigating Factors, And (3) That Death Is The Appropriate Sentence, Proof By A Preponderance Of The Evidence Would Be Constitutionally Compelled As To Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in **any** sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of **any** historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [historical practice given great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co., supra*, 59 U.S. (18 How.) at 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue." There is no statute to the contrary. In **any** capital case, **any** aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state

expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

Accordingly, appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (*Sullivan v. Louisiana*, *supra*.) That should be the result here, too.

4. Some Burden Of Proof Is Required In Order To Establish A Tie-Breaking Rule And Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes*, *supra*, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v.*

Oklahoma (1978). 436 U.S. 921.) It is unacceptable – "wanton" and "freakish," *Proffitt v. Florida* (1976) 428 U.S. 242, 260) – the "height of arbitrariness," *Mills v. Maryland* (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana*, *supra.*) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is **no** burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[113] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards.

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[113] See, e.g., *People v. Dunkle*, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*.)

6. California Law Violates The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia*, *supra*, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and mitigating circumstances (*People v. Fairbank*, *supra*), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with

the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* 11 Cal.3d at 267.)[114] The same analysis applies to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a *non*-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to *more* rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, *supra*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at 383, fn. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643) and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79) does not mean that its basis cannot be, and should not be, articulated.

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[114] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[115]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact-finding process. The

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[115] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting Proffitt v. Florida, *supra*, 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the High Court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The High Court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that

the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at 52, fn. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316 fn. 21; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 821, 830-831; *Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22; *Coker v. Georgia* (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the

United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v. Georgia* (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Proffitt v. Florida*, *supra*, 428 U.S. at 259.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[116]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is

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[116] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).
Also see *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433,444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181,197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman* in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence

unreliable. (See, e.g., *Johnson v. Mississippi*, *supra*, 486 U.S. 578; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, *Ring v. Arizona*, *supra*, and *Apprendi_v. New Jersey*, *supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use Of Restrictive Adjectives In The List Of Potential Mitigating Factors Impermissibly Acted As Barriers To Consideration Of Mitigation By Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio* (1978) 438 U.S. 586.)

10. The Failure To Instruct That Statutory Mitigating Factors Were Relevant Solely As Potential Mitigators Precluded A Fair, Reliable, And Evenhanded Administration Of The Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031, fn.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585.)

The likelihood that the jury in appellant's case would have been misled as to the potential significance of the "whether or not" sentencing factors was heightened by the prosecutor's misleading and erroneous statements during penalty phase closing argument. It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he

might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (*Tuilaepa v. California*, *supra*, 512 U.S. at 973 quoting *Gregg v. Georgia*, *supra*, 428 U.S. at 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

D. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION BY DENYING PROCEDURAL SAFEGUARDS TO CAPITAL DEFENDANTS WHICH ARE AFFORDED TO NON-CAPITAL DEFENDANTS.

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California*, *supra*, 524 U.S. at 731-732.) Despite this directive California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, *second only to life itself*, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' *Trop v. Dulles*, 356 U.S. 86, 102 (1958)." (*Commonwealth v. O'Neal* (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In *Prieto*,[117] as in *Snow*,[118] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected."

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[117] "As explained earlier, the penalty phase determination in California is normative, not factual. *It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another.*" (*Prieto*, 30 Cal.4th at 275; italics added.)

[118] "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, *comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another.*" (*Snow*, 30 Cal.4th at 126, fn. 3; emphasis added.)

Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to *Prieto* and Snow, there is no hint in *Allen* that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen, supra*, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values which are reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting

death penalties that flout a societal consensus as to particular offenses. (*Coker v. Georgia*, *supra*, 433 U.S. 584) or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; Ford v. Wainwright, supra; *Atkins v. Virginia*, *supra*.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by *Allen* for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments *narrows* to death or life without parole." (*People v. Allen*, *supra*, 42 Cal. 3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright*, *supra*, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also *Reid v. Covert* (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; *Gregg v. Georgia*, *supra*, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; *Gardner v. Florida* (1977) 430 U.S. 340, 357-358; *Lockett v. Ohio*, *supra*, 438 U.S. at 605 [plur. opn.]; *Beck v. Alabama*, *supra*, 447

U.S. at 637; *Zant v. Stephens*, *supra*, 462 U.S. at 884-885; *Turner v. Murray* (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Harmelin v. Michigan*, *supra*, 501 U.S. at 994; *Monge v. California*, *supra*, 524 U.S. at 732.) The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (*Allen*, *supra*, at 1287.) The distinction drawn by the *Allen* majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in Prieto and *Snow*. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate *all* sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (*Bush v. Gore* (2000) 531 U.S. 985.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (*Charfauros v. Board of Elections* (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the

withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer permit the imposition of death in a particular case. (See, e.g., *Atkins v. Virginia*, *supra*.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [*Allen*, *supra*, 42 Cal.3d at 186]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (*Blakely v. Washington*, *supra*; *Ring v. Arizona*, *supra*.)[119]

California *does* impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland*, *supra*, 486 U.S. at 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (*Monge v. California*, *supra*.) To withhold them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and

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[119] Although *Ring* hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring*, *supra*, 536 U.S. 609.)

fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. And Civ. Confinement 339, 366.) The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. Of Brennan, J.]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830 [plur. Opn. Of Stevens, J.].) Indeed, *all* nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Nov. 24, 2006), on Amnesty International website [www.amnesty.org].)

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. Of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. at p. 227; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16

Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (*Atkins v. Virginia* (2002) 536 U.S. 304, p. 316, fn. 21, citing the Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina*, O.T. 2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot*, *supra*, 159 U.S. 113, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[120] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. *Ford v. Wainwright* (1986) 477 U.S.

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[120] See Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).

399; *Atkins v. Virginia*, *supra*.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

XIII

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HIS CO-APPELLANT THAT MAY ACCRUE TO HIS BENEFIT

Appellant James Daveggio joins in all contentions raised by his co-appellant that may accrue to his benefit. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant JAMES DAVEGGIO that the judgment of conviction and sentence of death must be reversed.

DATED:
Respectfully submitted,

_____
DAVID H. GOODWIN, SBN 91476
Attorney for Defendant and Appellant James Daveggio

CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 102,000 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2003 software which was used to prepare this document, I certify that the word count of this brief is 101,020 words.

Respectfully submitted,

_____
DAVID H. GOODWIN

CERTIFICATE OF SERVICE

I, David H. Goodwin, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 93579, Los Angeles, Ca 90093-0579. I have made service of the foregoing **APPELLANT'S OPENING BRIEF** by depositing in the United States mail on June ___, 2010, a true and full copy thereof, to the following:

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I declare under penalty of perjury that the foregoing is true and correct.

_____

David H. Goodwin