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 REPLY BRIEF

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

THE HONORABLE LARRY J. GOODMAN, PRESIDING

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APPELLANT JAMES DAVEGGIO'S REPLY BRIEF

In this Reply Brief, appellant does not respond to all of respondent's contentions, most of which are covered by Appellant's Opening Brief. This Reply Brief is limited to those points upon which further discussion may be helpful to this Court.

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 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

(Respondent addressed this argument in Argument III of Respondent's Brief, at pages 135-149)

Respondent addresses arguments appellant has raised regarding evidence admitted under Evidence Code sections 1101 and 1108 (Arguments I and III, respectively) in a single argument, Argument III of respondent's brief, at pages 135-149, on the ground that an 1101 analysis is unnecessary if evidence is admitted under section 1108. (RB 135 fn. 12.)

In order to facilitate review, appellant's reply is consolidated into a single argument, which is set forth under Argument II, *infra*, and which appellant incorporates by reference as though set forth here. In doing so, appellant does not concede any of the contentions raised in either Arguments I or III in the briefing.

II

THE TRIAL COURT ERRED IN THE INSTRUCTIONS GIVEN TO THE JURY REGARDING EVIDENCE OF WRONGFUL CONDUCT ADMITTED UNDER EVIDENCE CODE SECTION 1101. THE IMPROPER INSTRUCTIONS 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

(Respondent addressed this argument in Argument IV of Respondent's Brief, at pages 149-168)

A. Introduction

In Argument I of his opening brief, appellant argued that the trial court erred in admitting evidence of appellant's wrongful conduct with Christina, Rachel, Amy, and Aleda pursuant to Evidence Code section 1101. (See AOB 57-99.) Then, in Argument II, appellant made the related argument that while the trial court's instruction on the jury's use of the section 1101 evidence may have correctly stated a principle of law, the instruction created a substantial risk of misleading the jury because the evidence to which the law related was neither relevant nor admissible and the law therefore had no application to the facts of the case. (AOB 100-115.) In sum, the trial court's instruction failed to correctly limit the jury's use of other crimes evidence to the relevant disputed issues.

Appellant presents here his reply to respondent's argument regarding appellant's contentions in Argument I and II.

B. This Issue Is Cognizable on Review

Respondent first contends that appellant has forfeited his claim of instructional error by failing to object below. (RB 150-151.)

Initially, it must be observed that it is settled law that a trial court has a duty to instruct the jury sua sponte on general principles which are closely and openly connected with the facts before the court. (Pen. Code, §§ 1259, 1469; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

In addition, in *People v. Nottingham* (1985) 172 Cal.App.3d 484, the Court of Appeal recognized that a trial court has an obligation to instruct sua sponte where prior offenses admitted in sex offense cases are obviously important to the case.

> The trial court is normally not obligated to give sua sponte instructions in regard to the limited admissibility of evidence of prior bad acts at the time the jury receives the testimony. (*People v. Collie* (1981) 30 Cal.3d 43, 63.) But where the prior offenses admitted in sex offense cases "'might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence [in failing to request a limiting instruction] . . .,'" a limiting instruction should be given sua sponte. (*People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067.) Even if such an instruction is not required, when a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately. (*People v. Key* (1984) 153 Cal.App.3d 888, 899.) (*People v. Nottingham, supra*, 172 Cal.App.3d at p. 497; see also related discussion of *Nottingham*'s reasoning as relevant to this case at AOB 102-103.)

In this case, in instructing the jury that the other offenses could be used to prove facts such as intent and plan (17RT 3989), the court inaccurately described the uses for which the evidence could be used, contrary to the holdings in cases such as *Key* and *Nottingham*.

Respondent relies on *People v. Lewis* (2006) 39 Cal.4th 970, 1037 and argues that in order for this Court to review appellant's claim appellant must have first objected or sought clarification of the instruction below. (RB 150-151.) In *Lewis*, this Court did find that co- defendant Oliver forfeited his challenge to the Evidence Code section 1101 instruction by failing to preserve it at the trial level,

but nevertheless considered the merits of Oliver's claim and concluded that no error occurred because the instruction was not misleading, confusing, or incomplete and because the jury could not have misapplied the instruction to Oliver's detriment. (*Id.* at p. 1037.) Oliver's specific complaint was that the other crimes' instruction did not sufficiently limit evidence of his codefendant's repeated verbal and physical mistreatment of a woman, and this Court concluded that inasmuch as there was no evidence Oliver was present during the incidents of abuse the jury had no basis on which to attribute his codefendant's violent conduct to Oliver. There are therefore evident and significant differences between the review and outcome in *Lewis* and appellant's circumstance as the discussion in subsection C, *infra*, explains. As appellant explains in that location, and as is evident from the huge amount of other-crimes evidence admitted at trial, evidence of other sexual assaults played a prominent role in the prosecution's case against appellant.

That the prior sex offenses were important to the prosecution of this case requires is clear as the prosecution's proof of the charged offenses depended heavily upon evidence of other sexual offenses. This is apparent for two reasons.

First, the sheer volume of other-crimes evidence in terms of the number of witnesses describing those acts speaks loudly as to its importance.

Secondly, the prosecutor relied on this evidence in its arguments to the jury to bolster its case. (For example, see 33RT 7108-7109, 7113-7114, 7118-7119, 7150-7152, 7157, 7195, 7200-7207, 7154-7159, 7162-7167, 7182-7193, 7194-7198.)

Accordingly, contrary to respondent's assertions, appellant has not forfeited review of this issue.

C. Summary of Contentions and Discussion

The gravamen of appellant's argument is that the court's final charge to the jury on the use of other crimes evidence allowed the jury to use evidence related to Aleda, Christina, Rachel, and Amy to prove motive, intent, characteristic common plan or scheme, and absence of consent (and, as to Aleda, identity) in spite of the fact that not all of the evidence was relevant to prove all of those matters as appellant explained in Argument II of the opening brief.

For example, the instruction incorrectly allowed evidence related to the acts against Christina, Rachel, and/or Amy to be used to prove appellant's liability for Vanessa's charged murder or the related special circumstances even though the acts against those victims lacked sufficient common features with Vanessa's kidnap, entirely different sexually assaultive conduct, and murder from which to infer the existence of a common plan or scheme to kidnap, sexually assault, and murder Vanessa in accordance with that plan. (See Argument II of the Opening Brief at page 104.)

In addition, the instruction also incorrectly allowed evidence of Aleda's stranger-on-stranger kidnap, sexual assault, and release to be used to prove the charged crimes involving Sharona and April. Appellant explained in Argument II of the opening brief that evidence related to Aleda lacked sufficient common features with the prosecution's evidence concerning the charged sexual assaults upon Sharona and April as to the force used, the nature of the sexual assaults, Sharona's and April's ages, and the fact of the abduction itself to establish the existence of a common plan or scheme and the further inference that the assaults upon Sharona and April were carried out in implementation of that plan.

The instruction also incorrectly allowed Amy's evidence to be used to prove appellant's guilt of the charges related to Vanessa, Sharona, and April in spite of the paucity of common features between these crimes. Amy's evidence, for example, when compared with Vanessa's, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in ac-

cordance with that plan. In sharp contrast with Vanessa's evidence, Amy's evidence revealed a sexual assault perpetrated upon a friend, who was then released. In the same way, Amy's experience shared virtually no common features with April's and only a limited few with Sharona's. Amy's evidence did not support the finding of a common plan sufficient to support an inference that the abduction and murder of Vanessa and the charged sexual assaults upon Sharona and April were committed in accordance with that plan.

The instruction also incorrectly allowed the jury to use Christina's and Rachel's evidence to prove the existence of a common plan and to further prove that Vanessa was murdered in accordance with that plan. Appellant has previously explained that both Christina's and Rachel's evidence, when compared with Vanessa's evidence, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan. (Appellant's Opening Brief, Argument II, p. 104.)

The instruction incorrectly allowed the jury to use Aleda's evidence to prove that appellant was guilty of the murder of Vanessa and its associated special circumstances, despite the fact that Aleda's evidence, when compared with Vanessa's evidence, contained some similarities but the common marks were not sufficiently distinctive to give logical force to an inference of identity.

The instruction also incorrectly allowed the jury to use evidence of the defendants' acts of paraphilia to prove the defendants had the intent to engage in acts of paraphilia with Vanessa and to murder her. The instruction allowed the jury to use evidence of the defendants' sexual misconduct, but not misconduct paraphilic in nature, with Amy and Aleda to prove the defendants had an intent to rape Vanessa with modified curling irons. Evidence pertaining to Rachel, Christina, Amy, and Aleda was not relevant to prove the defendants intended to kill Vanessa, as section 1108 does not logically allow for proof of prior sexual offenses to show a propensity to commit murder.

In support of this contention, appellant discussed in his opening brief (AOB at pp. 101-103) the cases of *People v. Swearington* (1977) 71 Cal.App.3d 935, and *People v. Nottingham, supra*, 172 Cal. App. 3d 484. Respondent argues these cases are inapposite because this Court has ruled that (1) the instruction given here (CALJIC No. 2.50) correctly states the law; (2) *Swearington*'s premise is incorrect; and (3) the instruction given adequately informed the jury of how it might use the evidence. (RB 153-156.)

Respondent initially argues that the pattern instruction CALJIC No. 2.50 correctly states the law. Respondent also makes the related argument that the other crimes evidence was directly tied to the evidence regarding the charged crimes. Respondent supports the latter contention with the following generally drawn illustrations that capture some but not all of the various ways the broadly worded instruction allowed the jury to use the other crimes evidence to prove the charged crimes: (1) the kidnap and assault of Aleda was relevant to prove the kidnap for purposes of sexual assault of Vanessa; (2) the sexual assaults upon Rachel, Christina, and Amy were relevant to prove the sexual assaults upon Sharona and April. (RB 154-155.) As appellant has more specifically set forth above, the instruction given appellant's jury allowed the jury to use other crimes evidence without further limitation in proving the motive, characteristic method, plan, or scheme, and intent required for the charged crimes and special circumstances. (CALJIC No. 2.50; 138CT 36343-36344.) The examples set forth above explain the specific ways in which the instruction allowed the jury to use evidence of other crimes to improperly prove the charged crimes.

