IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent, v. DAVID LYNN SCOTT, Defendant/Appellant	S068863 Riverside County Superior Court CR-48638

APPELLANT'S REPLY BRIEF

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

On Automatic Appeal from the Judgment of the Riverside Superior Court, Honorable Judge William R. Bailey, Jr., presiding.

I. THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO SEVER COUNT I (THE KENNY MURDER COUNT) FROM THE BALANCE OF THE INDICTMENT, THEREBY DENYING APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's AOB Argument

While the crime charged in Count I and the crimes charged in the

balance of the indictment preliminarily qualified for joinder as they are of the "same class of crime", the trial court committed reversible error by joining these two sets of crimes. Appellant was so prejudiced by the ruling that he was deprived of a fair trial.

As a general proposition, "[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Bradford* (1997) 15 Cal.4th 1129, 1313-1314 quoting *People v. Balderas* (1985) 41 Cal.3d 144, 171-172.)

The law creates two black letter requirements before "other crime" evidence can be admitted under section 1101(b). Firstly, the other crime evidence must be relevant to some issue in the case other than defendant's propensity to commit a crime, such as defendant's intent in committing the act in question, that the act was done as part of a common plan or scheme or the defendant's identity. This is a materiality issue, therefore, before the "other crime" evidence can even be considered it must be relevant to some *contested* issue. If there is no contested issue as to the point for which the other crimes evidence is to be introduced (e.g. intent, identify, common

plan, etc.), it is not admissible. If the other crimes evidence does not relate directly to a contested issue then it is "merely cumulative and the prejudicial effect of uncharged acts would outweigh its probative value..." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 406.) [1]

Secondly, there must a sufficient degree of similarity between the charged offense and the "other crime" to allow the jury to logically raise an inference that the perpetrator of the uncharged offense was the perpetrator of the charged offense.

In addition, the admission of this evidence is still subject to the overarching considerations of Evidence Code section 352.

In the instant case, there was no cross-admissibility between the two sets of charges under Evidence Code section 1101. Contrary to the position of respondent at trial, the non-murder charges were neither relevant nor material to any issues of identity, common plan or scheme, or intent as to Count I. (AOB at pp. 90-140.) Further, even if there was the required materiality, there was an insufficient degree of similarity between the two sets of crimes to allow the jury to draw the inference sought by the

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1. *People v. Gray* (2005) 37 Cal.4th 168, 202 and *People v. Roldan* (2005) 35 Cal.4th 646, 705 stated that when defendant pleads not guilty he puts all issues before the jury. However, neither of these cased suggest that the above holding of *Ewoldt* concerning Evidence Code section 352 considerations is no longer still the law.

prosecution.

Once the lack of cross-admissibility has been established, an appellant must show that he suffered substantial prejudice from the joinder. In the instant case, substantial prejudice did exist. The joinder of the two sets of counts in a single trial caused appellant to suffer substantial prejudice from the joinder that affected the ultimate result of both phases of the trial. All of the four "*Bradford*" criteria (presence or absence of cross-admissibility, inflammatory nature of the crimes, relative strength of the two sets of crimes compared to one another, and the fact that one of the crimes charged involved a possible punishment of death) all weighed against joinder. (*People v. Bradford* (1977) 15 Cal.4th at p.1315; AOB at pp. 145 et seq.)

As discussed, there is no cross-admissiblity in this case and Count I involved a capital crime. The non-murder counts are highly inflammatory vis a vis the murder count, not only by their sheer number but because they were crimes that occurred after the murder, which suggested to the jury that the perpetrator could not be deterred from his behavior even by the death of a woman. Further, the evidence as to the murder count was relatively weak as compared to the other set of crimes. There were no eyewitnesses to the murder, no property taken from the victim's home found in possession of

appellant nor any other evidence that indicated exactly what happened in the victim's home the night of the murder.

The only physical evidence that even arguably connected appellant with the murder scene was that appellant fell into the 8% of the population that could have deposited the semen stains that were found on the murder victim's pants.[2] The only other evidence was appellant's statements made to friends that were discounted by these friends as being too absurd to warrant belief. This is especially true in light of appellant's long history of emotional and mental health problems.

As there was no cross-admissibility of evidence between the two sets of crimes, the non-murder counts prejudicially served to provide the jury with improper, irrelevant and highly prejudicial evidence that enabled them to convict appellant of the murder count. This evidence served no other purpose than to show that appellant had a predisposition to commit violent crimes against women. Evidence of predisposition is incontrovertibly inadmissible under Evidence Code section 1101(a). This inadmissible evidence also allowed the jury to speculate, without any evidentiary basis, as to what happened in Ms. Kenny's apartment and to impermissibly conclude that if appellant committed the other charged

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2. In the AOB, appellant mistakenly misread the transcript and stated that it was 14% of the population.

crimes, he must have committed the murder in a similar fashion.

As such, the improper joinder of the murder count with the other counts substantially violated his right to due process of law and a fair trial under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) Considering the fundamental injustice of this joinder, such a burden was not met and the entire judgment must be reversed.

B. Brief Summary of Respondent's Argument

In its response brief, respondent stated that the trial court acted properly in joining the two sets of counts and did not abuse its discretion in doing so. (RB at pp. 51-52.) It further stated that the trial court was correct in finding that there was cross-admissibility between these two sets of counts under the Evidence Code 1101 (b), as evidence of the non-murder counts went to prove identity, common plan or scheme and intent in the murder.

Respondent further maintained that even if there was no cross-admissibility, analysis of the other "*Bradford*" factors by the trial court properly resolved the issue in favor of joinder. (RB at pp. 57-58.)

C. Appellant's Reply

1. The Two Sets of Counts Were Not Cross-Admissible.

Respondent argued that as a general proposition, appellant's argument as to the lack of cross admissibility "is fundamentally flawed because he fails to consider or mention the special circumstances of the murder being committed during the commission of burglary and/or rape. When the murder with its accompanying special circumstances is considered in connection with the other charged crimes, it is clear that there is a cross-admissibility of evidence." (RB at p. 54.)

Appellant did not fail to consider the special circumstance in his analysis. The difference between appellant's analysis and that of respondent was that appellant relied upon the facts and the law, while respondent relied upon theory and speculation as to the details as to what *may* have occurred to Ms. Kenny. What respondent essentially did was to turn the law on its head and use the facts of the non-murder crimes to fill in the evidentiary gaps as to what occurred in the murder count and then claim that the two sets of crimes were factually similar. Instead of comparing the facts of the two sets of crimes to ascertain whether they were similar enough to prove identity, common plan or scheme or intent, respondent transported the facts from the non-murder counts to the murder count and

then claimed that it met the legal requirements for cross-admissibility. This "logic" is both convoluted and contrary to the law of joinder.

a. There is No Cross-Admissibility as to the Issue of Identity

Regarding the issue of cross-admissibility as to identity, respondent argued that "the degree of similarity was sufficient to support the inferences that it was (appellant) who entered Kenny's home with the intent to commit a felony, that he is the one who raped or attempted to rape her or kill her."(RB at pp. 54.) However, as will be shown below, by respondent's reasoning, the non-murder counts could be joined with virtually any murder of a woman in the vicinity of her residence, at night, in the Riverside area.

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) 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. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.)

Therefore, to be admissible as modus operandi (identity) evidence

there must be common marks which, considered singly or in combination, support the strong inference that defendant committed both crimes. (*People v. Alcala* (1984) 36 Cal.3d 604, 632.) These common marks must be distinctive rather than ordinary aspects of any such category of crime. They must be sufficiently distinctive that they bear defendant's unique "signature." Reaching a conclusion that offenses are signature crimes requires a comparison of the degree of distinctiveness of shared marks with the common or minimally distinctive aspects of each crime. (*Id.* at pp. 632-633; *People v. Guerrero* (1976) 16 Cal.3d 712, 725; *People v. Antick* (1975) 15 Cal.3d 79, 93-94; *People v. Thornton* (1974) 11 Cal.3d 738, 756; *People v. Haston* (1968) 69 Cal.2d 233, 245-247.)

Respondent argued that there were "signature" similarities between the Kenny crime and the non-murder counts. It argued that appellant burglarized homes of Ms. Kenny, Cliff, Johnson[3], Gonzales, Griffen and Chidley at night while these homes were occupied and that all the women were alone except for Cliff, but when Cliff told the perpetrator that there was someone else at home, the perpetrator left. Respondent also argued that the knife that was used to kill Kenny was obtained from the victim's kitchen as was the knife that was used to assault Cliff. Further, it was

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3. Ms. Johnson was former last name was "Multari" but will herein be called by "Johnson", as she was referred to in the AOB.

argued that entry in all of the cases was through a sliding glass door or a window and that all of the burglaries took place within a three month time span. (RB at pp. 54-56.)

Respondent further argued that in all of the assaults, the assailant possessed a weapon or weapons. It claimed that with Regina Johnson and Julia Chidley[4], he withdrew prior to ejaculation, resulting in an absence of semen inside of the victim's body and semen was found on the clothes as with Kenny.[5] Respondent claimed that the appellant had these two rape victims dress and undress prior to the rape and then redress after the rape which was similar to Kenny that her body was found dressed. Further, in the Johnson rape, the perpetrator had the victim wash the sheets on the bed where she was raped and in the Kenny murder, there were no sheets on the bed. (RB at p.55.)

While identity was a contested issue in this case, respondent's argument that the evidence in the non-murder counts were admissible to prove identity in the murder count lacks merit for several reasons. Its most

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4.At the time of the crime, Julia Chidley was named Julia Karg. By the time of the trial , she had married Joe Chidley and will be referred to as "Chidley" herein.

