SUPREME COURT COPY

COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
MAR 24 2008
Frederick K. Ohlrich Clerk
Deputy

PEOPLE OF THE STATE OF CALIFORNIA,	)	
	)	
Plaintiff and Respondent,	)	No. S026408
	)	
v.	)	
	)	Alameda County
FRANKLIN LYNCH,	)	Superior Court
	)	No. H-10662
Defendant and Appellant,	)	
	)	

Appeal from the Judgement of the Superior Court of the State of California
for the County of Alameda

The Honorable Philip V. Sarkisian, Judge Presiding

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

MICHAEL J. HERSEK
State Public Defender

DENISE KENDALL
California State Bar No. 120802
Assistant State Public Defender

ALISON BERNSTEIN
California State Bar No. 162920
Deputy State Public Defender

221 Main Street, 10th Floor
San Francisco, CA 94105
Telephone: (415) 904-5600/Fax (415)
904-5635

Attorneys for Petitioner
FRANKLIN LYNCH

DEATH PENALTY

TABLE OF CONTENTS

Page

XXX THE TRIAL COURT'S ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S PRIOR CONDUCT AT THE HARVEY RESIDENCE TO PROVE IDENTITY IN THE UNDERLYING CHARGED CRIMES VIOLATED STATE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 2

A. Proceedings Below 2

B. Factual Background 4

C. The Incident at the Harvey Home Was Not Highly Similar to the Charged Crimes and Was Not Admissible to Prove Identity 6

D. The Harvey Evidence Should Have Been Excluded for All Purposes Because it Had Limited Probative Value Which Was Substantially Outweighed by the Prejudice from the Introduction of the Evidence 13

E. The Court's Erroneous Admission of the Harvey Incident Violated Federal Due Process 16

F. The Court's Erroneous Admission of Evidence of the Harvey Incident Was Prejudicial 18

CONCLUSION 22

CERTIFICATE OF COUNSEL 23

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

Chapman v. California
(1967) 386 U.S. 18 18

Garceau v. Woodford
(9th Cir. 2001) 275 F.3d 769 . . . . 16, 18

McKinney v. Rees
(9th Cir. 1993) 993 F.2d 1378 . . . . 16, 17

Stovall v. Denno
(1967) 388 U.S. 293 14

Sullivan v. Louisiana
(1993) 508 U.S. 275 18

STATE CASES

People v. Alcala
(1984) 36 Cal.3d 604 20

People v. Alvarez
(1975) 44 Cal.App.3d 375 9

People v. Antick
(1975) 15 Cal.3d 79 8

People v. Balcom
(1994) 7 Cal.4th 414 . . . . 8, 16

People v. Bean
(1988) 46 Cal. 3d 919 . . . . 8, 10

TABLE OF AUTHORITIES

Pages

People v. Ewoldt
(1994) 7 Cal.4th 380 . . . . 7, 16

People v. Guerrero
(1976) 16 Cal. 3d 719 10

People v. Haston
(1968) 69 Cal.2d 233 . . . . 7-9, 16

People v. Kipp
(1998) 18 Cal.4th 349 . . . . 7, 13

People v. Marshall
(1997) 15 Cal.4th 1 18

People v. Nottingham
(1985) 172 Cal.App.3d 484 9

People v. Rodriguez
(1977) 68 Cal.App.3d 874 8

People v. Simon
(1986) 184 Cal.App.3d 125 21

People v. Smallwood
(1986) 42 Cal.3d 415 13

People v. Thompson
(1980) 27 Cal. 3d 303 16

People v. Wein
(1977) 69 Cal.App.3d 79 8

People v. Willoughby
(1985) 164 Cal.App.3d 1054 8

TABLE OF AUTHORITIES

Pages

STATUTES

Evid. Code § 410 17
1101 . . . . 2, 3, 6, 22

JURY INSTRUCTION

CALJIC No. 2.50 3

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. FRANKLIN LYNCH, Defendant and Appellant.	)	Case No. S026408 Alameda County Sup. Ct. No. H-10622

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

This supplemental brief presents an additional argument in appellant's automatic appeal. In order to avoid confusion, the argument is numbered sequentially to the arguments in the opening brief. Consequently, the additional argument is numbered Argument XXX.