Respondent relies upon *People v. Wilson* (2005)[1] 36 Cal.4th 309, 328, and *People v. Carter* (2005) 36 Cal.4th 1114, 1151, to support the argument that CALJIC No. 2.50 is a correct statement of the law. (RB 154.)

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[1] Wilson involved two appeals. The first, People v. Wilson (1992) 3 Cal.4th 926, is referred to as "Wilson I". The second, People v. Wilson 36 Cal.4th 309, is referred to as "Wilson II".

A review of these cases, however, shows that this Court concluded that CALJIC No. 2.50, as given in those cases, correctly stated the law i*n the context of the factual and legal circumstances,* and in fact, *Wilson* is an example of how a court correctly instructs a jury on other-crimes evidence by limiting the use of the evidence.

In the trial in *Wilson*, as discussed more fully in the original appeal in that case, the prosecution introduced evidence that the defendant had solicited someone to kill a witness, which this Court stated "was highly probative of defendant's consciousness of guilt, which in turn was probative of his identity as the perpetrator of the charged offenses." (Id. at p. 1220.)

Subsequently, the jury was instructed with a version of CALJIC No. 2.50 which stated that the "evidence was received and may be considered by you *only for the limited purpose* of determining *if it tends to show*: [¶] *The identity* of the person who committed the crime, if any, of which the defendant is accused." (Id. at p. 326, italics added.)

Thus, the evidence was introduced for a specific purpose and the court limited it to the correct purpose for which it had been introduced and when that happens CALJIC No. 2.50 correctly stated the law.

Here, the court did not specifically tailor the instruction to the particular use for which it was logically relevant.

The defendant in *Wilson* had argued that the instruction allowed the jury to also use the evidence for propensity. This Court rejected that argument noting that the instruction that "the jury *not* to consider defendant's other crimes for a variety of purposes (i.e., to prove that defendant 'is a person of bad character or that he has a disposition to commit crimes'), while limiting the jury's use of the evidence solely to decide the issue of identity." (*Id.* at p. 327.)

Thus, in *Wilson* the instruction correctly informed the jury of the proper principles because it limited the use of other-crimes evidence.

Likewise, *Carter* does not support respondent's position. Some of prior

crimes were found to be sufficiently similar so as to support the inference of identity. (*Id.* at p. 1148.) Other evidence of prior bad conduct was found to be properly admissible for common plan and intent. (*Ibid.*) As a result, this court held that the jury had been properly instructed when it was told it could use that evidence of inferences of common plan, identity, and intent. (*Id.* at pp. 787-788.) While it is true that the jury was also instructed on some other uses, such as "knowledge" and "lack of consent" on the part of the victim (*Ibid*), those aspects of the instruction were not part of the of arguments raised on appeal and were therefore not discussed in that case.

As explained in another context in Appellant's Opening Brief (AOB p. 193), when an issue is not raised in a case, the case cannot be regarded as precedent. (See *Cohens v. Virginia* (1821) 19 U.S. 264, 399; *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.)

Thus, contrary to respondent's assertion, *Wilson* and *Carter* do not hold that CALJIC No. 2.50 correctly states the law for all purposes. Rather, each of those cases considered the propriety of modified versions of CALJIC No. 2.50 as they applied to properly admitted other crimes evidence and concluded the instructions correctly stated the law. Appellant's claim in contrast asserts that the version of CALJIC No. 2.50 given his jury incorrectly allowed the jury to use improperly admitted evidence to prove his guilt of the charged crimes. Neither *Wilson* nor *Carter* control the issue appellant brings for review by this Court.

Respondent next contends that *Swearington* is incorrectly decided to the extent it "rests upon the notion that a defendant's failure to dispute an element of the crime renders evidence on that element inadmissible." (RB 155.) Appellant discussed *Swearington* at pages 101-102 of the opening brief and respectfully refers the reader to that discussion. In addition, appellant notes that he relied on *Swearington* and *Nottingham* for the principle that a 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. Appellant did not rely on *Swearington* in this argument in order to prove the trial court erred in admitting the evidence. Rather, appellant's argument was directed at showing that the trial court did not properly limit the jury's use of the other crimes evidence the court had chosen to admit.

Respondent's final contention is that the version of CALJIC No. 2.50 given appellant's jury adequately instructed the jury because the instruction limited proof of identity to Aleda's evidence. Respondent reasons that the jury would therefore infer that the other crimes evidence was to be considered only with regard to intent, motive, and common plan or scheme. (RB 155-157.) Appellant notes that the instruction also allowed the jury to consider the evidence on the matter of consent.

Respondent fails to address the thrust of appellant's argument, which is that the version of CALJIC No. 2.50 given appellant's jury allowed the jury to use evidence that lacked relevance to the charged crimes to prove appellant's guilt of the charged crimes. Appellant has described the uses to which the instruction allowed the evidence to be put above and in Arguments I and II of the opening brief. Respondent is silent with regard to these points because there can be no reasonable explanation for the inappropriate use of such evidence.

Likewise, respondent argues that "The instruction [CALJIC No. 2.50] is no less correct simply because appellants dispute the trial court's ruling admitting the other-crimes evidence." (RB 154.) It is respectfully submitted that this is not appellant's claim. Rather, the claim is that *not only* was the evidence improperly admitted, but the instructions were also incorrect, and those instructions would be incorrect *even if* the evidence had been properly admitted.

To give but one example, in the incident involving Christina it was alleged that appellants lured her to the motel on the pretext of running errands with her. To tell the jury that this could be used to establish a common plan to kill Vanessa,

when in fact it did not involve a common plan, is improper and misdirects the jury's attention.

Finally, appellant recognizes that recently, this Court held that "nothing in the language of section 1108 restricts its application to uncharged offenses." (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1164.)

While there may no longer exist a *per se* bar against using charged offenses to prove other charged offenses, under the facts of a particular case the use of charged offenses still may be improper. This follows from the fact that section 352, the "saving grace" of section 1108, remains an important factor that must be considered. This is clear from this Court's other statements during the discussion of this issue in *Villatoro*. For example, this Court did agree with the Court of Appeal

> "that nothing precludes a trial court from considering section 352 factors when deciding whether to permit the jury to infer a defendant's propensity based on this evidence. [The Court of Appeal] explained: 'Even where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote or unconnected to each other, that the trial court could apply the criteria of section 352 and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses.' "

(*Id.* at p. 1163.)

As a result, the similarity or dissimilarity of the prior offenses still in a factor that must be considered in the decision as to whether or not to admit section - 1108 evidence.

Indeed, this court recognized that even if section 1108 had not expressly included section 352 analysis, section 352 "still serves as a limitation on the admission of all evidence." (*Id.* at p. 1163.)

Appellant respectfully suggests that this Court reconsider the conclusion in *Villatoro*. This request is based on the belief that the concurring and dissenting opinions are better reasoned and should be adopted by the majority.

As Justice Corrigan explains, section 1108 was intended to create a "narrowly crafted" exception to the ban on propensity evidence for uncharged offenses. (*Id.* at p. 1172, con. opn.)

Furthermore, the result in *Villatoro* is contrary to the long-established rule that each count for which a defendant is to be tried must be decided independently of any other count. (*Id.* at p. 1170, con. opn.)

As Justice Corrigan discussed, such a view is also consistent with the legislative history which envisioned a limited reading of section 1108. (*Id. at pp.* 1173-1175.)

Finally, as noted above, section 1108's saving grace is the incorporation of section 352. However, as Justice Corrigan explained, a propensity inference based on charged crimes lacks the safeguard of inherent in section 352. (*Id. at p.* 1176-1177.)

Therefore, appellant respectfully suggests that this Court reconsider the conclusion in *Villatoro*.

For the reasons set forth here and in the opening brief, the incorrect instruction erroneously allowing use of evidence of uncharged misconduct to prove elements of the charged offenses deprived appellant of the right to a fair trial under the Fifth and Fourteenth Amendments and his right to a reliable determination in a capital case guaranteed by the Eighth Amendment.

III

APPELLANT'S 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 UNDER THE EIGHTH AMENDMENT WERE VIOLATED BY THE TRIAL COURT'S INCORRECT ADMISSION OF PREJUDICIAL EVIDENCE OF OTHER SEXUAL OFFENSES TO PROVE APPELLANT'S PROPENSITY TO COMMIT THE CHARGED CRIMES

(Respondent addressed this argument in Argument III of Respondent's Brief, at pages 135-149)

A. Introduction

Two sections of the Evidence Code governing the admission of character evidence are in issue in this case in Arguments I and III. "[E]vidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352." (*People v. Lewis* (2009) 46 Cal.4th. 1255, 1286)

Additionally, the two aspects of analysis under section 1108, namely, admissibility and instructional issues, are discussed in this section.

Evidence of a defendant's commission of a crime other than one for which he is being tried is not admissible to show bad character or predisposition to criminality, but it may be admitted to prove some material fact at issue, such as motive, intent, or identity. (Evid. Code, § 1101.)

Following a hearing on the subject, the trial court in this case admitted evidence of the defendants' uncharged conduct involving Christina, Rachel, Amy, and Aleda to show motive, intent, and a characteristic common plan and design under both Evidence Code sections 1101 and 1108. In addition, the trial court also admitted evidence involving Aleda to prove identity under both sections 1101 and 1108. (5CT 1203-1207; 3RT 653-656.)