5.There was no evidence that the perpetrator in either the Johnson or Chidley rape ejaculated on top of the victim's clothes. The evidence was that a semen stain was found on Johnson's pajamas (29 RT 5129), and Chidley's sweat pants (32 RT 5645) both of which may very well be a result of draining from the victim's vaginal vault. Further, neither victim testified that the perpetrator(s) did not ejaculate inside of them.

obvious flaw is the overarching fact that respondent simply assumed that what happened at the Kenny house bore the same signature as to some of the other crimes. This assumption was pure speculation There was no proof of any significant similarities between the two sets of crimes. There was no proof that the perpetrator of the murder broke into the Kenny house in a signature fashion as did the perpetrator(s) of some of the other crimes. There was no independent proof that Ms. Kenny's assailant carried a weapon into the premises. There was no proof that he was dressed like a ninja. There was no proof that he dressed and undressed Ms. Kenny as did the perpetrator(s) in some of the other crimes. There was no proof that the perpetrator actually penetrated Ms. Kenny and the medical examiner stated that he found no unusual findings in the genital area. (41 RT 5505.)

Respondent never actually compared the evidence of the Kenny crime to the evidence of the other crimes as is required by the above law. Instead, respondent compared the evidence of the each of the individual crimes in the same set of the non-murder counts, derived a *modus operandi* therefrom, and then substituted this *modus operandi* for evidence in the Kenny crime.

The reality is that as far as the evidence showed, the murder of Brenda Kenny had virtually nothing at all in common with the joined

counts. Firstly, it was a homicide in which the victim was murdered by multiple stab wounds. In addition, there was evidence that the victim was tortured through the infliction of other painful, yet non-fatal injuries.

With the exception of the Courtney/Hall crimes (Counts XX and XXII) none of the joined crimes involved any physical injury whatsoever, let alone a murder[6] or a torture. As described in the Statement of Facts, in several of these crimes the perpetrator had the opportunity to injure or kill the victim but did not. Further, no attempt was made to use any weaponry to physically harm any of the other victims.

Further, the Kenny murder involved a form of sexual activity that had nothing at all in common with the rapes perpetrated by upon the victims in the rape counts. There was no evidence of penetration of Ms. Kenny nor was there any sign of injury commonly associated with rape. The perpetrator ejaculated on Ms. Kenny's clothes, the same clothes she wore home from her mother's house the night of December 10, 1992. While it may serve the respondent's cause to speculate, there was no evidence of any kind that the perpetrator of the murder tried to rape Ms. Kenny or that he made her dress and undress. Further, respondent's claim

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6. The use of the weapons and injures suffered by the victims in Counts XX and XXII had absolutely nothing to do with an assault on a woman in her own home.

that the absence of sheets on Ms. Kenny's bed is an attempt to destroy forensic evidence is sheer speculation. There was no evidence that there was a sheet on the bed nor was there any evidence that someone ejaculated on the sheets. In fact, if it was Ms. Kenny's assailant's desire to destroy evidence, he had plenty of time to dispose of her stained pants.

Further, there is no evidence that Ms. Kenny's assailant entered her apartment through a window or a sliding glass door. The only evidence of any sort of "breaking and entering" was a scuff mark on the outside wooden fence which may or may not have had anything to do with the crime. (31 RT 5368.) There was no indication of entry through a window or sliding glass door, as in any of the other crimes.

As indicated in the AOB, even amongst the non-murder counts, many of the "similarities" urged by the prosecution were either of the most insignificant nature or the result of prosecutorial speculation as opposed to evidence. The similarities claimed by the prosecution were that the crimes all took place at night, in *most* of the cases the victims were alone, in *most* of the cases a stainless steel handgun was displayed, in *two* of the cases, there was a sword, in *all but the Kenny case* the perpetrator wore dark clothes, and in *a few* of the crimes "souvenirs" were taken. These "similarities" in the non-murder counts are not even consistent with one

another, let alone with the Kenny case.

The fact that the crimes were committed at night is of no account whatsoever , as a great percentage of such type of crimes occur at night. Upon closer examination, that fact that *most* the women were initially alone is similarly of little probative value. In Counts X and XI (Buhr and Penas victims) the woman was not alone. In Counts XX and XXII (Courtney) not only was the woman not alone, but the crime apparently had nothing at all to do with sexual assault. This leaves only five incidents where the evidence indicated that the women were at least initially alone, Cliff (Counts II-III), Johnson (Counts IV-VI), Griffen (Count XIII), Gonzalez (Counts VII and VIII) and Childley. (Counts XVI-XVIII.). It is highly disputable whether or not this percentage of woman initially alone is significantly different than the average number of women who might be alone in an apartment complex at night. In any event, as will be discussed below, there is no evidence that Ms. Kenny was alone in her apartment when the murderer entered.

Further, in three of these five incidents where the woman was alone there was no indication that sexual assault was the motive. In Count II, the perpetrator had every opportunity to commit an assault on Ms. Cliff but apparently had no desire to do so, instead voluntarily leaving the premises.

Similarly, in Counts VII-IX, the burglary of the residence of Linda Gonzalez, there was no evidence that rape was the intent of the intruder, who made no attempt to sexually assault the victim even though he had ample opportunity to do so. Further, in Counts IX and X, the "Buhr" incident, there was no evidence that the intruder intended to commit an assault on the woman of the house. Similarly, in the Griffen incident (Counts XI and XIII), the perpetrator had ample opportunity to assault the victim but apparently had no intention of doing so.

In addition, the conduct of the perpetrator once inside the victims' residences differed as well. In the Cliff and Johnson crimes, he announced he was a "hit man." In the Johnson and Chidley crimes, he lectured the victims about safety. In the Griffen crimes, he asked for money. However, there was no signature similarities shared by the non-murder counts.

The reason why these cases have surface similarities is less a function of true similarities than it is of the prosecution gathering up a series of unsolved crimes that bore what they considered to have some connection and presenting them as a group to the grand jury.

However, whatever similarities there were are amongst the non-murder counts, in the Kenny murder count there were no eyewitnesses as to how the perpetrator dressed, his features, his stature, his dress, his race or

anything else about him. There was no evidence as to the nature of any weapons he carried, whether or not anything was taken from the premises, any conversations between the victim and the perpetrator or anything else for that matter that could establish some similarity between the murder of Ms. Kenny and the perpetration of the other crimes.

What little is known of the method of commission of the Kenny crimes shows far more dissimilarities of a far more significant nature than the few insignificant similarities. In the Kenny murder, there was no indication of forced entry as in the other crimes. In fact, the evidence presented by the state strongly suggests that Ms. Kenny may have known her attacker as their own witness recalled hearing *two* sets of footfalls leading up to Ms. Kenney's apartment at 10:00 p.m. on September 12, 1992, yet he did not hear any sign of struggle until 4:00 am that next morning. (31 RT 5426 et seq.) This strongly suggested that Ms. Kenny knew the killer, voluntarily admitted him or her into her apartment where he or she stayed until 4:00 a.m. when the actual attack occurred. Such a scenario is completely unlike any of the other crimes.

Even if we assume that the person who had accompanied Ms. Kenny up the stairs at 10:00 p.m. did not previously know her and was forcibly taking Brenda Kenny into her apartment for some purpose, this scenario is

completely dissimilar to the other counts where the attacker broke into the victims' residence either through a sliding glass door or through a window.[7]

Therefore, the only proven similarities between the *evidence,* in the Kenny murder and *any*, let alone all, of the non-murder counts, is that the crimes occurred at night, against a woman, and had involved some sort of sexual activity.

This degree of similarity is completely inadequate. 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. (*People v. Miller, supra,* 50 Cal.3d at p.987.) "[T]he pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*People v Ewoldt, supra*, 7 Cal.4th at p. 403.)

As discussed in the AOB, this Court has demanded a much higher degree of similarity to justify cross-admissibility as to identity than exists between the non-murder case. (*Coleman v. Superior Court* (1981) 166

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7. In Counts 20 and 21, both victims were assaulted outside their apartment. However, one of the victims was a male making these incidents completely dissimilar with the others.

CalApp.3d 129; *People v. Alcala, supra,* 36 Cal.3d 441; *People v. Bean* (1988) 46 Cal.3d 919; *People v. Rivera* (1987) 41 Cal. 3d 388, See AOB at pp. 129-140.)

b. There is No Cross-Admissiblity to Prove the Issue of Common Plan or Scheme

Respondent made a perfunctory argument that the "other crime " evidence of the non-murder counts was relevant to show a common plan or scheme with the special circumstances stating, "There was sufficient similarity to show that Scott's behavior was not spontaneous, isolated or aberrant in committing criminal acts against Kenny. Instead Scott was stalking victims in the Canyon Crest area of Riverside, preying on women who were alone at home at night, so he could enter their homes and victimize them." (RB at pp. 54-55.)

Even if respondent could prove that the existence of a common plan or scheme was relevant to an issue as to the special circumstances, there would still be no cross-admissiblity in that there was insufficient factual similarity between the two sets of crimes. Appellant discussed this issue in depth in his AOB. (AOB at pp. 117-129.) To establish a common plan or scheme between two sets of crimes, the shared similarities do not have to

rise to a "signature" level , as with the proof of identity. However, there still must be a "high degree of similarity" between the common features of the two sets of crimes. (*People v. Ewoldt, supra,* 7 Cal.4th at pp. 402-403.) Further, the similarities can not be "coincidental" but rather "directed by design." (*People v. Peete* (1946) 28 Cal.2d 306, 317-318.)