XXX

THE TRIAL COURT'S ERRONEOUS ADMISSION OF EVIDENCE OF APPELLANT'S PRIOR CONDUCT AT THE HARVEY RESIDENCE TO PROVE IDENTITY IN THE UNDERLYING CHARGED CRIMES VIOLATED STATE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

The prosecution built its case against appellant on the false assertion of similarity between factually distinct incidents, and by ignoring, obfuscating and misrepresenting the physical evidence, which resoundingly refuted that appellant was the perpetrator of these crimes.[1] Not only did the court err in denying appellant's motion to sever the five charged cases, impermissibly allowing the prosecution to bolster the patently weak evidence in each case by encouraging the jury to consider all the evidence in combination,[2] the court also erred in allowing the introduction of evidence of appellant's unrelated, lawful conduct at the home of Lavinia Harvey. The court improperly allowed the prosecution to rely upon Mrs. Harvey's identification of appellant as the man who entered her property with her consent as evidence of appellant's identity as the perpetrator of the five charged crimes. The court's errors were prejudicial, mandating reversal of appellant's convictions, corresponding special circumstances, and death sentence.

A. Proceedings Below

Appellant moved to exclude the testimony of Lavinia Harvey under Evidence Code section 1101, subdivision (a), arguing that the incident to

---

[1] See, *In re Lynch*, Supreme Court No. S158710, Claims B, C, I, F, & J.

[2] See, Claim III of Appellant's opening brief.

which Mrs. Harvey would testify was not sufficiently similar to allow its introduction "to prove identity, or any other permissible area of inquiry." (24 RT 3032-3033.) The prosecution argued that the Harvey incident was sufficiently similar to the charged crimes to allow for its introduction under Evidence Code section 1101, subdivision (b). (24 RT 3033-3034.) The specific similarities relied upon by the prosecutor were that the Harvey home was in the Hayward area and was within a few blocks of one of the other charged crimes; was a corner house; the incident occurred in roughly the same time period as three of the other charged crimes; and that Mrs. Harvey was an elderly woman who was home alone. (24 RT 3033-3034.)

The court overruled the defense objection and allowed Mrs. Harvey to testify. (24 RT 3035.) Prior to its ruling, the court noted that the Harvey incident occurred at or about the same time of day as the charged incidents, and was in fairly close geographic proximity to at least one of the other incidents. (24 RT 3034.)

The jury was instructed pursuant to CALJIC No. 2.50 as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crime.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show:
>
> The existence of the intent which is a necessary element of the crime charged;

> The identity of the person who committed the crimes, if any, of which the defendant is accused;
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose

(13 CT 3277.)

B. Factual Background

Lavinia Harvey testified that she resided at 304 Medford Avenue in the outskirts of Hayward in a white, corner house. (24 RT 3048.) At the time of appellant's trial, Mrs. Harvey was 86 years old. (24 RT 3047.) On August 12, 1987, in the mid-afternoon, she saw that a side gate to her yard was open. (24 RT 3051.) Mrs. Harvey testified that her husband, who had left the house sometime earlier, always shuts the gate. (*Ibid.*) As Mrs. Harvey continued to look out the window she saw the top of the head of a person with black hair walking along the side of her house. (24 RT 3052.) Mrs. Harvey testified that when she saw this she,

> thought it was a young black boy coming up the driveway. And I though, uh-huh, Papa's tools on his bench. So said I better put a stop to that. So I went out to the back – to the laundry to go out to the back door on the porch, back porch, and for some reason or other, I picked up this rod of iron.

(24 RT 3052.)

Mrs. Harvey testified that when she stepped out onto her back porch,

to her surprise she saw a tall black man. (24 RT 3053.) Mrs. Harvey stood on the porch and asked the man what he wanted. He asked her "was there a black kid come out this garden?" When she replied he was the only person she had seen, the man asked if he could check the side of the yard, and she agreed. (24 RT 3054.) Mrs. Harvey testified that there was nothing menacing about the man; he spoke to her in a conversational tone and made no threatening gestures. (24 RT 3069.) Indeed, Mrs. Harvey testified that she was not a bit apprehensive during her brief encounter with this man. (*Ibid.*) After he looked into the side yard, the man came back and exited her yard, closing the gate gently behind him. (24 RT 3056.)

