IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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 REPLY BRIEF

MICHAEL J. HERSEK
State Public Defender

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

DEATH PENALTY

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

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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

Respondent argues that the admission of appellant's lawful prior conduct at the Harvey home was not erroneous because the evidence was relevant to show opportunity, planning and preparation.[1] (Respondent's Supplemental Brief (RSB) 2.) At trial, the prosecutor argued the evidence was relevant to show "the identity of the person who committed the crime." (32 RT 4194.) The evidence should not have been admitted for any of these reasons.

First, the limited similarities and marked dissimilarities between the Harvey evidence and the charged crimes preclude its admission for any purpose. Second, this evidence can not be introduced as evidence of either opportunity or common scheme or plan. Third, even if there were sufficient similarities to allow for its admission, the second stage of the analysis outlined by this Court in *People v. Ewoldt,* (1994) 7 Cal.4th 380, 404-405,

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[1] Although Respondent relies on the language of Evidence Code section 1101, "opportunity, planning, and preparation," to identify categories under which this evidence could have been admitted, these categories are not generally recognized in this Court's jurisprudence regarding admission of evidence pursuant to Evidence Code section 1101. In *Ewoldt,* this Court identified the five following bases for the admission of uncharged misconduct: common design or plan, intent, identity, motive, and knowledge. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402, fn. 6.) In order to respond fully to respondent's argument, appellant will assume, *arguendo,* that "planning and preparation" would fit under the rubric of common scheme or plan.

and *People v. Balcom,* (1994) 7 Cal.4th 414, 426-428, precludes its introduction. Fourth, because this evidence was proffered for a specific purpose at trial, respondent should not be allowed to argue a new theory for its introduction for the first time on appeal. The introduction of this evidence was prejudicial error, and requires reversal.

Regardless of what theory is proffered, the Harvey incident is simply too dissimilar from the charged crimes to allow for its admission. The sole similarities between the Harvey incident and the charged crimes was the presence of a Black man on the property of an elderly white woman within the city of Hayward during the day.[2] These alleged commonalities are not sufficiently distinctive to be considered similarities upon which a court may reasonably rely for the admission of the Harvey incident for any purpose. (*People v. Haston* (1968) 69 Cal.2d 233, 248-249.)

Moreover, the dissimilarities between the Harvey evidence and the charged crimes are legion. The man at the Harvey home sought and was granted permission to enter the property (24 RT 3054); did not engage in any threatening or assaultive behavior (24 RT 3069); did not take or attempt to commit a theft or robbery; and left the property when asked (24 RT 3056). This clearly distinguishes the Harvey incident from all five of the charged crimes, in which an elderly woman was beaten and robbed. The cases that respondent proffers are clearly distinguishable from the instant case. In *People v. Bradford* (1997) 15 Cal.4th 1229, the court found two crimes sufficiently similar to allow for cross admissibility on the issue of identity because of three distinctive commonalities, including that each

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[2] Although at trial the Harvey incident was incorrectly characterized as a trespass, respondent now concedes that "it did not amount to any crime at all." (RSB 4, fn. 1.)

victim was taken to a specific and remote desert location; and in *People v. Miller* (1990) 50 Cal.3d 954, twelve similarities and absence of marked dissimilarities between the two charged offenses established cross admissibility on issues of identity and intent. In the present case there are no distinctive similarities and numerous dissimilarities.

For the first time, on appeal, respondent argues that the Harvey evidence is relevant to show opportunity, common plan or scheme.[3] However, the Harvey incident could not properly have been admitted to show the existence of a common scheme or plan. The law is clear that evidence offered to show a common scheme or plan need not display the same level of similarity as that offered to show identity. Nonetheless such evidence must establish "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which there are individual manifestations." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) There must be a sufficient degree of similarity between the two that the common features indicate existence of a plan rather than a series of similar spontaneous acts. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 558.) The requisite degree of similarity is simply not present in the instant case, for all the reasons outlined above.

Moreover, the Harvey incident is not properly admitted to show common scheme or plan because such evidence is properly admitted only if

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[3] As discussed more fully below, where a jury is specifically instructed as to a certain purpose for the admission of evidence, the reviewing court should not uphold the admission of the evidence on a different and never before presented theory. (*Warner Construction Company v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299; *Shepard v. United States* (1933) 290 U.S. 96, 102-103.)

there is a question as to the occurrence of the crime. As this Court explained in *Ewoldt*:

> Our holding does not mean that evidence of a defendant's similar uncharted acts that demonstrate the existence of a common design or plan will be admissible in all (or even most) criminal prosecutions. In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute (citation omitted) This is so because evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense.
>
> For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value.

(*People v. Ewoldt, supra,* 7 Cal.4th at pp. 405-406.) This reasoning follows a long line of cases holding that when the proffered evidence is merely cumulative of other evidence which may be used to prove the same issue, it must be excluded "under the rule of necessity." (*People v. Schader* (1969) 71 Cal.2d 761, 774, 775; *People v. Guerrero* (1976) 16 Cal.3d 719, 725, 727; *People v. Thompson* (1980) 27 Cal.3d 303, 318).

The probative value of the Harvey incident is further undercut because Mrs. Harvey did not provide this evidence independent of any knowledge of the charged crimes. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 404.) The danger that this Court identified in *Ewoldt*, that "the witnesses account may have been influenced by knowledge of the charged offense" undercuts the probative value of the evidence in the instant case. The Harvey incident should not have been admitted as evidence of a common scheme or plan because such evidence was not sufficiently similar, would have been cumulative of other proffered evidence, and was highly prejudicial.