As previously stated, the non-murder crimes had virtually nothing in common with the Kenny murder. Again, what the prosecution and the trial court either overlooked or discounted was the overriding difference between the two sets of crimes. Ms. Kenny was murdered. The other female victims were not physically injured.

Secondly, there was no sign that Ms. Kenny was penetrated as in the other two rape cases. In fact, no semen was found in her vagina, anus or mouth. She was found fully clothed in the same clothing as when she left her parents house two days before her body was discovered. Any argument that the prosecution made at trial that the perpetrator intended to rape her but for some reason was prevented from doing so is simply a guess. As stated above, it is impossible to tell from the evidence whether the ejaculate on Ms. Kenny was deposited before or after her death, whether the act of ejaculation was the result of a failed attempted to rape or a gesture of a murderer marking his territory. The only thing that can be stated with

certainty is that the evidence of sexual conduct at the murder scene has nothing at all in common with that of the scene of the other rapes.

Thirdly, there was no sign of forced entry in the Kenny crimes. In most of the other crimes, the perpetrator entered the victim's resident through a sliding door or through a window by cutting the window screen. There was no indication that this occurred in the Kenny murder. In fact, the prosecution's own evidence and theory was that the perpetrator accompanied Ms. Kenny up to her apartment at 10:00 p.m. and the actual assault did not occur until approximately six hours later, strongly indicating that the killer knew Ms. Kenny. (30 RT 5226 et seq.)

Finally, any suggestion that this was a "ninja" crime is pure, unsubstantiated speculation. There was no eyewitness to the Kenny crime nor was there any circumstantial physical evidence to even suggest that the perpetrator was dressed as a ninja or carried ninja style weapons.

In summary, other than the fact that all of these crimes took place in the same general neighborhood and that they were generally committed against women, the crimes were completely dissimilar. Any similarities between the crimes were pure coincidence and not very remarkable coincidence at that. As such, there was no cross-admissibility of the murder and non-murder counts based upon the theory of common

plan or scheme.

c. There is No Cross-Admissiblity to Prove the Issue of Intent

Evidence of intent is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it. (Citations omitted.) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant left the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it." (*People v Ewoldt, supra,* 7 Cal.4th at p. 394, fn 2.)

In the instant case, neither is there a confession of guilt by appellant nor was appellant's presence at the murder scene a part of the defense case. As stated in the AOB, the trial court misunderstood and misapplied the law when it accepted the prosecution argument that since the prosecution must always prove intent, they are always allowed to present "other crime" evidence that pertains in some way to the issue of intent. (11 RT 1843 et seq., 12 RT 1955.) The fact that the prosecution has to prove the element of intent in any special intent crime does not mean that in every special intent

crime "other crime" evidence of intent is admissible. It must be an issue directly and affirmatively contested by the defendant. *People v. Tassell* (1984) 36 Cal.3d 77, 88, fns. 6 & 7 reiterated this principle of law propounded in *People v. Thompson*, and later upheld in *People v. Ewoldt, supra,* 7 Cal.4th at p. 406.

> *In People v. Thompson, supra*, 27 Cal.3d at pages 314-321, we restated certain basic principles pertinent to the admissibility of evidence of other crimes - particularly the dogma which posits as a *sine qua non* the existence of a contested issue to which those crimes are relevant. In addition, we stressed the importance of assessing what, in other contexts, would be called the 'cost-effectiveness' of the evidence. As summarized by one learned commentator: 'The significance of the *Thompson* case lies. *People v Thompson* 27 Cal.3d 303,316 in its holding that, when evidence is offered that a defendant committed an offense other than that for which he is on trial, its *relevancy* to prove some *disputed* fact on a theory in addition to its relevancy as character-trait or propensity evidence - such as intent, motive, or modus operandi - *must* be *substantial* on the theory tendered in order for the probative value of such evidence to be considered as outweighing the manifest danger of undue prejudice, to avoid exclusion under Evid. Code section 352, even though not barred by Evid. Code section 1110(b)[*sic*] .

Respondent did not even attempt to support its position in its response brief. It cited no case law or other authority that disputed appellant's position that the defense had to affirmatively contest an issue before "other crime" evidence can be used to prove intent. It simply stated

that in conclusory fashion that it was entitled to use the other crime evidence of the non-murder counts to prove intent in the murder count.

Even assuming that the non-murder counts were material to prove the issue of intent in the murder count or special circumstances, these counts would still be inadmissible due to the lack of similarity between the two sets of counts. It is true that the least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. "[T]he recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act .... (2 Wigmore, supra, (Chadbourn rev. ed. 1979) §§ 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.' [Citations.]" (*People v. Robbin* (1980) 45 Cal.3d 867, 879; see *People v. Ewoldt, supra,* 7 Cal.4th at 402.)

However, as stated in the AOB (AOB p. 107 et seq.), respondent cannot meet even this reduced standard of similarity. So little was actually known about the commission of the Kenny crimes that it is impossible to

make the inference that the perpetrator probably harbored the same intent in each instance.

2. The Joinder of the Murder and Non-Murder Counts So Prejudiced Appellant That He Was Deprived of a Fair Trial and Due Process of Law

The prejudice suffered by appellant from this constitutionally improper joinder was undeniable. The jury that decided his fate in the capital case was permitted to consider evidence of other charges that could not but had the effect of portraying appellant as a predator and serial rapist. All of the evidence heard by the jury in the capital case was filtered through this prism. By trying the two sets of cases together, appellant's conviction in the capital case was virtually assured.

In the instant case, the sheer number of non-murder counts brought against appellant could have had no other effect than to convince the jury that appellant was a very dangerous criminal capable of virtually any type of violent crime. By joining all of the counts, the prosecution was allowed to present to the jury eight separate non-murder incidents, including multiple burglaries, multiple rapes, an attempted kidnaping and two attempted murders. Therefore, the jury deciding the capital murder count was bombarded with inflammatory evidence that appellant was essentially

a terribly dangerous, immoral serial predator. In no other reported case where joinder was not based upon cross-admissibility was there even close to *nine separate sets* of crimes involved. (See *People v. Crosby* (1988) 197 Cal.App.3d 853 (2 incidents); *People v. Sandoval* (1992) 4 Cal.4th 155 (2 incidents); *People v. Mendoza* (2000) 24 Cal.4th 130 (4 incidents) ; *People v. Balderas, supra,* 41 Cal.3d 144 (2 incidents); *People v. Bean, supra,* 46 Cal.3d 919 (2 incidents) ; *People v. Musselwhite* (1998) 17 Cal.4th 1216 (2 incidents.)

This type of assault on the jury's ability to make a logical dispassionate decision as to appellant's guilt in the capital count far exceeds the prejudice in cases reversed for improper joinder of counts for this very reason. In *Williams v. Superior Court,* this Court issued a writ to set aside a trial court order denying defendant's motion to sever two unrelated murder counts which apparently involved gang membership. This Court held that the introduction of evidence of two seemingly "senseless, gang-related shootings" would create the forbidden "overstrong tendency to believe defendant guilty of the charge merely because he is a likely person to do such acts." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 453 citing to *People v.Thompson, supra,* 27 Cal.3d at p. 317.) In addition, the *Williams* Court cited to the fact that gang activity was a

"highly publicized phenomena" which also encouraged the jury to convict on something other than the evidence presented. (*Ibid.*.)

Similarly, in *Coleman v. Superior Court, supra,* 116 Cal.App. 3d 129, the court of appeal issued a writ to set aside a trial court order denying defendant's motion to sever two counts of sex crimes against minors from an unrelated murder case. The court of appeal held that defendant was prejudiced by the presentation of evidence of the sex crimes in the same trial as the murder count. The court stated "evidence of sex crimes with young children is especially likely to inflame a jury. When confronted by direct evidence from two minor victims concerning petitioner's propensity to commit sex crimes, the jury would be hard pressed to decide the murder case exclusively upon evidence related to that crime. That difficulty would be exacerbated by the fact that the murder case consisted primarily of circumstantial evidence..." *(Id.* at p. 138.)

The *Coleman* court did not engage in the ultimately fruitless exercise of determining which crime was "worse," the sexual assaults or the murder, as there is no way to ever answer such a question without engaging in moral hairsplitting. The court simply stated that the introduction of other crimes of an emotionally inflammatory nature would invariably cause the jury to factor into its murder deliberation the "fact"

that defendant is a reprehensible person.

Further, this Court has indicated that in judging whether a crime or series of crimes was "inflammatory" for the purposes of a consolidation analysis, the trial court should inquire as to the nature of the victim. In *People v. Sandoval* (1992) 4 Cal.4th 155,173, this Court held that the joinder of two sets of murder cases was not inflammatory because the victims in one of the sets of murders were gang members, as was the defendant. In the instant case, the situation was completely opposite. The victims of the joined counts were not unsympathetic criminals, but were the most sympathetic individuals imaginable. They were all ordinary, law abiding citizens, victimized in or on the doorsteps of their homes. They were subjected to traumatic experiences and were in no conceivable way at personal fault for what happened to them. It is hard to imagine any type of crime that would inflame a jury more than an extended series of home invasions that culminated in rapes, attempted murder, gunfire and a series of terrified women.

In the instant case, the joinder of eight other sets of non-cross-admissible crimes to the murder count created the impression in the jurors' minds that they were dealing with the worst possible sort of predator. As such, the joinder created an inflammatory atmosphere in which they could

not possibly judge the murder count solely upon the relevant evidence presented as to that particular count only. Therefore, there is no question that the joinder of the unrelated, non-cross-admissible counts to a capital murder count inflamed the jury.