Sometime after the man left, Mrs. Harvey spoke to her neighbor, Janet Flood, who was a sergeant in the Alameda County Sheriff's Department about what she had observed. (24 RT 3059.) On September 1, 1987, after petitioner's photograph had been widely disseminated in the media, (29 RT 3894-3895), Detective Sergeant Nelson of the Alameda County Sheriff's Department showed Mrs. Harvey a photo lineup that included appellant's photograph. (24 RT 3060, 3076.) Mrs. Harvey told the officer that she saw two people in the photographic lineup who appeared similar to the person she had seen on August 12, 1987. (24 RT 3085.) According to Det. Nelson, Mrs. Harvey told him that photograph number one looked similar to the person she saw in her yard, particularly as to the complexion, and that the eyes in photograph number five, which was of appellant, matched the person she saw in her yard. (24 RT 3085.) After Mrs. Harvey made these comments, Det. Nelson returned to his vehicle, brought out a single photograph of appellant, returned to the Harvey house and displayed that photograph alone to Mrs. Harvey. (24 RT 3086-3087, 3093-3094) It was only after this single photo show up that Mrs. Harvey

positively identified appellant as the man she had seen on her property. (24 RT 3064.) On the back of appellant's photograph, Mrs. Harvey wrote, "I think this could be him, the eyes are his." (24 RT 3063, 3086.)

In closing argument, the prosecutor told the jury that three instances of "other crimes" evidence had been introduced in the guilt phase trial against appellant: "the trespass on Mrs. Harvey's property, the admissions of receiving stolen property and of the providing drugs, the cocaine rocks, to Mr. 'X' for the bracelet." (32 RT 4193.) The prosecutor specifically directed the jury that the evidence regarding the possession of the bracelet and exchange for drugs was offered to show intent, and the evidence regarding the Harvey "trespass" was offered to show "the identity of the person who committed the crime." (32 RT 4194.)

C. The Incident at the Harvey Home Was Not Highly Similar to the Charged Crimes and Was Not Admissible to Prove Identity

The evidence regarding the incident at the Harvey home was offered to prove identity – indeed, the prosecutor argued to the jury that it was "direct evidence" of petitioner's identity as the perpetrator of the five charged crimes. (32 RT 4195.) The admission of this evidence was in error because the events described by the witness do not possess sufficient similarities with the charged crimes; the similarities which do exist are not of the distinctive, signature nature required under Evidence Code section 1101, subdivision (b) for the introduction of other conduct evidence to show identity; and there are numerous dissimilarities between the Harvey incident and the charged crimes.

Evidence Code section 1101, subdivision (b) allows for the admission of evidence of a defendant's prior conduct on the issue of identity only if the offense is "highly similar" to the charged crimes.

(*People v. Kipp* (1998) 18 Cal.4th 349, 369.) Because the introduction of evidence of a defendant's conduct on other occasions to prove identity is inherently prejudicial, (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404), this Court has consistently emphasized that the similarities in the proffered conduct must be distinctive, setting apart this particular crime from others of the same class. "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation omitted.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Id.* at p. 403 [citing 1 McCormick on Evidence (4th ed. 1992) § 190, pp. 801-803].)] In *People v. Haston* (1968) 69 Cal.2d 233, this Court explained,

> It is apparent that the indicated inference does not arise, however, from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than defendant. On the other hand, the inference need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together. Thus it may be said that the inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, *logically*

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

(*Id.* at pp. 245-246 (italics added); *People v. Balcom* (1994) 7 Cal.4th 414, 425 ["The highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense"]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1066 ["highly distinctive marks of similarity" between the prior offense and the charged crime are required for admissibility to prove the defendant's identity]; *People v. Wein* (1977) 69 Cal.App.3d 79, 90 [prior offense was "unique and peculiar" to the extent that it constituted defendant's "trademark"]; *People v. Rodriguez* (1977) 68 Cal.App.3d 874, 883-884 [uncharged and charged offenses must have "highly distinctive marks of similarity"].)