In Argument I of the Opening Brief, appellant explained why evidence of the uncharged offenses admitted by the trial court had no tendency in reason to establish the factors for which they were admitted under Evidence Code section 1101. In Argument III, appellant explained that the trial court also incorrectly allowed this evidence to be admitted under Evidence Code Section 1108. Appellant also made the related argument that the effect of the admission of this evidence under sections 1101 and 1108 was compounded by incorrect instructions regarding the jury's use of the evidence. (AOB Arguments II and IV.)

Respondent has decided against responding separately to the Evidence Code section 1101 contentions raised by appellant in the opening brief. Instead, respondent contends that by its decision in *People v. Loy* (2011) 52 Cal.4th 46, 63, this Court has decided that if evidence of sexual misconduct is admitted under section 1108, that admission satisfies the requirements of section 1101 without further analysis. (See RB 135 fn. 12.)

In order to provide coherence in the discussion regarding the interface between sections 1101 and 1108 and thus facilitate review, appellant discusses the contentions here, but also incorporates his argument by reference as appropriate into his discussion regarding the admission of evidence under Evidence Code section 1101 contained in Arguments I and III of appellant's brief. In doing so, appellant does not concede any of the contentions raised in either Argument I or III in the briefing.

In the discussion below, appellant explains why respondent's analysis is flawed. Briefly, Evidence Code sections 1101 and 1108 together provide for the admission of character evidence for certain limited purposes if the proffered character evidence meets the required standards of relevancy for the stated purpose. As stated above and in the opening brief, section 1101 admitted character evidence to prove, e.g., motive, intent, existence of common plan or scheme, and identity, but precluded the use of such evidence to prove the defendant's disposition to commit the charged crime. Section 1108 eliminated section 1101's prohibition

against the use of propensity evidence where sexual offenses are charged by allowing evidence of prior sexual misconduct to be used, subject to Evidence Code section 352, to prove that the defendant had a propensity to commit the charged sexual offenses.

Section 1108 does not, as respondent advocates, allow the admission of evidence of sexual misconduct for all other section 1101 purposes without proper section 1101 analysis and weighing. The question of similarity of charged and uncharged crimes remains "relevant to the trial court's exercise of discretion" under sections 1101 and 1108. (*People v. Loy* (2011) 52 Cal.4th 46, 63.)

Moreover, the level of similarity between charged and uncharged crimes necessary for admission under section 1108, as illustrated in *Loy*'s evaluation and weighing of the evidence before it, establishes that the trial court erred in admitting the uncharged crimes involving Christina, Aleda, Rachel, and Amy under section 1108 to prove appellant's guilt of the charged crimes.

Finally, the jury should not have been instructed that it could use the evidence that was admitted under 1108 for the purpose of making the inferences that are addressed in 1101(b).

B. Discussion

After appellant filed his opening brief, this Court discussed the law attending the admission of other crimes evidence under Evidence Code section 1108 in *People v. Loy* (2011) 52 Cal.4th 46. The defendant in *Loy* was charged with sexually assaulting and killing his 12-year-old niece. The forensic pathologist who performed the autopsy found bleeding in various areas of the vagina consistent with sexual penetration and also concluded that death was caused by asphyxia due to compression of the face and/or neck and/or body. The coroner further testified that asphyxia is the most common sex-associated way of killing someone. (*Id.* at p. 53.) After hearing argument, the trial court admitted, under section 1108, evidence that the defendant had on two separate prior occasions committed violent sexual assaults against a woman. Each of the women testified that during the as-

sault the defendant choked her with his hand around the front of her neck. (*Id.* at pp. 54-55.)

On appeal, the defendant in *Loy* challenged the admission of the prior sexual assaults on multiple grounds, including claiming the evidence should have been excluded because it lacked sufficient similarity to the charged offense. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.) Appellant similarly claims that his trial court abused its discretion in incorrectly admitting evidence of other sexual misconduct under both Evidence Code sections 1101 and 1108.

In considering the defendant's claim that the evidence of his previous crimes was not sufficiently similar to the charged capital case, *Loy* noted that even if the charged and uncharged sexual offenses lacked similarity, that circumstance, although "relevant to the trial court's exercise of discretion," was not dispositive of the matter. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.) *Loy* then reviewed cases in which various courts of appeal had discussed the interface between Evidence Code sections 1101 and 1108, e.g., *People v. James* (2000) 81 Cal.App.4th 1343, 1353 fn.7 (section 1108 allows jury in sex offense cases to consider evidence of prior sex offenses for any relevant purpose), accord *People v. Britt* (2002) 104 Cal.App.4th 500; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405 (uncharged sexual offense presumed admissible without regard to limitations of section 1101); and *People v. Frazier* (2001) 89 Cal.App.4th 30, 40-41 (charged and uncharged crimes need not be sufficiently similar that the uncharged crimes would be admissible under section 1101).

Loy then adopted the standard set forth in *Frazier*, *supra*, in concluding that evidence of the defendant's prior sexual offenses had been properly admitted under section 1108. *Loy* noted that while the previous sexual offenses may not have been sufficiently similar to be admissible under section 1101, they were not dissimilar. *Loy* identified the following points of similarity: (1) One of the victims was only four years older than the 12-year-old victim was when she died; (2) the defendant had choked both of his previous victims; (3) the forensic pathologist

stated the 12-year-old victim had died of asphyxiation; (4) the forensic pathologist testified asphyxiation was the most common means of killing in cases of sexual assault. (*People v. Loy*, *supra*, 52 Cal.4th at pp. 63-64.) *Loy* found evidence of the choking to be highly relevant and therefore "weighing in favor of admission."

In *People v. James*, the Court of Appeal held that section 1108 "permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses for any relevant purpose." (*People v. James*, *supra*, 81 Cal.App.4th at p. 1353, fn. 7.) Evidence is relevant if it has any "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

In Argument I of the opening brief, appellant recited the evidence pertaining to charged and uncharged crimes and discussed the similarities and dissimilarities between them in the context of the purposes for which they were admitted under Evidence Code section 1101. Then, because the trial court also admitted the same evidence of uncharged crimes to prove the same disputed matters under section 1108, appellant, in Argument III, incorporated by reference the discussion of charged and uncharged offenses in Argument I into his contentions that the evidence was also wrongly admitted under section 1108. Appellant now incorporates by reference that discussion of charged and uncharged crimes as appropriate into the discussion here.

Respondent contends the uncharged evidence was no more inflammatory than the charged offenses (RB 143-144); was not remote in time (RB 144-145); and would not have caused the jury to want to punish appellant for the uncharged crimes through the vehicle of the charged crimes (RB 145-146). Respondent is mistaken. Because these matters are set forth in the opening brief, appellant respectfully refers the Court to just one of many examples of evidence more inflammatory than the charged crimes. At pages 97-98 of the opening brief, appellant discusses the inescapably inflammatory nature of evidence of predacious sexual assaults against these victims. Such evidence is intrinsically inflammatory in

multiple facets – breach of the parent-child relationship; breach of the friend-friend relationship; use of handcuffs in one incident and duct tape in the other; the application of violence and force in all of those incidents – and in many ways more inflammatory than evidence presented to prove the charged crimes involving Sharona, April, and Vanessa Samson. Contrary to respondent's urging, such inflammatory evidence was likely to cause the jury to want to punish appellant.

Respondent's final contention is that the "uncharged offenses were strikingly similar to the charged offenses." Respondent supports this assertion with a solitary example. "In all instances, appellants acted as a team to either lure victims they knew to a location where they could be sexually assaulted, or to kidnap their victims off the street as in the cases of Aleda and Vanessa." (RB 146.)

Loy informs this discussion. *Loy* found sufficient similarity between the charged and uncharged crimes for admission under section 1108 primarily in evidence that each of the previous victims testified that the defendant had choked her by placing a hand around the front of her neck in the course of sexually assaulting her. There was forensic evidence of vaginal bleeding in the victim consistent with sexual penetration and the forensic pathologist's determination that death was caused by asphyxiation and testimony that asphyxiation was the most common means of killing in sexual assaults. This Court found this evidence to be highly relevant and weighing in favor of admission. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.)

Loy explained that while such similarity may not have been sufficiently similar to prove identity under the test of *People v. Ewoldt* (1994) 7 Cal.4th 380, 403, it was highly relevant in determining the defendant's culpability under section 1108. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.) *Loy* reveals that the degree of similarity required is much more than a de minimis level of similarity and certainly more than just the prior commission of a sexual offense. The relevance of the other crimes evidence in *Loy* is indisputable; it reveals a characteristic or methodology in the *Loy* defendant's sexual assaults from which it may logically

and reasonably be inferred that the 12-year-old victim was similarly sexually assaulted and choked to death. In contrast, for the reasons set forth in the discussion of the evidence in the opening brief, the uncharged crimes in this case were not sufficiently similar to afford the equivalent logical and reasonable inference that appellant committed the charged crimes to be admitted under section 1108.

For example, respondent points to a similarity in the evidence that both Aleda and Vanessa were kidnapped off the street, but does not relate the similarity to a disputed fact. (RB 146.) Appellant addressed the dissimilarities in the evidence when admitted to prove the existence of a common plan or scheme in his opening brief (AOB 90-91). Appellant noted that there was evidence of stranger-on-stranger abduction involving both Aleda and Vanessa and evidence of a sexual assault upon Aleda and very limited forensic evidence of a sexual assault of a different nature upon Vanessa.

In short, Aleda's evidence included within the criminal transaction the crimes of abduction, multiple acts of sexual assault, and release. Vanessa's evidence included abduction, sexual assault different in kind from Aleda's evidence, and murder. Evidence that Michaud and appellant abducted Aleda, a stranger, was, however, not admitted only to prove the existence of a common plan to abduct Vanessa, a stranger, but to further prove that Vanessa was abducted for a sexual purpose, just as Aleda was, even though there was no evidence of shared common features in the sexual assault upon Aleda and Vanessa. What is lacking here is the degree of probativeness and thus relevance found in the choking evidence in *Loy* that allows reasonable inferences to flow in a coherent path to proof of guilt.