As stated in the AOB at pp. 156-158, the jury could not possibly compartmentalize the murder charge from the other charges so as to be able to decide that capital crime on its own merit. This concern resonates with particular force in the instant case. Not only did the trial court join counts for which the evidence was not cross-admissible, but the prosecution repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of appellant's criminal activities. Thus, the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime," (*United States v. Johnson* (9th Cir. 1987) 820 F.2d 1065, 1071) when the prosecution's closing argument urged it to do just the opposite. (See *Davis v. Woodford* (9th Cir 2004) 384 F.3d 628, 638-639.) Further, the court rendered no such admonition to the jury instructing them to decide each count on its own merits as required by cases such as *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1323 and *Bean v. Calderon* (9th Cir. 1998) 163 F.3d 1073,

1085.)

It is absolutely incontrovertible that no effort was made to compartmentalize the separate courts. In fact, the prosecution's entire theory of the case was that the charged crimes were so similar that there was an inference that they were all committed by the same person. By pursuing and winning the court's approval to join all of the counts on the grounds that they were cross-admissible, the prosecution can not divorce itself from the prejudice it caused.

Further, the prosecution's guilt summation was replete with comparisons between the non-murder counts and the murder count. In addition, there were prosecutorial urgings to find appellant guilty of the murder count since the same person who committed the non-murder counts committed the murder. (34 RT 6055, 6058, 6060, 6065, 6066-6069.) In fact, the final point the prosecutor made in his rebuttal summation ties all of the crimes together with the following statement. "Ladies and gentlemen, over and over again I can't accentuate how out of the ordinary, how strange, how bizarre, how goofy, how tragic, how deadly Mr. Scott has been. But ladies and gentlemen, I can't give you a reason why. But, ladies and gentlemen, there is no other ninja running around out there. And when you look at how the defendant was acting, how he would dress, how

he would be bizarre, you could see why he was trying to say what he was saying by this dream." (34 RT 6142.)

While appellant makes no concessions to the incorrectness of the trial court's ruling on the severance motion, even if the court's ruling was correct at the time it was made, this Court must reverse judgment if the joinder of the counts "actually resulted in 'gross unfairness' amounting to a denial of due process." (*Bean v. Calderon, supra,* 163 F.3d at p.1084; *People v. Mendoza, supra,* 24 Cal.4th at p.162.) Cases have this unfairness where the prosecutor has urged the jury to draw impermissible inferences based on evidence on another count where that evidence was not cross-admissible. (See, e.g. *People v. Grant* (2003) 113 Cal.App. 4th 579, 589-590; *Bean v. Calderon , supra,* 163 F.3d at p.1083.)

The prejudice to appellant was manifest. The jury that decided his fate on the capital murder count was not only exposed to evidence that suggested appellant was a serial rapist and stalker of defenseless women but was encouraged by prosecution argument to improperly believe the evidence showed that the person who committed the non-murder counts also committed the capital murder. There was insufficient admissible evidence upon which the jury could find the special circumstance of murder in the course of a rape or attempted rape. (See Argument IX, *infra.*)

The only way the jury could have made this finding was to have considered that appellant may have committed two other rapes, thereby supplying an intent that could not be otherwise proven. This created the forbidden "overstrong tendency to believe defendant guilty of the charge merely because he is a likely person to do such acts." (*Williams, supra,* 36 Cal.3d at p. 453 citing to *People v. Thompson, supra,* 27 Cal.3d at p. 317.)

The improper joinder of the murder and non-murder counts introduced evidence that and violated appellant's right to due process of law and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution by rendering his trial fundamentally unfair. (*Bean v. Calderon* , *supra,* 163 F.3d at p. 1084; *Grigsby v. Blodgett* (9th Cir. 1997) 130 F.3d 365, 370.)

Appellant conviction in Count I and the associated special circumstance allegations was largely based upon the use of related charged counts so as to create a mythological monster; one who fed on the weak and helpless. They further used improperly admitted evidence of uncharged incidents to (Arguments XI and XII, *infra*) impress upon the jury that appellant was the "type" of person that committed crimes such as murder. As such, appellant's trial was rendered fundamentally unfair.

The entire judgment must be reversed.

II. APPELLANT'S JANUARY 21, 1993 STATEMENT TO POLICE DETECTIVES OF THE MORENO VALLEY AND RIVERSIDE POLICE DEPARTMENTS WAS THE FRUIT OF HIS ILLEGAL ARREST, THEREFORE THE ADMISSION OF SAID STATEMENT VIOLATED APPELLANT'S RIGHTS AGAINST ILLEGAL SEARCH AND SEIZURE, SELF-INCRIMINATION, DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Procedural Summary of Facts

On September 24, 1993, appellant filed a Motion to Suppress the Statements of Defendant. The gravamen of the section of the motion pertinent to this Argument was that the January 21, 1993 arrest of appellant was made without probable cause, and that any subsequent statements he made while in custody were the illegal fruits of that arrest. (VIII CT 2151.)

The factual history surrounding the taking of the statement is as follows. Pursuant to information received from an anonymous informant on January 21, 1993, two Moreno Valley Police detectives arrived at appellant's residence at approximately 4:00 p.m. that same day. Approximately an hour later, these detectives received word that the Riverside Police Department wanted appellant arrested. The detectives waited for appellant to come out of his house and promptly arrested and handcuffed him. Riverside Police officers then transported appellant to a

Riverside Police station. (XI CT 2994)

Appellant was in custody at the police station for approximately three hours before questioning was commenced. Questioning began at approximately 8:14 p.m. by Riverside Detectives Theur and Heredia. During that pre-*Miranda* questioning, incriminating statements were elicited from appellant, specifically admissions that he was involved in martial arts and ninja training. (8th Supplemental Clerk's Transcript at pp.13-16.) However it was not until 8:30 p.m. that Detective Heredia read appellant his *Miranda* rights. Appellant then signed a waiver of those rights. These detectives continued questioning appellant for a substantial period of time at which point Detective Keers replaced Detective Heredia. Questioning continued for another hour, after which time Detective Bender from Moreno Valley Police Department questioned appellant for an additional extended period of time. (XI CT 2994.) Additional incriminatory statements were made during this period of time. The trial court granted the motion to suppress the pre-*Miranda* statements but denied the motion as to the post-*Miranda* statements holding that there was probable cause to arrest appellant.

B. Summary of Appellant's Argument

There was no probable cause for the arrest of appellant. Therefore,

any exculpatory statements obtained from him as a result of questioning that immediately followed the request should have been suppressed by the trial court as fruits of the poisonous tree. Specifically, appellant's arrest was based almost entirely upon the accusations of the informant, later identified as Richard Decker, in his anonymous phone call tip to Detective Heredia and in the subsequent interview with Detective Keers. Decker made no observations as to the crimes in question and the police were in possession of no other information that corroborated Decker's contentions. Appellant argued Decker was not a "citizen-informant", hence his statements were not entitled to the presumption of validity. As such, Decker's uncorroborated and unreliable information did not provide probable cause for arrest. (AOB Argument II; VIII CT 2154.)

C. Summary of Respondent's Response

Respondent argued that based upon the information received from the anonymous caller, Richard Decker, the interview of Decker by Detective Keers and the interview of Terry DeLatorre, appellant's fellow employee, there was probable cause to arrest appellant. Respondent further argued that any discrepancies in the statements of Decker were not evidence of unreliability on the part of Mr. Decker, but rather a result of confusion.

D. Appellant's Reply

Relative to warrantless arrests, probable cause is said to exist when the circumstances within the arresting officer's knowledge are sufficient to warrant a prudent man in believing that the defendant has committed an offense. (*People v. Hogan* (1969) 71 Cal.2d 927, 930.) While it is accepted that no precise definition of "probable cause" is possible, the United States Supreme Court requires that the credibility of the information of any informant be weighed under a "totality of circumstances" test. (*Illinois v. Gates* (1983) 462 U.S. 213, 231-232.)

Respondent supported the trial court's holding that Richard Decker was a "citizen informant", hence his statements to the police were presumptively reliable. (RB at p. 64.) It further argued that said presumptive reliability created the probable cause necessary for the arrest.

Richard Decker was not a "citizen-informant." The courts have defined such a person as a person who either had a crime occur to him or was a witness to a crime that occurred. (*People v. Terrones* (1989) 212 Cal.App.3d 139, 147-148; *People v. Shulle* (1975) 51 Cal. App.3d 809, 814. See *People v. Ramey* (1976) 16 Cal.3d 263, 269.) To merit the presumption of reliability the informant must act openly in aid of law enforcement, eliminating anonymous tipsters from this category. (*Ibid.*)

This Court distinguished between "citizen-informants" and other informants stating that a citizen informants are those "who may expect to be called to testify after an arrest, and may be exposing himself to an action for malicious prosecution if he makes unfounded charges" as opposed to "a mere informer" who "gives a tip to law enforcement officers that a person is engaged in a course of criminal conduct." (*People v. Hogan, supra,* 71 Cal.2d at p.891.)

Decker fell into the later category, not the former. His "tip" related to incidents in which he was neither a victim nor a percipient witness. Therefore there were no hard facts from which the police could have reached the conclusion that this informant was a "citizen-informant", therefore presumptively reliable. The fact that Detective Keers later stumbled upon Decker that same day while investigating the case does not render Decker a citizen-informant as his initial contact with the police was one of an anonymous tipster. Therefore, as Decker was not a citizen informant, the above case law makes it clear that there must be corroborating evidence.