In those instances where the similarities between the other conduct evidence and the charged crime are not sufficiently distinctive and do not reflect more than the "ordinary aspect of any such category of crime" this Court has rejected the admission of the evidence to prove identity. (*People v. Bean* (1988) 46 Cal. 3d 919, 937 [finding that two robbery/murders that occurred three days apart in the same neighborhood, in which both victims were older women who were assaulted and their homes burgled, and in each instance an automobile belonging to the victim was taken and abandoned in the same vicinity did not possess sufficient distinctive similarities to allow for admission to show identity]; *People v. Antick* (1975) 15 Cal.3d 79, 94 [fact that charged and uncharged offenses involved removal of personal property from private residence during owner's absence "cannot seriously

be asserted as a distinctive and signature-like feature"]; *People v. Nottingham* (1985) 172 Cal.App.3d 484, 500 [finding no logical inference of identity where (a) both victims were young women who were casual acquaintances of defendant; (b) both victims resided in the same neighborhood as defendant; (c) both attacks occurred in remote locations; (d) each victim had force applied to her neck and her clothing ripped; the first victim had hands placed around her neck that startled her and apparently left no permanent physical injuries, while the second victim was strangled to death]; *People v. Alvarez* (1975) 44 Cal.App.3d 375, 385 [similarities between earlier statutory rape of 13-year-old and later forced rape of 14-year-old were simply "necessary concomitants" of the crime, rather than distinctive marks tying defendant to both crimes].) As this Court explained in a robbery case shortly prior to appellant's trial, in which evidence of prior, uncharged robberies were admitted to prove identity:

> In order for evidence of a prior crime to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the two acts must have enough shared characteristics to raise a strong inference that they were committed by the same person. It is not enough that the two acts contain common marks . . . .

(*People v. Rivera*, *supra*, 41 Cal.3d at p. 392.)

Moreover, "the presence of marked *dissimilarities* between the charged and uncharged offenses is a factor to be considered by the trial court" in determining whether to admit the other crimes evidence. (*People v. Haston* (1968) 69 Cal.2d 233, 249, fn. 18 [italics added]; *People v. Alcala*, *supra*, 36 Cal.3d at p. 633 [defendant's pattern of sexual conduct was not consistent or distinctive and "[m]ost importantly, [the last victim]

was killed, while the earlier victims were not"]; *People v. Guerrero* (1976) 16 Cal. 3d 719, 729 [reversing murder conviction for admitting evidence of other crime where other crime victim was raped, not murdered, and murder victim was not raped].)

Consideration of both the number and distinctiveness of the similarities between the Harvey incident and the underlying charged crimes as well as the presence of marked dissimilarities between the Harvey incident and the underlying charged crimes dictates that the introduction of this other conduct evidence was in error. The similarities relied upon by the trial court in admitting the Harvey incident were that it occurred in the same general time period as some of the other charged crimes, in the same general area, involved a similar type of victim, and was on a corner lot. (24 RT 3033-3034.) However, these are precisely the type of similarities that this Court rejected in *Rivera* as being insufficient to prove identity in a robbery case. In *Rivera*, the prosecution argued that the fact that the prior crime occurred on the same day of the week, at approximately the same time, at convenience markets in the same town, and that both markets were on corner lots, was sufficient to admit the prior incident to prove identity. (*People v. Rivera*, *supra*, 41 Cal.3d at pp. 392-393.) This Court rejected the argument, reasoning that "[t]aken alone or together, however, these characteristics are not sufficiently unique or distinctive so as to demonstrate 'signature' or other indication that defendant perpetrated both crimes." (*Id.* at p. 393.) This reasoning was echoed in *Bean*, in which this Court reasoned that similarities in time, region, nature of crime and nature of injury, without more "do not establish a unique modus operandi" sufficient to allow for introduction to prove identity in a robbery murder case. (*People v. Bean*, *supra,* 46 Cal.3d at p. 937.)