Respondent also contends that *Loy* provides that an 1101 analysis is unnecessary if evidence is admitted under section 1108. (RB at 135, citing *People v. Loy*, *supra*, 52 Cal.4th 46, 63.)

Appellant disagrees with this contention. Rather, an Evidence Code section 1101 analysis is still needed when the evidence is also used for a purpose other than propensity.

As a result, if evidence is offered for several purposes, such as intent, common plan, *and propensity*, each of those uses must still be evaluated separately, and if, for example, the evidence is relevant to prove only intent and propensity it should not be offered to prove common plan, nor should the jury be instructed as to that use.

The holding in *People v. Falsetta* (1999) 21 Cal.4th 903 does not mandate a different result. In *Falsetta*, the defendant contended, inter alia, that the jury should have been instructed that evidence admitted under section 1108 could not be used for any other use normally allowed for evidence under section 1101. In rejecting this contention this Court agreed with the Court of Appeal that "other crimes evidence was not limited only to the propensity issue but could be considered for any **proper** purpose, such as establishing defendant's motive, intent, or identity (if those issues remain contested), or bolstering the young victim's credibility." (*Id.* at pp. 922- 923, emphasis added However, this does not mean that the evidence can be used without limitation. It only means that in addition to using it for propensity it may also be used for any "proper purpose" that it could have been used prior to section 1108 under the similar standard of relevance.

A simple illustration shows how a prior sexual act may be relevant to propensity and intent, but not to identity. It would therefore be irrelevant and inadmissible for the latter purpose. Section 1108 could not be used to bootstrap irrelevant evidence into admissibility for identity.

A defendant is accused of lewd act on a minor in violation of section 288, which requires the touching be done with the intent of appealing to sexual desires of that person or the child.

Evidence that he had previously committed a sexual battery in violation of section 243.4 on a 19-year old woman by brushing up against her in public in a

lewd manner would be admissible to prove he had a lewd intent. It would also be admissible to prove propensity.

However, the same prior violation of section 243.4would not be relevant to prove identity if instead of a lewd act in violation of section 288, the defendant was accused of being a serial rapist who always abducted women from an ATM after blindfolding them with a green bandana, using faux ermine handcuffs to restrain them, committed an act of sodomy as the only sexual offense, made each of the victims to repeat the same lewd phrase, and stole the victims' shoes. The reason is that the evidence of the sexual battery would not "**support the inference** the same person committed both acts." (*Ewoldt*, at p. 403, emphasis added.)

Neither section 1108 nor Loy made any change in the trial court's obligation to correctly instruct the jury on the use of the evidence. When evidence is admitted to show propensity for sexual misconduct, that does not justify instructing the jury that the evidence can be used for inferences that are logically unsupported.

For these reasons, appellant respectfully submits that the trial court erred in admitting prejudicial evidence of uncharged sexual misconduct.

IV

THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO A JURY TRIAL WHEN IT ERRONEOUSLY INSTRUCTED THAT A PERSON WHO AIDS AND ABETS IS EQUALLY GUILTY OF THE CRIME COMMITTED BY A PERPETRATOR. THE LAW CLEARLY RECOGNIZES THAT AN AIDER AND ABETTOR'S MENS REA IS PERSONAL TO THE AIDER AND ABETTOR AND, A FORTIORI, THAT AN AIDER AND ABETTOR MAY THEREFORE BE GUILTY OF A LESSER-INCLUDED CRIME THAN THAT COMMITTED BY THE ACTUAL KILLER

In the opening brief, appellant contended the trial court erred in instructing the jury that all principals were "equally guilty." An aider and abettor's guilt in a murder prosecution is based on the combined acts of the principals, but on the aider and abettor's personal mental state, as appellant explains below. Appellant asserted that he was entitled to have the jury consider his culpability in light of his own mens rea in deciding his guilt of the charged crimes and, if found liable for murder, in determining the degree of murder for which he is liable. (AOB 132-141; *People v. Samaniego* (2009) 172 Cal.App.4th 1148; *People v. Nero* (2010) 181 Cal.App.4th 504; *People v. McCoy* (2001) 25 Cal.4th 1111.)

Respondent initially argues that appellant has forfeited the claim because defense counsel did not object to the instruction at the trial below. (RB 169, 171.) Respondent further contends that the "equally guilty" language in the instruction was not misleading because there is no evidence that appellants acted with different mental states during the murder and that the true findings on the special circumstances show that both defendants in fact had the requisite mental state. . (RB 169, 177.)

A. Respondent's Contention That Appellant Forfeited Review

In the Opening Brief, appellant noted that trial counsel did not object to CALJIC No. 3.00 as it was given to the jury, and further explained that defense counsel's failure to specify the error claimed here did not bar appellant's claim of instructional error. It is settled law that a trial court has a duty to instruct the jury sua sponte on general principles which are closely and openly connected with the facts before the court. (Pen. Code, §§ 1259, 1469; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Statutory and case authority therefore provide for review of this issue by this Court under established law and legal principles.

Penal Code section 1259[2] authorizes this Court to "review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." Penal Code section 1469 authorizes review under similar circumstances.

Respondent nonetheless contends that appellant has forfeited review because trial counsel did not ask that CALJIC No. 3.00 be either modified or clarified at appellant's trial. (RB 169, 171-172.)

Respondent does not address the principal weakness inherent in his argument: *McCoy* (and other cases) explicitly established that mental state evidence critically differentiates an individual aider-abettor's liability from that of other

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[2]. 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 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."

principals. This core body of case law had either only been recently decided or simply did not exist at the time of appellant's trial. [3]

Thus, even if defense counsel had known that the "equally guilty" language of CALJIC No. 3.00 was an incorrect statement of the law, as in fact it was later declared to be by *Samaniego* and *Nero*, and failed to act to correct the instructional error, this Court would nevertheless still have authority to review it. (Pen. Code, §§ 1259, 1469.) "Claims of instructional error are reviewable when such error could only have resulted from counsel's neglect or mistake in requesting the instruction [citation] even though defendant would be barred from challenging an instruction that his counsel requested for a tactical purpose [citations]." (*People v. Beardslee* (1991) 53 Cal.3d 68, 88-89; no forfeiture of right to appeal instruction requested by trial counsel that lessened prosecution burden of proving mental state.)

Respondent also argues that appellant is wrong in claiming that the instructional error impacted his substantial rights so as to make appellant's claim of instructional error reviewable under Penal Code sections 1259 and 1469. (RB 172.) This claim by respondent is also not supported by the case law.

In *People v. Graham* (1969) 71 Cal.2d 303, this Court explained that the limitation of the invited error concept to the narrow circumstance of trial counsel's deliberate tactical decision had its roots in the statutory mandates of Penal Code sections 1259 and 1469. (*Id.* at p. 319.) *Graham* noted that "[a]n instruction relating to the various degrees of criminal homicide certainly affects the substantial rights of the defendant." (*Ibid.*) In *People v. Beardslee*, *supra*, this Court concluded that the mental state requirement of CALJIC No. 3.00 did affect the sub-

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[3]. The appellate record shows that appellant's trial began on August 22, 2011 (5CT 1155) and that the trial court entered the judgment of death on September 25, 2002. (September 25, 2002, 8 CT 2043.) At that time, *People v. McCoy* had only recently been decided on June 25, 2001. *Concha* and *Samaniego* were decided in 2009 and *Nero* in 2010.

stantial rights of the defendant because it lessened the prosecutorial burden of proving the necessary mental state and, as such, the instructional error was reviewable under Penal Code section 1259. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 89.)

The "equally guilty" language of CALJIC No. 3.00, as given to appellant's jury, lessened the prosecutorial burden of proving appellant's mental state. As such, the instructional error is reviewable under the authorities herein cited. Thus, under the circumstances present here, respondent's argument that appellant has forfeited his appeal of this instructional issue lacks merit.

B. The Equally Guilty Language of the Aider and Abettor Instructions Misdirected the Jury in Determining Appellant's Culpability for Murder. An Aider and Abettor's Guilt in a Murder Prosecution Is Based on the Combined Acts of the Principals, But on the Mental State of the Aider and Abettor.

"Murder is the unlawful killing of a person with malice aforethought. ([Pen. Code], § 187.) Murder includes both actus reus and mens rea elements. To satisfy the actus reus element of murder, an act of either the defendant *or an accomplice* must be the proximate cause of death. [Citations omitted.]" (*People v. Concha* (2009) 47 Cal.4th 653, 660.)

"For the crime of murder, as for any crime other than strict liability offenses, 'there must exist a union, or joint operation of act and intent, or criminal negligence. ([Pen. Code], § 20.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) "To satisfy the mens rea element of murder, the defendant must *personally* act with malice aforethought. ([*People v.*] *McCoy* [(2001) 25 Cal.4th 1111,] 1118.)" (*Id.* at p. 660; italics added.)