Respondent tried to create credibility for Decker by citing to Detective Keers opinion that upon meeting Decker he "appeared to be of average intelligence, answered the detectives questions in an appropriate

manner, and had command of the English language." (RB at p. 63; 7 PRT1544.) The fact that Decker seemed lucid and able to express himself obviously has nothing to do with his credibility.

Respondent argued that the information provided by Decker was corroborated. However, the only other piece of information that the police had prior to appellant's arrest was information from Terry Delatorre, an employee of the theater where appellant worked. She stated that the talk around the theater was that appellant may be responsible for the "ninja crimes." While she had no personal knowledge as to any facts that would substantiate this speculation, she related that she heard that certain employees saw him wearing a ninja outfit. Further, another employee told her that appellant had stated that he had been chased in the Canyon Crest area by Riverside Police. (VIII CT 2309.)

Further, Decker gave the police two entirely different versions of the same incident. In the anonymous tip, Decker said that appellant personally told him that he had stabbed "the librarian." In the interview with Detective Keers, Decker stated that *Stephanie Compton* told him that appellant had a dream that someone else stabbed the woman. Therefore, not only was there no independent information to corroborate Decker's tip and statements, the indisputable internal inconsistencies in his information

affirmatively destroyed his credibility. The police knew this but decided to proceed with appellant's arrest nevertheless. Further, they did not talk to Ms. Compton or any of the other employees of the theater who supposedly believed that appellant may be involved in criminal activity.

As such, there was no probable cause to arrest appellant, therefore any statements that they obtained from this unlawful arrest should be suppressed. (AOB at pp. 174-176.) Appellant was substantially prejudiced by the violation of his right against illegal search and seizure, to due process of law, and to a reliable determination of guilt. Appellant's illegal arrest provided the police with unconstitutionally admitted statements that formed the greatest part of the evidence against him in the capital crime and convicted him out of his own mouth. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Considering that appellant's statements to the police provided evidence of appellant's association with ninja activities as well as his "dream" about the death of Ms. Kenny, the prosecution cannot meet this burden.

This entire judgement must be reversed.

III. BY OBTAINING PRE-*MIRANDA* WARNING INCULPATORY STATEMENTS FROM THE PREVIOUSLY ARRESTED APPELLANT, ALL OF APPELLANT SUBSEQUENT STATEMENTS TO THE POLICE WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION, DUE PROCESS OF LAW, A FAIR TRIAL AND RELIABLE DETERMINATION OF PENALTY PURSUANT TO THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Argument

After appellant's arrest at his home, he was placed in custody and taken to a police station. At the station house, appellant was extensively interrogated prior to being given his *Miranda* rights. This questioning was clearly intended to, and did in fact, elicit inculpatory statements from appellant. The police eventually read to appellant his *Miranda* rights and continued the questioning, obtaining more incriminating statements from him. The pre-waiver police conduct deliberately employed improper tactics in order to secure the pre-waiver incriminating statements and the taint of those tactics infected appellant's subsequent post-waiver statements. Therefore, all of appellant's statements should be suppressed.

B. Summary of Respondent's Response

Respondent stated that the majority of the pre-*Miranda* interview involved booking or biographical type information. (RB at p. 68.) Respondent also maintained that much of the first 16 pages of transcript

that was excluded by the court was excluded because of Evidence Code 352 considerations, rather than for *Miranda* reasons. (RB at pp. 69-70.)

Respondent argued that " The United States Supreme Court has rejected an automatic application, such as for a Fourth Amendment violation, that all 'fruits' of an unlawfully obtained confession must be regarded as inherently tainted. (RB at p. 71.) It further stated that "The high court recognized in *Elstad* (*Oregon v. Elstad* (1985) 470 U.S. 298) that custodial statements made prior to the delivery of *Miranda* warnings do not necessitate exclusion of any subsequent confession." (RB at pp. 71-72.)

Respondent concluded by stating. "The police did not violate any of Scott's constitutional rights in the fifteen minutes they spoke with him prior to advising him of his *Miranda* rights. The trial court correctly found that the *Miranda* warnings were given, they were sufficient, adequate, and complied with the *Miranda v. Arizona* decision." (RB at p. 73.) As such, respondent argued that there was nothing about the pre-*Miranda* questioning that tainted the post-*Miranda* questioning.

C. Appellant's Reply

It is incontrovertible that the trial court suppressed the first 16 pages of the transcript that did not constitute biographical/booking information.

Respondent apparently believed that the fact that the jury did not get to hear any of this incriminatory or prejudicial information somehow negates violation of appellant's constitutional rights and justified the admission of all of the post-*Miranda* interrogation.

Respondent basically ignored the point of appellant's argument. The issue raised by appellant had nothing to do with what the jury heard or did not hear. Instead, it focused on the whether the pre-*Miranda* questioning so psychologically "softened up" appellant that his *Miranda* waiver was involuntary.

Respondent cited to the United States Supreme Court case of *Missouri v. Siebert* (2004) 542 U.S. 600 to support their argument that the fact that incriminatory statements were obtained from a defendant before *Miranda* warnings are given does not necessarily mean that incriminatory statements obtained after the *Miranda* warnings are given should necessarily be suppressed.

However, *Siebert* expressly supports appellant's argument that the post-warning statements should be suppressed as were similar statements in the *Siebert* case.

In *Siebert*, the United States Supreme Court took the opportunity to discuss the two stage interrogation process used in the instant case; known

as "question first" that had become more prevalent over the years prior to the holding in *Siebert* case. In this interrogation process, interrogators first question the suspect without first giving him *Miranda* rights until they obtain incriminatory statements. The interrogator then gives the suspect his *Miranda* and obtains whatever further incriminatory statements he can.

While the High Court in *Siebert* does not universally condemn the use of this tactic, it makes in very clear that it does not favor it and in fact bars it in a rather broad set of circumstances. *The Siebert* Court reiterated that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement-the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty for such silence." (*Siebert* at 607 quoting *Malloy v. Hogan* (1964) 378 U.S. 1, 8.)

Applying this basic maxim to the "question first procedure", the Court stated when incriminatory statements are obtained through this "question first" procedure, "attention must be paid to the conflicting objects of *Miranda* and the 'question first' (procedure)."(*Siebert, supra,* at p. 611.) The *Siebert* Court stated that the purpose of *Miranda* was to eliminate "interrogation practices...likely ...to disable an individual from

making a 'free and rational choice'"(*Ibid* citing to *Miranda v. Arizona, supra,* 384 U.S. at pp. 464-465.) Further, *Siebert* cites to *Miranda* in holding that a suspect must be "adequately and effectively" "advised of the choice of the Constitutional guarantees. (*Ibid.*)

The Court continued "[T]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." (*Siebert, supra,* at p. 611.) The Court further stated;

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could functionally "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at the juncture? Could there reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who had just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment. (*Id.* at p. 612.)

The High Court then discussed the factual situations that factor into this legal determination.

> There is no doubt about the answer that proponents of question-first give to this question about the effectiveness of warnings given only after successful interrogation, and we think their answer is correct. By any objective measure, applied to circumstances exemplified here, it is likely that if

the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. (*Moran v. Burbine* (1986) 475 U.S. 412, 424.) By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle. (*Siebert, supra,* at 612-613.)

The *Siebert* Court then reviewed its own case of *Oregon v. Elstad* (1985) 470 U.S. 298. In *Elstad,* two police officers went to the suspect's

house to take him into custody for a burglary. Prior to the physical arrest, an officer accompanied the suspect into his living room where the suspect's mother was waiting. The officer told the suspect that he thought the suspect was involved in the burglary. At this point the suspect admitted to being at the scene. In allowing the admission of *Elstad's* pre-*Miranda* admission, the High Court held that the purpose of the stop in the living room was to inform the suspect's mother of the reason he was being arrested, not to interrogate the suspect and described the interaction in the house as having "none of the earmarks of coercion." (*Id.* at p. 316.)

However, in the instant case, the interrogation and warning procedure were not to inform a third person of the arrest as in *Elstad.* The question first procedure used in the instant case was designed to deceptively elicit incriminating pre-warning statements from appellant so as to strip the later *Miranda* warning of its prophylactic purpose. Under the guise of having an "informational" conversation with the police, appellant had already given them information about his ninja activities. Once this was accomplished, the warnings could no longer effectively advise appellant that he had a real choice to not to go further.

Respondent argued that there was no link between the pre-warning interrogations and the post-warning interrogations, in that the pre-warning interrogations dealt with basic booking and biographical questioning. (RB

at p. 72.) Respondent further claimed that the pre-warning part of the interrogation was not specific to the crimes about which the police interrogated appellant after the warnings were given. (*Ibid.*)

This argument in incorrect. The arresting officers were specifically instructed to arrest appellant and bring him directly to a Riverside Police facility. Under the guise of obtaining "booking information" the Riverside Police began to extract admissions from appellant about his "ninja" and martial arts activities. Given the context of the crimes charged, any involvement or even interest in such activities on the part of appellant was, in and of itself, inculpatory. This was done with deliberation, planning and skill. Appellant, not having been advised of his rights, simply didn't know what was coming next. He fell into the police trap, lulled by the gentle and almost fatherly aspect of the pre-warning interrogation. By the time the police decided that it was "safe" to warn appellant of his rights, he had already given admissions that would provide the basis for the balance of the rest of his admissions. There was no separation between the pre and post-warning interrogations. They involved the same officers, in the same place and at the same time. As the police knew full well that the perpetrator of the crimes they were investigating fancied himself a ninja, the post-warning interrogation were simply a continuation of the same

subject matter as the pre-warning interrogation.