That Mrs. Harvey and the victims in the charged crimes were all elderly does not provide a distinctive similarity sufficient for the introduction of the evidence to show identity. It is an unfortunate truth that just as convenience stores are "prime targets for crime" (*Rivera, supra*, 41 Cal.3d at p. 393), the elderly are commonly targets of property crimes. According to the Department of Justice "Bureau of Justice Statistics: Crimes Against People 65 or Older, 1992-97":

> When compared with other age groups, the elderly were disproportionately affected by property crimes. More than 9 in 10 crimes against the elderly were property crimes, compared to fewer than 4 in 10 crimes against persons age 12 to 24.
>
> . . .
>
> Robbery accounted for a quarter of the violent crimes against persons age 65 or older, but less than an eighth of the violent crimes experienced by those age 12-64.
>
> In general, compared with crime incidents involving other age groups, most crimes against the elderly were more likely to occur in or near their homes, and to occur in daylight hours.[3]

The characteristics relied upon by the trial court to show similarity between the Harvey incident and the underlying charged crimes are simply neither sufficient nor distinctive enough to allow it to be used to show identity.

Moreover, in considering the evidence received at trial regarding the Harvey incident, it is apparent that the only similarities between it and the charged crimes are the presence of a Black man on or near the property of

---

[3] http://www.ojp.gov/bjs/pub/pdf/cpa6597.pdf

an elderly white woman, in a general area during a general time period. It is simply unreasonable to argue that appellant's presence alone, without any other common or distinctive factors, displays the sufficient distinct commonalities with the charged crimes to allow for its admission to show identity. Under this reasoning, the prosecution could have introduced evidence regarding any Black man seen near the property of any elderly woman within the City of Hayward within the summer of 1987. Appellant's presence, without any corresponding similar distinctive conduct linking it to the charged crimes simply cannot be accepted as a distinctive and signature-like feature.

Moreover, there were also marked dissimilarities between the Harvey incident and the underlying charged crimes. First and foremost, appellant engaged in absolutely no illegal conduct at the Harvey home. He did not in fact trespass, having asked for and received permission to be on the property. (24 RT 3069-3070.) He did not approach Mrs. Harvey, did not threaten her, did not enter her home, and engaged in no offensive action toward her. These facts distinguish this incident from the charged crimes, in which an elderly woman was assaulted within her home, her house searched, and property taken.

The only action that Mrs. Harvey testified to that is arguably distinctive is the presence of a Black man walking along the side of her house into the backyard. This fact is not present in any of the other five charged cases. In both the Durham and Herrick cases, it appears the perpetrator entered through the front door, (22 RT 2775-2776; 30 RT 4010; 23 RT 2876) and entry via a back door was not one of the eight points of similarity identified by the prosecution. (*See* 32 RT 4097-4099.)

Because there were no distinctive similarities between the Harvey

incident and the underlying charged offenses, and because there were significant dissimilarities, the introduction of this evidence to show identity was in error.

D. The Harvey Evidence Should Have Been Excluded for All Purposes Because it Had Limited Probative Value Which Was Substantially Outweighed by the Prejudice from the Introduction of the Evidence

Evidence of appellant's alleged conduct at the Harvey home should have been excluded because its probative value was greatly outweighed by the prejudice from its introduction. Evidence of uncharged acts are only admissible "if they have substantial probative value. If there is any doubt, the evidence should be excluded." (*People v. Smallwood* (1986) 42 Cal.3d 415, 429.) As this Court has more recently noted, "[t]here is an additional requirement for the admissibility of evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Kipp* (1998) 18 Cal.4th 349, 371.)

Evidence of the Harvey incident had limited probative value because the testimony did not in fact link appellant to the underlying charged crimes, and because of the multitude of problems with Mrs. Harvey's identification of appellant as the man she saw in her yard. (See *People v. Smallwood, supra,* 42 Cal.3d at p. 429.) Mrs. Harvey was shown the photographic lineup that included appellant on September 2, 1987, after appellant's photograph had been displayed at a press conference on August 19, 1987, and broadcast repeatedly throughout both the print and TV media, and in each instance appellant was identified as the man responsible for a rash of crimes against elderly women. (29 RT 3894-3895.) At the time of

the photo lineup, Mrs. Harvey was already inclined to believe, based on the news reports, that appellant was the man responsible for the attacks on elderly women. Yet, even with this priming, Mrs. Harvey was not able to identify appellant from the photo lineup. (24 RT 3063.) Mrs. Harvey was only able to make a positive identification of appellant after the officer conducted a subsequent photo show-up, running out to his car and bringing back a single photo of appellant and asking her if this was the man. (24 RT 3063.) This manner of identification is highly suspect, and calls into question the probative value of Mrs. Harvey's identification and testimony regarding appellant. (*Stovall v. Denno*, (1967) 388 U.S. 293, 302.) For all of the reasons outlined above, the probative value of this identification was minimal.