In *People v. McCoy*, upon which *Concha* relied, the Court recognized that an aider and abettor may harbor a greater mental state than that of the direct perpetrator and thus be culpable of a greater crime than the actual perpetrator. The Court based this conclusion on the premise that an aider and abettor's mens rea is

personal and may be different from that of the direct perpetrator. (*People v. McCoy*, *supra*, at pp. 1117-1118.) "'"[A]lthough joint participants in a crime are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.' " ' (Dressler, Understanding Criminal Law [(2d ed. 1995)], § 30.06 [C], p. 450, fns. omitted.)" (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)

McCoy concluded that an 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." (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118.) "[W]hen an accomplice 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, fn. omitted.) (*People v. Prettyman* (1996) 14 Cal. 4th 248, 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. 1120.) In sum, "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Ibid.*)

Respondent argues "the 'equally guilty' language was not misleading because there is no evidence that appellants acted with different mental states during the murder. . . ." (RB 169.) Respondent's contention is based on an incorrect premise. *Concha*, *McCoy*, *Samaniego*, and *Nero* make clear that the "equally guilty" language of the instruction constitutes an incorrect statement of the law. As such, the instruction should never have been given, whatever the state of the

prosecution's evidence. Moreover, respondent's contention that the instruction as given was acceptable because respondent finds no evidence showing appellants "acted with different mental states" impermissibly shifts the trial burden of proving each defendant's mental state from the prosecution to whom the burden belongs to the defense. In appellant's case, the prosecutor had the burden of proving to the jurors that when the actus reus of murder was committed appellant contemporaneously possessed the required mens rea to convict him of murder and then in determining the degree of murder.

Respondent further argues that the jury necessarily found that appellant had the requisite mental state required for murder because the jury found the kidnapping special circumstance (§ 190.2, subd. (a)(17)(B)) and the rape by instrument special circumstance (§ 190.2(a)(17)(K)) to be true. (RB 173-174; 8CT 1837; 34RT 7399-7400.) Once again, close review of respondent's contention reveals the logical error in respondent's analysis.

Respondent correctly points out that the applicable law provides that a person other than the actual killer is subject to the death penalty or life imprisonment without the possibility of parole if that person intended to kill or was a major participant in the underlying felony and acted with reckless indifference to human life. (RB 174; *People v. Estrada* (1995) 11 Cal.4th 568, 575; *People v. Mil* (2012) 53 Cal.4th 400, 408-409).) Under this instruction, the jury could return a true finding to the special circumstance allegation for a person other than the actual killer by finding the person possessed the mental state for an intentional killing *or* by finding the person acted with reckless disregard in the commission of an enumerated felony.

Appellant's jury was instructed accordingly. (See RB 171; 34RT 7368-7369.) Thus, the instruction allowed the jury to find the special circumstance allegations to be true if it first found that appellant as an aider and abettor either acted with intent to kill *or* as a major participant in a felony acted with a reckless indifference to human life. Because the instruction permitted a true finding based on

the felony murder action-related component alone, respondent is unable to argue the jury necessarily found that appellant possessed the required mens rea for the charged crimes and by extension that the incorrect and misleading "equally guilty" language did not factor into appellant's convictions. Given the use of the disjunctive in the instruction, respondent's reference to the instruction (Respondent's Brief p. 180) incorrectly suggests that the jury necessarily found that appellant had the requisite mental state for the charged crimes.

Respondent argues there was in any event no prejudice to appellant from the incorrect instruction. (RB 169.) Appellant respectfully refers the reader to his discussion regarding prejudice resulting from the incorrect instruction at pages 139-140 of the opening brief.

V

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

As explained in Appellant's Opening Brief, the trial court erred in refusing two defense requests relating to the admissibility of fingerprint identification evidence: 1) A defense request to preclude the prosecution expert from testifying as to a "match" made from latent fingerprints; and 2) A request for a hearing on the issue of fingerprint identification pursuant to *People v. Kelly* (1976) 17 Cal.3d 24.

In the opening brief, appellant argued that that while the fingerprint identification is not new, the reliability and validity of fingerprint identification is presently in question. (See AOB 180-187.) Accordingly, the trial erred in refusing the defense requests.

Appellant further explained that a *Kelly* hearing is the necessary first step in a reevaluation of the validity and reliability of fingerprint identification evidence. (AOB 187-192.)

A. The Request to Preclude the Prosecution Expert from Testifying as to a "Match."

Appellant reiterates that he argued the trial court erred in denying his requests (1) for a *Kelly* hearing on the admissibility of fingerprint identification evidence and (2) to preclude the prosecution's expert witnesses from testifying and the prosecutor from arguing that the fingerprints matched latent prints recovered during the investigation.

In its brief, respondent addresses the denial of appellant's request for a *Kelly* hearing, but is silent regarding the erroneous denial of appellant's request that evidence of fingerprint "matches" be excluded. Respondent thus concedes the argument regarding this latter issue. (*People v. Knights* (1985) 166 Cal.App.3d 46, 48; *Yarbrough v. Yarbrough* (1956) 144 Cal.App.2d 610, 612; *Berry v. Ryan* (1950) 97 Cal.App.2d 492, 493.)

B. The Court Erred in Denying the Request for a Kelly Hearing

The *Frye* test or general acceptance test is a test that once determined the admissibility of scientific evidence in federal courts. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 establishes the now prevailing federal standard in accordance with the Federal Rules of Evidence.) *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 articulated the rule that expert opinion evidence based on a new scientific technique is admissible at trial only if the technique is generally accepted as reliable in the relevant scientific community.

The primary flaw in respondent's approach to this issue is ultimately it relies on the premise that because fingerprint evidence has always been accepted by the courts, it should continue to be accepted without consideration of any new developments that may arise. Thus, respondent argues that *Kelly* only applies to "new scientific techniques and "[f]ingerprint analysis is not a new scientific technique. On the contrary, its use is widespread and its general acceptance is well established." (RB 195.)

In *People v. Kelly*, *supra*, this Court reaffirmed its allegiance to the rule requiring a preliminary showing of general acceptance of a new technique in the relevant scientific community. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

The admission of fingerprint identification evidence in trials predated both *Frye* and the adoption of the general acceptance standard in California. Because of this historical circumstance, fingerprint identification evidence has never been

subjected to the standard later adopted for the admission of "new" scientific evidence in *Kelly*. (See discussion at AOB 176-180.)

Since the time fingerprint identification evidence was routinely admitted into trials, however, substantial research within the relevant forensic community has cast doubts on the reliability of the theory and techniques underlying fingerprint identification evidence, including the very issue of whether a "match" should be declared. Defense counsel attempted to bring these concerns to the trial court's attention, but was unsuccessful in getting the trial court to pay attention to these concerns. It is because the acceptability of fingerprint identification evidence within the relevant forensic community is in question that *Kelly* requires that courts re-evaluate the admissibility of the evidence. Here, the trial court committed error when it summarily rebuffed counsel's attempts to notify it that the reliability of fingerprint identification evidence was being questioned within the forensic community.

Kelly, as will be seen, expressly requires the re-evaluation appellant contends that trial court should have performed. With a good deal of prescience, this Court, in *Kelly*, anticipated that the views of the scientific community might change over time and that certain scientific theories and/or techniques once widely accepted would be questioned, abandoned, or come to be viewed with disfavor. Thus, although *Kelly* held on the one hand that the admission of a new scientific technique need not be re-litigated once it has been found acceptable in a published opinion, it also expressly stated that the admission of such evidence as an accepted scientific technique would continue only until such time new evidence showed a change in the view of the relevant scientific community.

> 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.)

Subsequently, in *People v. Leahy* (1994) 8 Cal.4th 587, this Court considered the question of whether the results of a horizontal gaze nystagmus (HGN) field sobriety test, which had been used by law enforcement agencies for years, were admissible in the absence of a *Kelly* foundational showing. This Court concluded that given the recent history of legal challenges to the admissibility of HGN test evidence, "it seems appropriate that we deem the technique 'new' or 'novel' for purposes of *Kelly*." (*Id.* at p. 606.) In reaching this decision, the Court dismissed the People's contention that the HGN test had been used by law enforcement for 30 years. "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." (*Id.* at p. 605.)

In language of particular relevance to the present discussion on fingerprint identification evidence, *Leahy* stated: "To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom seems unjustified." (*Id.* at p. 606.) *Leahy* thereafter concluded that HGN tests involve a "new scientific technique" that is required to meet *Kelly*'s general acceptance test. (*Id.* at p. 607.)

Thus, *Leahy* establishes that fingerprint identification techniques are not immunized from *Kelly* scrutiny on the basis of their history.

Here, there was, as appellant will explain below, sufficient reason to question the continued validity and acceptability of fingerprint identification evidence under *Kelly*.

In light of the circumstances described above, the trial court abused its discretion in denying appellant's requests for a *Kelly* hearing on the admissibility of fingerprint identification evidence and to preclude the prosecution's expert witnesses from testifying that appellant's, Michaud's, and Samson's fingerprints

matched latent prints recovered during the investigation and to prevent the prosecutor from commenting that appellant's prints matched the prints found. Appellant's contention, in brief, is that the trial court erred in refusing the defense request for a *Kelly* hearing because there was sufficient reason to question the reliability of the fingerprint identification evidence to warrant a *Kelly* hearing. Appellant's claim is not that the fingerprint evidence was necessarily inadmissible.

As part of his right to present a defense guaranteed under the right to due process of law and his right to confront witnesses, appellant should have been allowed to question the basis of this evidence in the forum of a *Kelly* hearing.

Respondent's argument, in sum, is that "the science underlying fingerprint analysis is not subject to a *Kelly* hearing because the science is not new, and its reliability is apparent to a lay person." (RB 198.)

In the brief, appellant set forth the historical basis for the admission of fingerprint identification evidence and the recent developments in that area. Appellant set forth also the theory underlying the admissibility of fingerprint identification evidence and described the developing recognition that the validity and reliability of fingerprint identification evidence is in question and provided samples of incorrect identifications. Appellant explained why a *Kelly* hearing is the necessary first step in re-evaluating the validity and reliability of fingerprint identification evidence.

Respondent treats these arguments summarily, contending only that appellant has not shown there is any new evidence reflecting a change in the attitude of the scientific community. Respondent further asserts that appellants only presented the trial court with the results of one FBI study. (RB 199.) The more reasonable view is that the substance of the study and not the number of studies is the relevant factor. At trial below, defense counsel was not given the opportunity to fully develop his contention. A review of the colloquy between the trial court and counsel and, in particular, of the trial court's statements, which appellant has

summarized in the Opening Brief at pages 175-176, reflects that the trial court's mind was set and the subject of a *Kelly* hearing was very simply off the table.