Were they not suppressed by the trial court, the pre-warning statements would have been touted by the prosecutor as evidence of appellant's guilt. At very least, they would have amounted to an admission that appellant had taken training as to how to move with stealth at night, and that he had practiced the "arts" of invisibility, tools, climbing, escape and how to kill." (8th Supp.CT 14-15.)

The questioning after the *Miranda* warnings continued along the same lines as did the pre-warning questioning and progressed gradually to more incriminating statements which included appellant being in people's backyards in his ninja uniform (5th CT 164-167) to having a dream in which he saw a man stabbing a woman (5th CT 144-1146.)

There was no reason not to give the warnings from the outset of the questioning other than to obtain an unadvised admissions from appellant which the police could later use to extract additional admissions after the functionally ineffective warning was finally given. As stated in *Seibert,* "unless the warnings could place a suspect who had just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from

the first, unwarned and inadmissible segment." (*Siebert, supra* at p.612.)

These warnings could not have served this function. As fully discussed in the AOB (182 et seq), the "taint caused by the coercive impact of the deliberately improper tactics" had not been dissipated by time, change of location, change of general subject matter or by any other means. (See *United States v. Orso* (9th Cir, 2000) 234 F.3d 436, 441.) These tactics included a deliberately deceptive and misleading pre-warning interrogation to elicit "breakthrough" incriminating evidence by using ingratiating and conversational questioning to get appellant to commit to the fact that he practiced "martial" arts as one of his hobbies. (8th Sup.CT 6.) The police then followed this statement with "sympathetic" conversation about appellant's personal life (8th Supp CT 7 et seq) before turning back to the martial arts and, under the guise of interest in appellant's life, elicited from him that these arts included "the art of invisibility, the art of escape, and the art of tools, the art of climbing, the art of, uh, how to kill somebody and stuff like that." (8th CT 14-15.)

The procedure used by the police in this case was exactly that condemned by the High Court in *Siebert*. The police first obtained incriminatory information from appellant and then inserted a meaningless *Miranda* warning, in the midst of coordinated and continuing

interrogation. This procedure served no other purpose than to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." (*Siebert, supra,* 542 U.S. at pp. 612-613.)

If this sort of government chicanery is all it takes to subvert *Miranda*, then that landmark case's protections are without meaning. If the police are free to elicit incriminatory statements in a custodial setting without advising a suspect of his Constitutional right to remain silent, few suspects will be able to sort through a subsequently given *Miranda* warning and be able to appreciate and understand the rights therein contained. As stated above in *Siebert*, "telling a suspect that 'anything you say can and will be used against you,' without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail." (ARB, *supra,* at p.44)

As stated in the AOB, appellant's statement was the key piece of evidence in his conviction. It cannot be reasonably argued that the illegal admission of the statement was harmless error. Therefore, the entire judgment must be reversed.

IV. APPELLANT'S JANUARY 21, 1993 POST -*MIRANDA* WAIVER STATEMENT WAS INVOLUNTARY IN THAT IT WAS THE PRODUCT OF POLICE COERCION THAT OVERBORE APPELLANT'S FREE WILL THEREFORE, THE ADMISSION INTO EVIDENCE OF SAID STATEMENT VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

A. Summary of Argument

As discussed in Arguments II and III, upon appellant's illegal arrest he was taken to the police station where he was improperly questioned by the police without benefit of his *Miranda* rights. As such, any and all statements given to the police should be suppressed pursuant to Arguments II and III of this AOB, *supra.* However, in addition to these constitutional violations, the January 21, 1993, post-waiver statement was itself the product of impermissible police coercion, therefore involuntary. This provides yet a *third* reason to suppress appellant's January 21, 1993 statement to the police.

B. Summary of Respondent's Response

Without reference to any specific case authority or responding to the authority that appellant set forth in the AOB, respondent claimed that the interrogators' questions "were proper and did not individually or cumulatively overcome Scott's will in his decision to freely speak with the

detectives." (RB at p. 76.) It further maintained that Scott was an "above average" college student "planning on becoming an attorney" or a teacher. Respondent further stated that appellant worked at a movie theater and had a steady girlfriend and that his "age, sophistication, education, employment experience support the concept he maintained command to freely exercise his will in deciding whether to answer the detective's questions." (RB at p. 77.)

Respondent further concluded, without addressing appellant's particular legally supported arguments that "[T]here were no improper police tactics or coercion during Scotts's January 21, 1993 interview" and that the detectives acted "appropriately and professionally." (RB at p.77.)

In addition, respondent stated "assuming arguendo that the trial court erred in admitting Scott's statements, the error was not prejudicial" under the harmless error standard of *Chapman* as the statements obtained added little to information that the jury already possessed. (RB at 77.)

C. Appellant's Reply

Appellant has argued this issue in great detail in his AOB. (AOB Argument IV.) He has outlined in great detail the instances of overbearing police conduct and promises of leniency. In response, respondent could only make conclusory statements as to the legality of the police conduct.

Combined with the conduct of the police in not properly Mirandizing appellant, there is little doubt that appellant's post-warning statements were involuntary under the law as was discussed in the AOB.

However, there is one point that appellant must refute, if for nothing else because of its incongruity. In making its claim that appellant was a mature, intelligent and sophisticated individual who knew when to exercise his right to remain silent, respondent completely ignored its own witnesses and premise of its case; that appellant thought that he was a ninja, dressed in a ninja suit and jumped from roof top to roof top in an effort to show off and practice his "skills." Further, the penalty phase of the trial showed appellant to be a deeply troubled individual.

Running around in a black costume, fantasizing about being a ninja warrior and jumping from roof tops are inconsistent with "sophistication." Unable to counter appellant's arguments with any specific legal authority, respondent relies on trying to paint a troubled young man, obsessed with the idea that he was following in the footsteps of medieval Japanese warriors, as a sophisticate for the purposes of this argument. This is the same young man that the prosecutor referred to in his summation as "looney", "goofy", "strange" and "bizarre."(35 RT 6142.)

Once again, this error was not "harmless." It directly implicated

appellant from his own mouth and gave weight to otherwise weak or ambiguous evidence as to his guilt. Respondent stated the "the only thing new" revealed by appellant in this interview with the police was he confirmed that he knew the layout of the bedroom." (RB at p. 78.) This is not so. Without appellant's statement to the police, the prosecutor chiefly relied upon the evidence from the improperly joined counts to convict appellant of murder. (AOB, Argument I.) The only admissible evidence that connected appellant to the Kenny murder was the forensic evidence that put appellant in a group of thousands of others in the Riverside area that could have deposited the semen stain and a few belatedly reported statements to civilians that even they did not believe. It was appellant's illegally obtained statement that arguably placed appellant in the Kenny house, involved in the crime, that convicted him of the murder of Ms. Kenny. Hence, its admission was not harmless error.

V. APPELLANT'S RIGHT AGAINST SELF INCRIMINATION WAS VIOLATED BY THE POLICE FAILURE TO HONOR HIS INVOCATION OF HIS RIGHT TO REMAIN SILENT IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Appellant respectfully relies upon his Argument V in the AOB.

VI. THE JANUARY 21, 1993 SEARCH WARRANT WAS ISSUED WITHOUT SUFFICIENT PROBABLE CAUSE THEREBY VIOLATING APPELLANT'S RIGHT AGAINST ILLEGAL SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's Argument

On January 21, 1993, a search warrant was issued for the search of appellant's residence at 11832 Graham St., Moreno Valley, California. The application for the warrant was accompanied by an affidavit by Detective Hector Heredia. (8 CT 2203.) The warrant was executed the date of its issuance and the various items were seized. (see AOB Statement of Facts at pp 41 et seq.)

It is appellant's argument that the information provided to the magistrate in the affidavit to said warrant was insufficient to establish probable cause because the informant who provided the information to the police was not reliable in that the informant was not a "citizen informant" (See Argument II, *supra.*) Further there was insufficient corroborating evidence to establish probable cause for the search of appellant's residence.

B. Summary of Respondent's Response

The prosecutor argued that appellant did not have standing to challenge the search in that he did not have an "actual (subjective) expectation of privacy...[and that the expectation is] one that society is

prepared to recognize as reasonable." (RB at pp.84-85)

Further, respondent argued that there was sufficient information in the affidavit to support a conclusion that the informant was a citizen informant and hence reliable. (RB at pp. 86-87.) Further, it argued that even if probable cause was lacking, the executing officer, Detective Heredia, had a reasonable good faith belief in its existence and hence the evidence seized pursuant to the warrant should not be suppressed. (*United States v. Leon* (1984) 486 U.S. 897, 923; RB at pp. 88-87.)

C. Appellant's Reply

1. Appellant Has Standing to Challenge the Search

In its response brief, respondent never challenged appellant's contention that he had standing to challenge the search. All the respondent did was state that "it was undisputed that he lived at the Graham Street house" and state the general law that to challenge the constitutionality of a search a defendant must show an actual expectation of privacy that society is prepared to recognize. (RB at pp. 84-85; *Smith v. Maryland* (1979) 442 U.S. 735, 740.)

While respondent did not concede the standing issue, it did not argue against it. Appellant respectfully refers this Court to its Argument VI section B of the AOB, which fully discussed the issue of standing.

2.The Affidavit Did Not Contain Probable Cause

To a large extent, respondent responded to this Argument in the same way it responded to Argument II. Respondent stated that the anonymous informant was a "citizen-informant" and hence worthy of credibility.