Moreover, Mrs. Harvey's testimony, despite the inflammatory manner in which it was argued by the prosecution, provided little relevant information to the jury. Stripped of its provocative overtones, Mrs. Harvey's testimony established that she saw a Black man enter her property, stopped him, engaged in a brief conversation with him, and then gave him permission to enter her property. Mrs. Harvey's testimony was that the man made no threatening gestures, was not menacing, and that she was "not a bit apprehensive" during the encounter. (24 RT 3069.) Playing on the jury's fears, the prosecution argued that Mrs. Harvey's identification was "one of the keys to the case," (32 RT 4194) when in fact it established nothing of consequence in relation to the underlying charged crimes.

Despite the limited relevance and probative value of this evidence, the prosecution relied heavily on Mrs. Harvey's testimony, arguing that her identification was "direct evidence of Mr. Lynch's activities." (32 RT 4195.) The prosecution argued to the jury that appellant's conduct at the

Harvey home was an attempted robbery and assault:

> Mrs. Harvey is a female. She's 82 at the time. The attempt took place in the daytime. She lived in a corner house. And she was alone in her home. We don't get the part about the bindings. We don't get the part about the injuries, and we don't get the part about any cut screens. And we know why. Because she caught this clown coming around trying to sneak in. That's why the rest of this whole scene of eight points of similarity stops after five. She stopped him. She identifies him.
>
> Do you think she's lying? Do you think she's lying?

(32 RT 4195.) The prosecution's argument cleverly side-stepped the true significance of Mrs. Harvey's testimony, which was only that she saw a Black man on her property, who sought and was given permission to be there, and turned it into a litmus test of with whom the jury would side – appellant or Mrs. Harvey. By portraying Mrs. Harvey as the victim of an attempted violent crime, without any factual basis, the prosecutor was able to inflame the jury against appellant. The prosecutor further vilified appellant by arguing that it was only the foresight of "this remarkable little British lady" that prevented appellant from attacking her. (42 RT 4196.)

In discussing the introduction of other conduct evidence to prove identity, this Court has noted that:

> [t]he important point to be made is that, when such evidence is introduced for the purpose of proving the identity of the perpetrator of the charged offense, it has probative value only to the extent that distinctive "common marks" give logical force to the inference of identity. If the inference is weak, the probative value is likewise weak, and the court's discretion should

be exercised in favor of exclusion.

(*People v. Haston, supra*, 69 Cal.2d at p. 247) Given the limited relevance of Mrs. Harvey's testimony, the significant problems with her identification, and the highly prejudicial manner in which the prosecutor argued and relied on her testimony, it is clear that the limited probative value of this evidence was not substantially outweighed by the prejudice from its admission, and the evidence should have been excluded. (*People v. Balcom* (1994) 7 Cal.4th 414, 426-427.)

E. The Court's Erroneous Admission of the Harvey Incident Violated Federal Due Process

Evidence of other crimes is inherently highly prejudicial (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404; *People v. Thompson* (1980) 27 Cal. 3d 303, 318), and may violate federal due process (*Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775). The Ninth Circuit has held that the admission of irrelevant "other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence . . . was similar to the [crimes] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was 'emotionally charged.'" (*Ibid.* [citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1381-1382, 1385-1386].) As shown, the Harvey evidence constituted irrelevant character evidence. Moreover, under *Garceau* and *McKinney*, it violated appellant's Fourteenth Amendment right to due process.

First, the balance of the prosecution's case against appellant for the murders was solely circumstantial. There were no eyewitnesses to their

deaths,[4] and no direct evidence of appellant's guilt. (Evid. Code, § 410.)