The trial court said: "In this court[,] fingerprint evidence is still good." (15RT 3514:5-6.) The court also said: "We are not doing any *Kelly/Frye* hearings because back east some judge decides he wants to write new law. That's not happening." (15RT 3514:10-12.)

These circumstances make clear that defense counsel did not have the opportunity to elaborate upon their concerns regarding the reliability and validity of fingerprint identification evidence. As noted above, appellant discussed the theoretical underpinnings of fingerprint identification evidence and the developing recognition that the validity and reliability of fingerprint identification evidence in the opening brief at pages 180-192, and appellant respectfully refers the reader to that discussion.

In the opening brief, appellant discussed the applicable law (AOB 187-194) and further explained that this Court's decisions in *People v. Webb* (1993) 6 Cal.4th 494 and *People v. v. Farnam* (2002) 28 Cal.4th 107 do not compel a different result (AOB 315-318.). In both *Webb* and *Farnam*, this Court discussed the *Kelly* standard in the context of fingerprint evidence. Appellant explained that whereas the challenge was to the validity and reliability of fingerprint identification evidence itself, *Webb* challenged the use of a chemical and laser process involved in the detection of fingerprints and *Farnam* challenged the use of a computerized system in the CAL-ID system to create matches. (*People v. Webb*, *supra*, 6 Cal.4th at p. 524; *People v. Farnan*, *supra*, 28 Cal.4th at p. 160.)

Respondent asserts that appellant's arguments are unavailing. (RB 197-198.) Although respondent acknowledges that the issue before this Court in both *Webb* and *Farnam* involved challenges to the methods used to obtain fingerprints and fingerprint matches and not the validity and reliability of fingerprint identification evidence, the issue presently before this Court, respondent nevertheless

claims that both cases "stand for the proposition that the analysis of fingerprint evidence itself is not subject to a *Kelly* hearing." (RB 197.)

Well-settled and well-reasoned law establishes that matters not in issue before a court may not be regarded as precedent for that issue.

> 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 their possible bearing on all other cases is seldom completely investigated.

(*Cohens v. Virginia* (1821) 19 U.S. 264, 399-400.)

Accordingly, *Webb* and *Farnam* do not support respondent's argument as respondent claims. Appellant has discussed the matter of prejudice at pages 198-201 of the opening brief and respectfully refers the reader to that discussion, which appellant supplements with the discussion that follows.

In ignoring the new authority that would call for a re-examination of fingerprint evidence, respondent argues that appellants rely on a single FBI study to support the arguments presented. (RB 199.)

This is not true. It is respectfully submitted that appellants presented more than a single study to raise questions about fingerprint methodology and conclusions, questions that should have been addressed at the trial court. Rather, appellants had set forth numerous authorities and studies raising questions about the methodology of fingerprint analysis that arose subsequent to the wide-spread acceptance of that methodology.

Without repeating in full the arguments set forth in appellant's Opening Brief (AOB at pp. 180-187), the highlights of this other authority include:

1. A study by National Academies of Science (NAS), commissioned by Congress, which called for an "overhaul of the forensic sciences and cautioned

judges about assuming the reliability of certain forensic science methodologies ...." The study further noted that areas of forensic identification, including fingerprints, "have yet to establish either the validity of their approach or the accuracy of their conclusions...." (*Ibid. a* OB 186.)

2. A Department of Justice (DOJ) solicitation for validations of friction ridge examination techniques. In doing so, the DOJ explained, that the acceptance of techniques may lie in the fact that they were introduced before a critical view of the procedures was adopted.[4] (AOB 184.)

3. The revelation of cases of "false positives," including a false positive "matched" to a Portland attorney of a fingerprint found in the case of the Madrid subway bombing, a Minnesota murder conviction obtained partially on the basis of a false positive, and other cases involving erroneous matches by agencies as noted as Scotland Yard. (See, respectively, Real Crime 1,000 Errors in Fingerprint Matching Every Year, LiveScience, Sept 13, 2005, *State v. Caldwell* (Minn. 1982) 322 N.W.2d 574 and Stephen Gray, *Yard in Fingerprint Blunder*, London Times, Apr. 6, 1997, at 6, cited in Mears, Michael & Day, Terese, *The Challenge of Fingerprint Comparison Opinions in the Defense of a Criminally Charged Client*, 19 Ga. St. U. L. R. 705at p. 732, see AOB 186-187.)

4. Problems that have been noted in numerous legal and forensic journals regarding the newly discovered problems in both the comparison stage and conclusion stage of fingerprint analysis. (AOB, at pp. 180-184.)

The net result of these authorities is the conclusion that there is a basis to look at fingerprint methodology with a critical eye, and not just repeat the fact that fingerprint evidence has been accepted in the past.

Respondent's interpretation of *People v. Webb* (1993) 6 Cal.4th 494 and *People v. Farnam* (2002) 28 Cal.4th 107 fails to address the issue presented by appellant. As respondent recognizes, those cases were concerned with the meth-

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[4] (Validating Friction Ridge Examination Techniques Proposals Solicited, http://www.forensic-evidence.com/site/ID/ID_fpValidation.html)

odology of obtaining the fingerprints. (RB 197.) *Webb* and *Farnan* accepted the underlying validity of fingerprint methodology which was not the issue in those cases. However, while it accepted the underlying principles of fingerprint analysis, that underlying issue had never been presented to the court.

As appellant explained in the Opening Brief (AOB at p. 193), when a case does not address a particular issue it is not to be regarded as precedent for that issue. (*Cohens v. Virginia* (1821) 19 U.S. 264, 399.)

Therefore, neither *Webb* nor *Farnan* are precedent for the proposition that the methodology of fingerprint evidence passes muster.

Consequently, although the majority of respondent's discussion of this issue focuses on *Webb* and Farnan, those cases are simply irrelevant because they do not deal with the specific issue presented.

Respondent presents its view of prejudice at pages 199-200 of its brief. Respondent argues that appellant was not prejudiced because appellant had the opportunity to examine the prosecution fingerprint expert about the FBI study and about conclusions that appellant's print matched latent prints. (RB 199.) Appellant's objection to testimony – direct or cross -- regarding fingerprint "matches" is presently the issue before this Court. Moreover, cross-examination of a prosecution expert regarding the FBI study for the jury's edification in weighing the evidence is not the equivalent of a hearing before a court of law on the admissibility of that evidence based on challenges to the theory of relevance of that evidence, as was requested by the defense here. Respondent's argument lacks coherence.

In conclusion, 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.

VI

THE TRIAL COURT ERRED IN ADMITTING ITEMS OF EVIDENCE OTHERWISE INADMISSIBLE UNDER EVIDENCE CODE SECTIONS 210, 350, 352, AND 1101. THE IMPROPER ADMISSION OF THIS EVIDENCE DENIED APPELLANT THE 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 UNDER THE EIGHTH AMENDMENT

In the opening brief, appellant challenged the admission of evidence that: (1) cuts had been made in the carpeting in Michaud's van that allowed access to unused seat anchor bolts to which ropes could be secured to restrain someone in a spread-eagled position; (2) crossbows and bolts were seized from Michaud's van and from a box of belongings appellant and Michaud left with his daughters; and (3) guns were seized from Michaud's van and from the motel room occupied by appellant and Michaud at the time of their arrest. Appellant argued the evidence was inadmissible character evidence under Evidence Code section 1101 and/or the evidence either was not relevant or, if probative, its probative value was outweighed by its prejudicial nature. (AOB 203-223.)

This evidence of guns, crossbows, bolts, and restraints was not relevant in proving appellant's culpability for the murder and special circumstance allegation pertaining to Vanessa Samson because there was no evidence that any of these items had been used in any crimes against her. There was no evidence that Vanessa Samson had been restrained in any fashion and no evidence that she or anyone had been restrained by ropes passed through the van anchor bolts made accessible by cuts made into the carpet. (See defense arguments 14RT 3445-3448.) Similarly, there was no evidence that the crossbow or guns had been used in ant manner against Vanessa Samson. (See defense arguments 14RT 3443.) In the absence of evidence connecting these items of evidence with material matters

in issue at trial, the evidence was not relevant and amounted to inadmissible character evidence. The character evidence allowed the jury to view appellant as a bad person or a person with a propensity for violence because he possessed deadly weapons and owned a van that had, in the prosecution's view, been modified to allow a person to be restrained in a spread-eagled position.

In the opening brief, appellant supported his contentions with citations to, inter alia, *People v. Henderson* (1976) 58 Cal.App.3d 349, *People v. Riser* (1956) 47 Cal.2d 566 (overruled on other grounds in *People v. Balderas* (1985) 41 Cal.3d 144), and *United States v. Hitt* (1992 9th Cir.) 981 F.2d 422. (AOB 210-214.)

Respondent initially contends that where evidence associated with modifications to the van's carpet is concerned appellants forfeited the right to claim error as to all but photographs of a template made from the carpet because appellants failed to properly object below. (RB 200.) That is not the case, however. The trial court ruled the evidence of the carpet cuts, including the template and ropes, more probative than prejudicial and therefore admissible to prove planning, premeditation, and scheming. (See 15RT 3506.)

It is well-established that an objection to evidence is sufficient for the purposes of preserving the issue if it fairly apprises the trial court of the issue it is being called upon to decide." (*People v. Scott* (1978) 21 Cal.3d 284, 290; *People v. Dell* (1991) 232 Cal.App.3d 248, 254.) As a result, even if an objection was phrased improperly or inaccurately, an appellate court may reach the merits of the issue if the lower court was on notice as to the nature of the complaint.

Such a rejection of this hyper technical forfeiture claim is particularly appropriate in death penalty cases where the Eighth and Fourteenth Amendments demand a greater degree of reliability than in non-capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334.)