Richard Decker may or may not have been a reliable individual. However, there was no ascertaining this from the affidavit. According to the affidavit, the initial phone tip did not mention appellant by name. It did not state that the informant observed any crimes nor did he indicate that the perpetrator of the crimes admitted to him any involvement in the "ninja" crimes. While the affidavit indicated that the informant saw appellant with certain weapons on his person and in a ninja costume, there was no indication in the affidavit as to how informant knew whether the "gun of some kind" or the other weapons were real or just part of the ninja costume. The affidavit stated that appellant told the informant that appellant had recently "stabbed someone" but no details were given as to this supposed stabbing. Further, the only "corroboration" in the affidavit as to the other informant's credibility was the statement by Detective Keers that she had met with the informant and he "appeared" to be responsible and credible person.

As discussed fully in this Reply, Argument II, *supra,* Richard Decker was not a "citizen-informant, hence, was not legally deserving of credibility without corroborating evidence. The only "corroborating" information was that garnered from appellant himself, who told the affiant that he possessed a pistol, a "ninja" uniform and certain "ninja weapons." (8 CT 2211.) However, appellant did not admit to committing any crimes or even illegally possessing these weapons. As such there was no corroborating evidence that appellant committed any crimes. Further, appellant's statements contained in the affidavit were the result of the illegally obtained statements and as such should not have been contained in the affidavit at all. Even if the information in the affidavit amounted to probable cause with the illegal statement considered, by law the illegal statement cannot be considered by the reviewing court in determining whether the affidavit is sufficient. (*Franks v. Delaware* (1978) 438 U.S. 154, 171-172; *People v. Murtha* (1993) 14 Cal.App. 4th 1112, 1124-1125.)

3. The "Good Faith Exception of *United States v. Leon* Does Not Apply

Regarding, respondent's claim that the "good faith" exception of *United States v. Leon* applies to the instant case, the law states as

follows.

In *United States v. Leon* (1983) 468 U.S. 897, 919, the Supreme Court held that the evidence cannot be suppressed if the police officer executing the warrant relies in good faith on said warrant which was issued by a neutral magistrate even though the warrant is later determined to be invalid. "Application of the good faith exception requires a factual presentation of the officers' activity, which is then measured against a standard of objective reasonableness." (*People v. Gottfried* (2003) 107 Cal.App.4th 254, 265 citing to *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 944.)

However, this objective standard requires that the executing officers have "a reasonable knowledge of what the law prohibits." (*Leon, supra* at 923.) In this vein, "any rookie officer knows uncorroborated, unknown tipsters cannot provide probable cause for an arrest or search warrant." (*Higgason v. Superior Court, supra,* 170 Cal.App.3d at p. 944.) Further, "where...neither the veracity nor the basis of the knowledge of the informant is directly established, the information is not so detailed as to be self-verifying and there is no logical or other reason verification from other sources cannot be achieved, ... the failure to corroborate may be indicative that it was objectively unreasonable for the officer to believe in the

existence of probable cause." (*People v. Maestras* (1988) 204 Cal.App. 3d 1208, 1220-1221; *People v. Johnson* (1990) 220 Cal.App.3d 742, 749.)

In the instant case, there was no corroboration that the informant, Richard Decker, was reliable. His information was not verified by independent sources. He did not witness the commission of any crimes and did not in any way explain his allegation that appellant was responsible for the "ninja crimes that were in the paper." Therefore, there was no *Leon* good faith exception as stated by respondent.

VII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO ORDER A HEARING TO TRAVERSE THE SEARCH WARRANT PURSUANT TO *FRANKS V. DELAWARE* IN VIOLATION OF APPELLANT'S RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE, RIGHT TO DUE PROCESS, RIGHT TO A FAIR TRIAL AND RIGHT TO A RELIABLE DETERMINATION OF PENALTY UNDER THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant will rely upon the argument set forth in the AOB.

VIII. THERE WERE NO SPECIFIC FACTS IN THE WARRANT AFFIDAVIT TO ESTABLISH PROBABLE CAUSE FOR THE SEIZURE OF IDENTIFICATION MATERIAL OF REGINA JOHNSON AND JOSEPH CHIDLEY, THEREFORE THE FAILURE TO SUPPRESS THIS MATERIAL VIOLATED APPELLANT'S RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE, TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO A RELIABLE DETERMINATION OF GUILT UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Appellant will rely upon the argument set forth in the AOB.

IX. THERE WAS INSUFFICIENT EVIDENCE FOR A TRUE FINDING OF THE SPECIAL CIRCUMSTANCE OF MURDER COMMITTED DURING THE COMMISSION OF A RAPE OR AN ATTEMPTED RAPE THEREBY VIOLATING APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND RELIABLE DETERMINATION OF PENALTY UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's Argument

Appellant was not charged with the crime of rape pursuant to Penal Code section 261. However, one of the special circumstances that made Count I punishable by the death penalty was that the murder was committed in the course of a rape or attempted rape. (Penal Code section 190.2 (a) (17)

(c).)[8] As such, the prosecutor was required to present sufficient evidence under the above-described standard to permit the jury to conclude beyond a reasonable doubt that appellant committed a rape or an attempted rape. (Penal Code section 190.4 (a).)

There was no evidence that Ms. Kenny was raped or that the perpetrator attempted to rape her. There was absolutely no indication from the pathologist who performed the autopsy, nor from any other witness, that there was any evidence of intercourse on Ms. Kenny's person. There was no sign of trauma to her private areas, nor was there any indication that the assailant attempted to remove her clothes. When Ms. Kenny's body was found she was wearing the same clothes that she had been wearing when her parents last saw her, two days before the discovery of her body. (30 RT 5248.) There was no seminal fluid anywhere on her body. The only evidence of any sexual activity was the ejaculate found on her pants. Further, there was no evidence that Ms. Kenny's clothes had been taken off and put back on, nor that any attempt was made to remove them as the stained pants were the ones that the victim wore home from her mother's

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8. Penal Code section 190.2 (a) (17) (c) reads "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing or attempting to commit...rape."

house on September 10, 1992. The only reasonable inference that can be drawn from these facts is that there was no attempt at penetration, therefore no attempted rape.

B. Summary of Respondent's Argument

The basis of respondent's argument was that the similarities between the non-murder counts and the murder count allowed the jury to draw a reasonable inference that appellant raped or attempted to rape Ms. Kenny. Respondent argued that the Chidley and Johnson rapes were so similar to the Kenny crime that and an inference can be drawn that it was the same perpetrator that committed all three crimes. (See also RB Argument I.) Respondent further stated that the evidence presented inferred that appellant had forced his way inside of Kenny's house the same way he forced Allison Schultz inside her house, by confronting her outside of her apartment.

C. Appellant's Reply

In Argument I, appellant discussed in great depth why the evidence of the other rapes is not cross admissible as to the murder count and why the murder count and the non-murder counts should not have been joined. Respondent's response to this Argument only further supports appellant's position. As stated in Argument I, there is a completely insufficient degree

of similarity between the two rape charges, or the Allison Schultz charges and the Kenny murder to allow for any sort of inferences to be made. The Chidley and Johnson rapes were committed by a perpetrator who wore a Ninja suit, carried Ninja weapons, had the same racial characteristics and build. There were other similarities to these crimes in that the perpetrator broke into both houses and to a certain extent made repeated inquiries about the "husband" and engaged the victim in other conversation The perpetrator told the victim that his friends were "coming for him." (29 RT 4973; 30 RT 5122-5123.)

While these two crimes may have had some similarities to each other, they had no significant similarities to the evidence presented about the Kenny offense. There was no evidence as to the physical appearance of the murderer, the weapons he carried, the clothes than he wore, whether he inquired about any man in Ms. Kenny's life or whether he spoke to her at all. According to the respondent, the attack on Ms. Kenny was not the result of the perpetrator entering the premises through a door or window as with the other charged crimes. Respondent argued that the fact that there were no sheets on Ms. Kenny's bed mirrors the perpetrator's attempt to remove trace evidence of his identity seen in other cases. However, as there was no evidence that there ever was a sheet on Ms. Kenny's bed. Further,

the fact that the perpetrator of the Kenny crime did not attempt to remove the trace evidence on Ms. Kenny's clothing belies respondent's argument. The only thing that these two sets of crimes had in common was that the victims were alone, at least at first, and they occurred at night in the same general part of town.

The respondent put a great deal of emphasis on the fact that the perpetrator of the Kenny crime ejaculated on her clothes. If anything, this is a further argument as to the *dissimilarities* of these crimes. Ms. Chidley and Ms. Johnson were actually raped. However, there was no proof of any rape having taken place at the Kenny residence. There was certainly nothing to have stopped the perpetrator, as according to the prosecutor he had Ms. Kenny under his control. Further, and perhaps most importantly, the perpetrator on the Chidley and Johnson crimes had the opportunity to kill his victims but did not. Such as not the case in the Kenny crimes.

As stated in the above Reply as to Argument I, respondent simply speculated as to what might have happened in the Kenny rape and used the facts of the other two rapes to substitute for evidence. In reality, the evidence of the Chidley and Johnson crimes lend no proof as to the perpetrator of the Kenny crime at all. Therefore, respondent's use the perpetrator's actions in the other crimes to prove that Ms. Kenny was

murdered during the course of a rape or attempted rape cannot be taken into account in determining whether there is sufficient evidence to sustain the verdict on the special circumstances count.