Second, the Harvey incident, although it did not possess distinctive similarities with the underlying charged crimes, did share some common features. The Harvey incident was in the same general geographic area as the charged crimes; Mrs. Harvey was home alone; the incident occurred during the daytime, and was in the same general time frame as the charged crimes; and both the Harvey incident and the other charged crimes involved the presence of a Black man on the property of an elderly white woman.

Third, the prosecution relied heavily on the evidence of the Harvey incident to tie appellant to the charged crimes. The prosecutor called both Mrs. Harvey and Det. Nelson to testify regarding the incident, and introduced Mrs. Harvey's subsequent identifications of appellant, which constituted approximately 47 pages of testimony. (42 RT 3047-3088; *McKinney v. Rees*, *supra*, 993 F.2d at p. 1386 [finding erroneously admitted character evidence in approximately 60 pages of testimony].) Of equal import, the prosecution argued to the jury that the Harvey incident was "direct evidence" that appellant had committed the charged crimes. (42 RT 4195.)

Finally, the Harvey evidence was emotionally charged. Mrs. Harvey was the only live "victim" to testify before the jury.[5] The prosecutor

---

[4] Although at trial Frank Herrick testified he had seen appellant beating his wife (24 RT 2984), his initial statements to the police were that he did not see the person who had beaten his wife, and could not identify him. (29 RT 2996.)

[5] The prosecution was allowed to introduce the video taped preliminary hearing testimony of both Ruth Durham and Bessie Herrick in lieu of live testimony or the reading of the transcripts. (22 RT 2728; 23 RT 2852.)

described her a "remarkable little British lady" (42 RT 4196), who was able to deter appellant from his attempted assault and robbery. He urged the jury to believe that the only reason there were not more similarities between Mrs. Harvey and the other charged crimes was because of her bravery in forcing him to flee. (42 RT 4112.) The prosecution encouraged the jury to identify Mrs. Harvey directly with the victims, arguing that had she not been so vigilant, she would have "swollen up like a blob" – the words Vickie Constantin used to describe the horrific condition in which she found her mother. (27 RT 3673.) Given the prosecutor's argument strongly identifying Mrs. Harvey with the other victims, it is likely that her testimony, cast as a story of remarkable elderly lady standing up to a would be attacker, had a significant emotional impact on the jury.

Accordingly, application of the *McKinney* factors leads to the ineluctable conclusion that admission of evidence regarding the Harvey incident violated appellant's federal due process rights.

F. The Court's Erroneous Admission of Evidence of the Harvey Incident Was Prejudicial

A federal due process violation is subject to the "harmless beyond a reasonable doubt" standard of *Chapman v. California* (1967) 386 U.S. 18 for reversible error. (*Garceau v. Woodford*, *supra*, 275 F.3d at p. 776.) The proper *Chapman* inquiry is "whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Appellant's convictions for the murders of Pearl Larson, Adeline Figuerido and Ana Constantin were not unattributable to the Harvey evidence given the emotional impact of the Harvey incident and the paucity of evidence connecting appellant to the other crimes. (See also *People v. Marshall* (1997) 15 Cal.4th 1, 42

[applying *Chapman*, where evidence is not overwhelming, jury could have reasonable doubt].) Hence, the convictions, special circumstances, and death sentence must be reversed.

The prosecution offered the Harvey incident to prove appellant's identity as the perpetrator of the five underlying charged crimes (RT 3907), arguing that the similarities between the Harvey incident and the charged cases were "like a fingerprint" which identified appellant. (30 RT 3911, 32 RT 4194.) The prosecution argued that Mrs. Harvey's identification of appellant as the man she saw on her property was "direct evidence" that appellant had committed the charged offenses. (32 RT 4195.) In opening statements, the prosecution presented Ms. Harvey as one of the women "stalked" by appellant during "the days of the predator." (24 RT 2642, 2651.) In closing argument, the prosecutor maintained that:

> the trespass to Lavinia Harvey's house is one of the keys to this whole case. Her situation is identical to everyone of the other elderly female people. She found him sneaking around, do you think she is lying? But they are unique – she is the same situation, what do you think her physical condition would have been if she had not surprised him rather than vice versa. Harvey is direct evidence of Lynch's activities. Who else but Franklin Lynch slinks around old people's property on corner homes in Hayward San Leandro part of Alameda County during daylight hours.