As applied to this case, it was perfectly clear that both defendants were objecting to the entire presentation that the prosecution contrived to support the in-

ference that the defendants had designed the van as a rolling torture chamber. There was no reason for the defendants to object "to the template of the carpet, or to the carpet itself," because the prosecution was not offering these component parts into evidence.

Respondent also argues that "Because there were more anchor bolts than slits, the seats could not have been attached over the carpet." (RB 201.) It should be noted that this matter is asserted with no supporting evidenceand it should not be assumed to be true in order to justify the trial court's ruling.

Respondent next argues that the guns were relevant because gun use was a common characteristic of the charged and uncharged sexual assault evidence. (RB 205-206.) Respondent also contends the carpet cuts and the rope were relevant to "appellants' diabolical plot to torture and murder Vanessa." (RB 207.)

Respondent further contends that appellant's reliance on *Henderson*, *Riser*, and *Hitt* is misplaced because the evidence in issue in those cases was not connected to the charged crimes whereas, in contrast, the challenged evidence here was relevant to the charges. (RB 208-210.) Respondent, in turn, relies upon *People v. Alexander* (2010) 49 Cal.4th 846, 903-904, and on *People v. Prince* (2007) 40 Cal.4th 1179. (RB 203-205.) As appellant explains below, respondent's argument is not supported by either the law or respondent's reasoning.

In *Alexander*, the defendant was charged with murdering a secret service agent by shooting the agent at close range. At trial, a crime scene reconstruction and bloodstain expert testified the shooter, who was wearing a jacket, would have been splattered with a fine mist of blood caused by the close-range shot. Presumptive blood tests conducted on a jacket seized during the investigation and linked to the defendant indicated the presence of blood on the jacket. On appeal, the defendant challenged the admission of the results of the presumptive blood tests on the grounds that the presumptive tests could not confirm the substance tested was human blood, that the confirmatory tests failed to prove the presence of blood, and that it was not known when the jacket was exposed to the substance that tested

presumptive for blood. This Court found the presumptive blood test results relevant and admissible because the evidence indicated the jacket might be stained with blood in a pattern consistent with the manner in which the murder was committed and that circumstance tended in reason to prove or disprove a disputed fact of consequence to the determination of the murder charge. (Evid. Code, § 210.) *Alexander* reasoned that the grounds for exclusion identified by the defense were relevant not to the admissibility of, but to the weight to be given to, the evidence of the presumptive blood results. (*People v. Alexander*, *supra*, 49 Cal. 4th at pp. 860, 904.)

Contrary to respondent's assertions then, *Alexander* supports appellant's argument that the evidence of guns, crossbows, and carpet cuts should have been excluded because, unlike the blood test results and the defendant's jacket in *Alexander*, the evidence in issue here was not relevant to a material point in issue. *Alexander* found the presumptive blood test results relevant and therefore admissible based on this analytical track: The shooter wore a jacket. The shooter fired at close range. As a result of the close-range shooting, a fine mist of blood would have covered the shooter. A jacket seized during the investigation and linked to the defendant tested presumptively for blood. The results of the presumptive blood tests were admissible because they indicated the jacket might have been used in the shooting and that circumstance tended to prove a disputed fact of consequence in the determination of the murder charge, to wit, whether the defendant was the shooter or had knowledge regarding the shooter's identity.

In contrast, in appellant's case, the equivalent of the nexus between the items of evidence, i.e., the evidentiary link between the close-range shooting, the anticipated presence of blood of the shooter's clothing, and the results of presumptive blood tests indicating the presence of blood on the defendant's jacket, is missing. There was in appellant's case no evidence that the guns or cross bow had been used on Vanessa Samson that would make that evidence relevant and no evidence that Vanessa had been physically restrained that would have made evidence

of the carpet cuts and ropes relevant to either the sexual assault, kidnapping, or murder charges associated with Vanessa Samson, as appellant explains more fully below.

In *Prince*, the defendant was convicted of multiple counts of first degree murder, burglary, and attempted burglary, among other crimes. Police seized four knives, including a kitchen and a steak knife, from the defendant's car upon his arrest. The murder victims were stabbed and there was evidence that during the crimes the defendant had removed kitchen knives from drawers and in one instance taken a kitchen knife away. There was evidence the defendant used his car to stalk young women and that he used kitchen knives similar to the one taken from his car. There was also evidence that the defendant had brought a knife with him to two of the murders. At trial, testimony regarding the physical evidence was admitted without defense objection, but defense counsel subsequently objected to the admission of the knives as exhibits as being more prejudicial than probative (Evid. Code, § 352.) On appeal, this Court reasoned that the trial court did not abuse its discretion in admitting the evidence. *Prince* pointed to evidence that the defendant had come armed with his own knife to two of the murders and that the burglaries and attempted burglaries he committed after the murders bore similarities to the murders and the burglaries related to the murders. This circumstance allowed the jury to conclude that he "was armed with his own knife (perhaps one of the knives discovered in his automobile) when he committed some of the charged burglaries and attempted burglaries." (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1248-1249.)

Thus, here again in *Prince*, the connections between the evidence that made the challenged evidence of the knives admissible is readily discernible, whereas in appellant's case they are not. In *Prince*, although there was no evidence that the four knives seized from the defendant's car had been used in the charged murders, there was evidence that the defendant had brought a knife with him to two of the charged murders and had used his automobile in stalking victims, which this Court

found relevant to the jury's determination that the defendant was armed with his own knife when he committed some of the related charged crimes.

Appellant reiterates again that in his case no evidence linked the guns, crossbow, or carpet cuts to the crimes associated with Vanessa Samson. Moreover, there is no evidence that linked these items of evidence to the charged sexual assaults committed against either Sharona or April. In addition, respondent's attempts to argue the weapons were relevant to evidence related to uncharged crimes involving Amy and Christina are not helpful to respondent as the prosecution had no burden of proving any material fact of consequence regarding those uncharged crimes.

The thrust of respondent's contention is that the challenged evidence was relevant to issues at trial and therefore properly admitted. (RB 205-208.) Respondent describes gun use as a characteristic of the sexual assault crimes, but that representation is not accurate. The sexual assault crimes, charged and uncharged, were distinguishable by victims who were known to both appellants and victims who were not known to them. The victims who were known to them were either friends or relations. Of the victims who were known to appellants, there was evidence that appellants used guns in sexually assaulting Amy and Christina, neither of which was charged. Amy testified she was struck by a gun and Christina testified appellant displayed a gun while they were in the bathroom where the sexual assault took place. Sharona, on the other hand, testified that appellant displayed a gun after the sexual assault was over and so not used in committing the assault and April testified that appellant displayed a gun during an incident independent of the sexual assault. In contrast, Aleda and Vanessa, the two victims who were not known to appellants and whose circumstances contain other resemblances, were women who were taken off the sidewalks where they were walking and sexually assaulted and, in the case of Vanessa, strangled and killed. There was no evidence of gun or crossbow use or of the use of restraints upon either woman or any evi-

dence either Aleda or Vanessa was tied down to the van floor with restraints secured to seat anchor bolts made accessible through cuts in the carpet.

Ironically, the prosecution and the trial court both were of the opinion that the incidents involving Aleda and Vanessa were similar enough to qualify for an inference of identity, which, as noted, requires a signature-like similarly. However, in seeking to draw an inference of weapon use in Vanessa's case, respondent ignores the fact that that case that was supposed to be the most similar to Vanessa's case did not involve any use of a weapon.

Furthermore, as explained previously, the level of similarity required for the purposes of proving common plan was not met, as there were not sufficient similarities to prove that appellant utilized the same plan or scheme in accomplishing these offenses.

The kind of evidentiary connection so necessary a part of this Court's analysis in *Alexander* and in *Prince* is absent here and the cases relied upon by respondent support rather than dispose of appellant's arguments.

As noted above, respondent contends that appellant incorrectly relies on *Henderson*, *Riser*, and *Hitt* because the evidence in issue in those cases was not connected to the charged crimes whereas, in contrast, the challenged evidence here was relevant to the charges. (RB 208-210.) Clearly, respondent and appellant are in agreement on the relevant law, but disagree of the application of the facts to the law. Appellant respectfully refers the reader to the discussion of *Henderson*, *Riser*, and *Hitt* set forth in the opening brief at pages 210-214.

VII

THE TRIAL COURT ERRED IN REFUSING THE DEFENSE-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 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

A. Introduction

Defendants asked that the jury be given the following proffered modification to the felony murder special circumstance instruction (CALJIC No. 8.81.17). The proffered defense special instruction was based on language taken from *Ario v. Superior Court, Alameda County* (1981) 124 Cal.App.3d 285, 287-290, and was intended to make clear that "[f]or a felony-murder special circumstance to apply, the felony cannot be merely 'incidental or ancillary to the murder'; it must demonstrate 'an independent felonious purpose,' not an intent 'simply to kill.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 511.) The proffered 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 trial court found the proffered instruction to be an incorrect statement of the law and declined to give it. (33RT 7053-7054.)

In the opening brief, appellant argued that, contrary to the trial court's finding, the proffered instruction was a correct statement of law; that a criminal defendant is entitled to an instruction pinpointing his theory of defense; and that appellant was prejudiced by the court's refusal to give the proffered instruction. (AOB 226-240.)

B. Respondent's Argument and Discussion

Respondent contends the trial court did not err in refusing the clarifying instruction because the jury was adequately instructed in the language of the pattern instruction. (CALJIC No. 8.81.17.) Respondent relies on *People v. Horning* (2004) 34 Cal.4th 871 and *People v. Davis* (2009) 46 Cal.4th 539. (RB 182-192.) In respondent's view, *Horning* and *Davis* are dispositive of appellant's claim. (RB 190.) However, a review of the holdings in these cases reveals that the decisions arose in different contexts than those present here and neither supports respondent's position in the way respondent claims.