Nor is the Harvey evidence relevant to show appellant's "opportunity" to commit the charged crimes. Two years prior to its decision in *Ewoldt*, this Court reasoned in dicta that evidence of prior misconduct may be admissible to show opportunity. (*People v. Thomas* (1992) 2 Cal.4th 489, 520.) *Thomas* is the only published case to address opportunity as a valid basis for the introduction of other crimes evidence. Even if this Court were to find that that evidence of opportunity is admissible under Evidence Code section 1101, the Harvey evidence patently fails to meet any valid criteria relating to opportunity, as it does no more than put appellant within a few blocks of three of the five charged crimes several days prior to one of the those crimes. Given that this was an

urban area, and that appellant's family lived in the neighboring city, this can hardly be considered evidence of opportunity.

Moreover, respondent's attempt to analogize evidence of the Harvey incident to the Casteel testimony is clearly flawed. (RSB 2.) Mrs. Casteel's testified she saw appellant a block away from the Figuerido home the day preceding that murder. (29 RT 3798-3802.) This testimony was offered as a direct link between appellant and the Figuerido crime. It is clearly distinguishable from the Harvey evidence which was offered as similar conduct.

Third, even if this Court were to find that evidence of appellant's alleged conduct at the Harvey home was relevant to show either common scheme or plan or identity, which it is not, this would not establish the admissibility of the proffered evidence.

> Our conclusion that section 1101 does not require exclusion of the evidence of defendant's uncharged misconduct, because that evidence is relevant to prove a relevant fact other than defendant's criminal disposition, does not end our inquiry. Evidence of uncharged offenses is 'so prejudicial that its admission requires extremely careful analysis' [citation omitted]

(*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) This Court went on in *Ewoldt* to explain that inherent in a trial court's analysis of the admissibility of evidence under Evidence Code section 1101 is a consideration of the probative and prejudicial effect of the proffered evidence. The holding of *Ewoldt* that inherent in a court's analysis under Evidence Code section 1101 is an independent balancing of the probative value of the uncharged conduct against its prejudicial effect is well established in California jurisprudence. (*People v. Balcom* (1994) 7 Cal.4th 414, 426-427 [establishment that

uncharged act and charged offenses are manifestations of a common design or plan does not end inquiry; court must establish that the probative value of the evidence is substantially outweighed by its prejudicial effect]; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1210 ["Once a court determines that a prior bad act is admissible under Evidence Code section 1101, subdivision (b), it must conduct a further inquiry"].[4]

As has been discussed above, and in appellant's supplemental opening brief, the probative value of the Harvey incident was limited, and the introduction of this evidence was highly prejudicial. The prosecutor relied heavily on the Harvey evidence to prove the case against appellant, calling it direct evidence of appellant's guilt. (32 RT 4195.) Moreover, the only evidence linking appellant to any of the charged crimes was highly suspect cross-racial identifications, most of which placed him only in the area of the crimes. Further, none of the physical evidence recovered from any of the crime scenes linked appellant to the crime.

Finally, in a case such as this, when the evidence was clearly offered and admitted for a specific purpose, which was in error, and the jury was specifically instructed as to that purpose, the reviewing court should not uphold the admission of the evidence on a different and never before presented theory. (*Warner Construction Company v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299; *Shepard v. United States* (1933) 290 U.S. 96, 102-103.) As the High Court noted in *Shepard,* "A trial becomes unfair if testimony thus accepted may be used in the appellate court as though

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[4] Respondent's mistaken assertion that appellant argued for the exclusion of the Harvey evidence under Evidence Code section 352 may be rooted in his misapprehension of this aspect of the analysis under Evidence Code section 352. (RSB 3.)

admitted for a different purpose, unavowed and unsuspected." (*Ibid.*) That is precisely the situation in the instant case. The record is clear that the Harvey evidence was offered at trial for the sole purpose of establishing identity. As noted in appellant's supplemental opening brief, in closing argument, the prosecutor told the jurors that the Harvey "trespass" was "direct evidence" of appellant's identity as the perpetrator of the charged crimes. (32 RT 4194-4195.) The jury was instructed pursuant to CALJIC No. 2.50 that other crimes evidence was introduced for the limited purposes of establishing the existence of the necessary intent and the identity of the perpetrator of the crimes. (13 CT 3277; ASOB 3-4.) Respondent argues now for the first time that in addition to being admissible to establish identity, the proffered evidence also could have been admitted to shown that appellant had the opportunity to commit the crime, and the existence of a common scheme or plan. (RSB 2.) For this Court to now rule the admission of this evidence as proper under a theory of opportunity or common scheme or plan would render the trial unfair.

Under any theory, the limited similarities and marked dissimilarities between the Harvey evidence and the charged crimes and the prejudicial impact of the evidence compared to its slight probative value preclude its admission for any purpose.

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CONCLUSION

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

DATED: May 30, 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 8.6.30 (b)(B))

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 2316 words.

Dated: May 30, 2008

DENISE KENDALL
Attorney for Appellant

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 REPLY 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

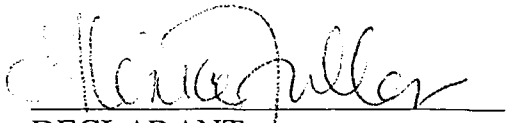
Mr. Franklin Lynch
P. O. Box H-34201
San Quentin State Prison
San Quentin, CA 94974

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

Each said envelope was then, on May 30, 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 May 30, 2008, at San Francisco, California.



DECLARANT