(31 RT 4194-4195.) Thus, the admission of this evidence was integral to the prosecution's case against appellant.

The use of the Harvey incident in this way was also highly prejudicial, as it encouraged the jury to conflate the questionable identification of appellant by Mrs. Harvey with a positive identification of

appellant at each of the other crimes scenes. The jury was likely to identify and empathize with Mrs. Harvey, and the likelihood that the jury would identify with Mrs. Harvey was heightened by the prosecution's representation of her as a courageous, "remarkable little British lady" who scared off her would be attacker. (42 RT 4196.) Moreover, the prosecutor's argument put the jury in a psychological bind, arguing that there were only two ways they could address Mrs. Harvey's testimony – either they accepted that she had "caught him in the act," or they thought she was lying. (32 RT 4195.) The prosecutor's argument essentially blackmailed the jury into accepting Mrs. Harvey's testimony as not only true, but as directly identifying appellant as the perpetrator of the charged crimes

The Court was aware of the potential danger of the other crimes evidence in this case, given the paucity of evidence actually linking appellant to any of the charged crimes. In pre-trial motions the trial court already expressed its concern with "improper evidence of other crimes to prove identification," (20 RT 2613) and excluded proffered other crimes evidence. (20 RT 2613-2614.) The introduction of the Harvey incident led to the very errors that the trial court had previously tried to avoid. Appellant was convicted not on the strength of the evidence of the crimes for which he was charged, but based on his identification in an unrelated event, in which his conduct was entirely legal.

This is precisely why "other-crimes evidence is so inherently prejudicial" and should be admitted only after careful examination and with "extreme caution." (*People v. Alcala* (1984) 36 Cal.3d 604, 631.) All doubts, moreover, about its connection to the crime must be resolved in the defendant's favor. (*Ibid.*) And, of course, it should be excluded if its

probative value does not outweigh its prejudicial effect. (*People v. Simon* (1986) 184 Cal.App.3d 125, 129.)

Here, the only evidence linking appellant to the underlying crimes were cross-racial eyewitness identifications that placed him in the area of the crime scenes, and a pawned bracelet taken from one of the crime scenes. There was no physical evidence recovered from any of the crime scenes that actually linked appellant to any of the charged crimes. In one of the many improper tactics employed by the prosecution to obtain a conviction regardless of the evidence, the prosecution encouraged the jury to convict appellant based on Mrs. Harvey's identification of him in an unrelated incident, and further encouraged the jury to convict appellant based not on his actual conduct at the Harvey home, which was entirely lawful, but based only on a surmise or speculation as to what he might have been intending to do.

Appellant's conviction was based on evidence and argument that he acted in conformity with his character, "his propensity or disposition to engage in a certain type of conduct" (Cal. Law Revision Com. com., Evid. Code, § 1101), purportedly established by his conduct at the Harvey home. Appellants' convictions, corresponding special circumstances and death sentence must therefore be reversed.

CONCLUSION

For all of the foregoing reasons, the convictions and sentence of death must be reversed.

DATED: March 18, 2008

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender

DENISE KENDALL
Assistant State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 8.520(d)(2)

I am the Assistant State Public Defender assigned to represent appellant, Franklin Lynch, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief, excluding tables and certificates, contains approximately 5,801 words.

Dated: March 18, 2008

DENISE KENDALL

DECLARATION OF SERVICE

Case Name: In re Franklin Lynch

CSC No. S026408
Superior Court No. H 10662

I, GLENICE D. FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105. I served a true copy of the attached:

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

on each of the following, by placing same in an envelope addressed as follows:

Gerald A. Engler
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Valerie DeClare
Clerk of Superior Court
1225 Fallon Street, Room 109
Oakland, CA 94612

Mr. Franklin Lynch
P. O. Box H-34201
San Quentin State Prison
San Quentin, CA 94974

Michael Ciraolo, ESQ
Michael Berger, ESQ
3306 Harrison Street
Oakland , CA 94611

Each said envelope was then, on March 19, 2008, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on March 19, 2008, at San Francisco, California.

DECLARANT