In *Horning*, this Court considered a situation in which the trial court had omitted a portion of the pattern felony murder special circumstance instruction (CALJIC No. 8.81.17). As a result, as to the relevant portion of the instruction, the trial court told the jury only: "In other words, the special circumstance referred to in these instructions is not established if the robbery or burglary were merely incidental to the commission of the murder." (*People v. Horning*, *supra*, 34 Cal. 4th at p. 907.) On appeal, the defendant contended that the trial court erred in not instructing with the omitted portion of the instruction – that the murder had to be committed in order to carry out or advance the robbery or burglary.

This Court disagreed, finding that, although courts have used various phrasings in explaining the unitary requirement that no separate felony-based special circumstance exists if the felony was merely incidental to the murder, there was but one requirement. This Court concluded that although the pattern instruction provided two alternative phrasings to convey the one requirement, instructing with one of the two was sufficient.

Thus, the circumstances in *Horning* differ from those in issue here and the differences refute respondent's argument that the outcome in *Horning* disposes of appellant's claim of error. Respondent argues that *Horning* stands for the proposition that the phrasing "merely incidental" (1) is not ambiguous and (2) adequately instructs the jury on the applicable law. (RB 183, 190.) But, proper review of

Horning shows the court's analysis was much more narrowly focused on whether the version of the pattern instruction given adequately conveyed the applicable law in the context of whether the omitted portion of the instruction defined an element of the special circumstance enhancement that was not covered by the instruction given.

The gravamen of defense counsel's objection, in contrast, focused on the suitability of the phrasing given in this case. As *Horning* noted, courts have sanctioned various phrasings to convey to the jury that the felony murder special circumstance cannot be established if the crime was not a murder in the commission of the felony. In trial counsel's view, the phrasing in the pattern instruction was not suitable for appellant's case. The decision in *Horning* is not dispositive of that issue.

Respondent also relies on *People v. Davis*. In *Davis*, the defense requested two pinpoint instructions requiring "the prosecution to prove that the defendant had a purpose for the [attempted lewd act, robbery, burglary and kidnapping] wholly independent of murder," and instructing the jury that it "may not convict the defendant of first degree murder based upon the commission or attempted commission of burglary if the defendant entered the premises with the intent to [murder]." (*People v. Davis*, *supra*, 46 Cal. 4th at p. 616.)

The trial court refused the instructions as being duplicative and, instead, gave CALJIC No. 8.81.17, which instructed that "the special circumstance referred to in these instructions is not established if the robbery, kidnapping, or lewd act on a child was merely incidental to the commission of the murder." (*Ibid.*)

After deliberations began, the jury asked for the definition of the phrase "merely incidental." The parties agreed to give the jury a definition of "incidental" from Black's Law Dictionary: "[D]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose." (*Ibid.*)

On appeal in *Davis*, the defendant argued the Black's Law Dictionary definition was vague and ambiguous. This Court first observed that trial counsel agreed to the definition given, stated a common dictionary meaning was not appropriate, and did not renew his request for the pinpoint instructions. This Court commented that, forfeiture aside, the Black's Law Dictionary definition was superior to the initially requested (albeit not renewed) pinpoint instructions "because it was better targeted to the specific issue that caused the jurors' concern," *viz.*, the definition of the phrase "merely incidental." (*Id.* at p. 617.) This Court further observed that the defendant had failed to explain why the Black's Law definition was deficient. (*Ibid.*)

Respondent argues that *Davis* establishes that appellant's jury was adequately instructed. (RB 187-188.) But, here again, a review of *Davis* shows that this Court was focused there on a very case-specific procedural and contextual posture in concluding that the Black's Law definition of "merely incidental" was superior to the pinpoint instructions earlier proposed by the defense. This Court reasoned that the Black's Law definition was superior only because it was targeted to the jury's specific question asking for a definition of the phrasing "merely incidental" and because the *Davis* defendant challenged the definition but never explained why it was deficient. Consequently, while *Davis* may have tangentially touched upon the adequacy of the instruction, it does not resolve the question in issue here, which is whether the trial court erred in refusing the proposed clarifying instruction on the felony murder special circumstance in circumstances present in appellant's case.

Respondent's contention then that *Horning* and *Davis* establish that the phrase "merely incidental" adequately conveys controlling law (RB 190) and thus dispose of appellant's claim lack merit for the reasons stated.

Respondent further argues that appellant was not prejudiced by the rejection of the defense-proposed modification to CALJIC No. 8.81.17. Respondent relies on the argument of the parties at trial and upon the meaning and use of the

word "incidental." (See RB 190-193.) Appellant has discussed both of these matters above and in his opening brief. Rather than repeat such arguments here, appellant respectfully refers the reader to the discussion at page 240 of his opening brief.

VIII

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.

The trial court erred in refusing appellant's counsel a few extra moments of argument to respond to closing arguments made by Michaud's attorney at the guilt phase of trial, thereby 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.

After appellant's attorney had argued to the jury, Michaud's counsel presented arguments on her behalf. The arguments included Michaud's trial counsel arguing that appellant was the muscle of the team. (34RT 7267.) He repeatedly argued that appellant was the major participant, and Michaud was submissive to him. (34RT 7264, 7267, 7270-7271.)

Thereafter, appellant requested time to rebut those arguments, and that request was denied.

Respondent contends that there was no abuse of discretion in denying appellant's request because appellant's counsel was "well-aware that the entire thrust of Michaud's defense was to present herself as a victim of post-traumatic stress disorder (PTSD) who was dominated by Daveggio." (RB 216.)

Respondent goes on to explain that consistent with that defense, Michaud presented evidence from Dr. Stewart who explained she was a victim of domestic violence, as well as the testimony of another witness who described Michaud's abuse by a former boyfriend. (RT 216.)

Appellant submits that this is not sufficient to put him on notice so as to *mandate* that he rebut these arguments before they were presented, or forever hold his peace.

First, as respondent notes, the evidence of PTSD related primarily to abuse by her former boyfriend and sexual abuse by her father. While there was a reference to an incident where appellant waived a gun in her face (31RT 6708), this evidence was perhaps the most insignificant aspect of the PTSD evidence, especially compared to abuse such as Michaud working in a euphemistic "massage parlor" where her father was one of her regular "clients."

Because the evidence relating to appellant was a minor part of Michaud's defense, and it was possible that it would not even be argued that appellant was the muscle, there is no reason why appellant should have been compelled to rebut that argument in advance.

Indeed, there is no requirement anywhere in law that a party must rebut an argument before it is made. There often may be a greater danger in rebutting arguments no one is going to raise, and thereby stressing an issue that is better left alone, that weighs against a decision to take preemptive action and dispute things not yet claimed.

Therefore, appellant cannot be faulted for not addressing this issue before.

The other flaw in respondent's contention is that in reciting the normal mantra of trial court discretion, both the trial court and respondent ignore the unusual nature of this case.

The unusual nature of this case stems from the fact that it is a capital case involving two defendants. Both of these facts often alter normal rules of procedure, and when they are combined a heighted awareness to potential prejudice is geometrically increased.

Death penalty cases are already in a class of their own. From automatic appeals, to a habeas corpus petition as a matter of right, to a bifurcated penalty phase, to any number of other special provisions, there is a heightened awareness

of the unique nature of the death penalty and the heightened level of care taken to prevent an erroneous result.

The special nature of capital cases is made even more unique in this case where there are two defendants. Capital cases involving more than one defendant often require special attention to ensure that one co-defendant does not tread on the rights of the other.

Thus, to cite but one example, rules relating to joinder receive heightened scrutiny for potential prejudice in capital cases compared to non-capital cases. (*People v. Keenan* (1988) 46 Cal.3d 478, 500.)

In co-defendant cases, one area where the danger of prejudice is at its highest level is when one defendant seeks to put blame on a co-defendant. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082.)

Likewise as discussed in Appellant's Opening Brief (AOB at 244-248), co-defendant cases often justify putting a limit on the normal rights of a criminal defendant, such as the right to present certain arguments and the right to represent oneself pursuant to *Faretta v. California* (1975) 422 U.S. 806.

Ironically, appellant is not asking to restrict the rights of his co-defendant in this case, as he would be allowed to do in other areas such as limiting her right to represent herself or present certain arguments that may help her defense.

Instead of seeking to curtail her right to defend herself, appellant is only contending that when she exercised that right in a manner that struck not at the prosecution's case, but at appellant's defense, it is only fair to allow appellant a few minutes to rebut those arguments.

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.

X

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.)

In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." *(Id.* at 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has, in Argument XII of the Opening Brief, identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in Appellant's Opening Brief, and therefore makes no reply.

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.

David H. Goodwin
Attorney for appellant

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, David H. Goodwin, declare that I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579.

On October , 2012, I served a copy of the attached Appellant Daveggio's Reply Brief on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles , California addressed as follows:

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Executed on October , 2012, at Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.

David H. Goodwin

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

AMENDED CERTIFICATE OF WORD COUNT FOR APPELLANT DAVEGGIO'S REPLY BRIEF

Rule 8.630, subdivision (1)(b), California Rules of Court, states that an Appellant's Reply 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 Appellant Daveggio's Reply Brief previously filed with this court is 16,523 words.

David H. Goodwin
Attorney for appellant

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I, David H. Goodwin, declare that I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 93579, Los Angeles, Ca 90093-0579.

On October 12, 2012, I served a copy of the attached AMENDED CERTIFICATE OF WORD COUNT FOR APPELLANT DAVEGGIO'S REPLY BRIEF on the interested parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles , California addressed as follows:

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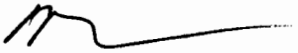
Superior Court
1255 Fallon Street
Oakland, CA 94612

Executed on October 12, 2012, at Los Angeles, California

I declare under penalty of perjury that the foregoing is true and correct.



David H. Goodwin