Respondent's argument in RB Argument I that the perpetrator's actions in the Schultz crimes helps prove the Kenny offense is similarly flawed. Except for the dress of the assailant, the Schultz crimes had *nothing* in common with any of the other crimes. In that set of crimes, the assailant attacks both a woman *and* a man *outside* of their apartment. The motivation was unclear and certainly there was no indication that there was an intent to rape. Therefore, respondent's claim that there were sufficient similarities between Schultz and the Kenny crimes in completely unfounded and any evidence in the Schultz crimes cannot be used to sustain this special circumstance.

Therefore, none of the evidence from any of the other crimes should have been admissible against appellant in the Kenny crime and therefore the evidence of the non-murder offenses cannot be considered in the determination of the sufficiency of the rape-murder special circumstance. Regarding the Kenny crime itself, the lack of evidence of the special circumstances has been completely discussed in AOB argument IX. There was no evidence that Ms. Kenny was raped. There was absolutely no

indication from the pathologist who performed the autopsy, nor from any other witness, that there was any evidence of intercourse on Ms. Kenny's person. There was no sign of trauma to her private areas, nor was there any indication that the assailant attempted to remove her clothes. When Ms. Kenny's body was found she was wearing the same clothes that she had been wearing when her parents last saw her, two days before the discovery of her body. (30 RT 5248.) There was no seminal fluid anywhere on her body. The only evidence of any sexual activity was the ejaculate found on her pants. Further, there was no evidence that this ejaculate was deposited while the victim was still alive.

Further, there was no circumstantial evidence that penetration occurred. The fact that semen was found on clothes that the victim had been wearing the day before her murder does not lend itself to an inference of penetration. In fact, the only logical and reasonable inference can be that the victim's clothes were never removed at all, making vaginal penetration impossible.

Further, there was no evidence that appellant even attempted to rape the victim. As rape requires penetration, attempted rape must include an attempt to penetrate the victim, coupled with an act, albeit ineffectual, toward the commission of penetration. There was no direct or

circumstantial evidence as to this attempt. Respondent cites to *People v. Guerra* (2006) 37 Cal.4th 1067, 1132 to support its position that the absence of sperm in Ms. Kenny's body was not grounds for overturning the special circumstances. However, this citation is unavailing. In *Guerra,* there was a plethora of evidence to support the fact that the victim was killed during the course of an attempted rape. Guerra had shown a repeated sexual interest in the victim, an interest not shared by her. He had also repeatedly made overtly sexual gestures towards her and had made statements to third parties that indicated that he wanted to get the victim alone. He had also entered the victim's residence several times before the killing. Further, the wounds on the victim was of a sexual nature, Guerra having stabbed and slashed the victim's breasts. *Guerra, supra,* at pp. 131-132.) None of this type evidence was present in the case of Ms. Kenny.

Therefore, there was insufficient evidence to justify a conviction as to the special circumstance allegation that the murder was committed during the course of a rape. Further, as there is insufficient evidence that the perpetrator raped or attempted to rape Ms. Kenny, there can be no proof of the remaining special circumstance, that the victim was killed during the commission of a burglary, as the underlying predicate felony of the burglary was rape. Therefore, as there is insufficient evidence to support either of the

special circumstances, the judgment of death must be reversed.

X. THE ADMISSION OF EVIDENCE THAT NON-TESTIFYING DEFENSE EXPERTS EXAMINED THE BALLISTICS AND SHOE-PRINT EVIDENCE VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND TO THE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant will rely upon the argument set forth in the AOB.

XI. THE TRIAL COURT ERRED BY ALLOWING INADMISSIBLE PREJUDICIAL EVIDENCE THAT APPELLANT WAS ASKED TO LEAVE HIS PRIOR RESIDENCE, THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's Argument

During the direct examination of Todd Wolf, the prosecutor elicited testimony that in 1991 and 1992, appellant was living with him in Mr. Wolf's apartment in Moreno Valley. (26 RT 4402-4403.) The prosecutor then asked whether at some point Mr. Wolf asked appellant to leave. Defense counsel objected on relevancy grounds, stating that the appellant left the apartment in question months before the first of the crimes charged, therefore "what he was doing in the months preceding the first event giving rise to an allegation is irrelevant in this action." (26 RT 4405.)

Upon inquiry by the court, the prosecutor stated that the testimony was being elicited to establish appellant's "habit and custom" as well as the prowling charge. The prosecutor added "Plus, the theory–part of the theory of the People's case is that this guy went out wandering around. And by his own admission, he said he would be out wandering around." (26 RT 4405.)

The court held that the testimony could be admitted for this limited purpose and the witness subsequently testified that he asked appellant to leave the apartment because "he was staying out to late... repeatedly", and when asked to "not to do that" he continued to do so. (26 RT 4407.)

Appellant argued that the trial court erred in allowing this evidence before the jury in that it was irrelevant to any issue. While the prosecutor called this evidence "habit and custom", in essence evidence of appellant's late hours were nothing more than evidence of disposition to commit crimes at night, and as such forbidden under Evidence Code section 1101(a).

B. Summary of Respondent's Response

Respondent adopted the position espoused by the prosecutor at trial as to the admissiblity of this evidence.

C. Appellant's Reply

The trial court was incorrect in admitting this evidence based on a

"habit and custom" analysis. The admission of evidence of "habit and custom" is controlled by Evidence Code section 1105 and has absolutely nothing to do with the factual situation in the instant case. According to this Court the word "habit", as used in said section means a person's regular or consistent response to a repeated situation. The word "custom," means the routine practice or behavior on the part of a group or organization that is equivalent to the habit of an individual. Habit and custom are often established by evidence of repeated instances of similar conduct. (*People v. Memro* (1985) 38 Cal.3d 658, 681.)

Obviously "custom" has nothing to do with the instant case. Further, as far as "habit " is concerned, respondent does not even venture a guess as to what "repeated situation" or "regular response" the prosecutor and the court were referencing. The only repeated situation was nightfall. The only "regular response" was that sometimes the appellant stayed out late at night. The problem with respondent's argument and the court's position is appellant's behavior in not returning to his shared apartment at a time agreeable to his roommate has no connection with the commission of violent nocturnal crimes, therefore is not relevant. However, it is highly prejudicial in that it invites the jury to speculate that the reason why appellant stayed out late was to commit unspecified, and likely violent,

crimes.

This error cannot be viewed in a vacuum. The introduction of this prejudicial evidence was part and parcel of an attempt by the prosecutor to improperly bolster his weak case in the Kenny killing through the use of unrelated charged offenses (See Argument I, IX, *supra*), or unrelated non-charged incidents such the ones discussed in this Argument and the one described below in Argument XII.

Further, section 1005 states that evidence of habit or custom can only be employed if "otherwise admissible." It is clearly barred by Evidence Code section 1101(a), as argued in Argument XI of the AOB.

XII. THE TRIAL COURT ERRED BY ALLOWING INADMISSIBLE PREJUDICIAL EVIDENCE OF THE ALLEGED ASSAULT ON MATTHEW TEXAR, THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Argument

The prosecution called Matthew Texar, a employee of the movie theater where appellant worked prior to his arrest. He was asked, "Now at some point in time did anything unusual happen between you and Mr. Scott?" (26 RT 4437.) Counsel objected to the question on the grounds of

relevance and asked for a side bar. (26 RT 4438.) Upon inquiry by the court, the prosecutor revealed that he sought to elicit testimony from the witness that one time while the witness was at work appellant took "a swipe at him with a knife." (26 RT 4438-4439.) The prosecutor stated that this testimony would also prove that appellant had access to a knife. (26 RT 4439.) The court noted that this evidence also indicated "his ability to come behind someone with stealth, so to speak." The court further stated that there was no undue prejudice with regard to Evidence Code 352, and overruled counsel's objection. (26 RT 4439.)

B. Summary of Response

Respondent stated that this evidence was admissible because very rarely do people carry a knife around with them while they go about their everyday activities. It also proved that appellant was adept at stealthily moving around people and that appellant would use a knife against other persons "without provocation." (RB at p. 117.)

C. Appellant's Response

Appellant has no doubt that the prosecution wanted to show that he was "adept" at using an knife and liked to sneak up behind people while so armed. However, this is precisely why this evidence is inadmissible. It was admitted simply to show predisposition under Evidence Code 1101(a), and

hence is inadmissible. Appellant has discussed section 1101 in great length in Argument I of his AOB. In *Thompson* this Court explained the reason for the prohibitions of 1101(a):

> The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. (See *People v. Schader, supra,* 71 Cal.2d at p. 772.) Rather, it is the insubstantial nature of the inference as compared to the "grave danger of prejudice" to an accused when evidence of an uncharged offense is given to a jury. (Citations) As Wigmore notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." (Citation) It breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses ...." (Citation) Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." (Citation.) "We have thus reached the conclusion that the risk of convicting the innocent ... is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty." (Citation) (*People v. Thompson*, *supra,*27 Cal.3d at p. 317, fns. omitted.)

Therefore, evidence must be excluded under section 1101, subdivision (a), if the inference it directly seeks to establish is solely one of propensity to commit crimes in general, or of a particular class. (*Ibid.*) Once again, the only purpose that this evidence served was to prejudice appellant by allowing the jury to improperly consider prior acts of violence which had no relevance to the charged crimes.

As stated in Argument XI, *infra,* this error is part of an overarching

pattern of error in this case that permitted the jury that was deciding the murder count to consider evidence that appellant was an individual predisposed to committing crimes of violence. Errors in the application of state law that render a trial fundamentally unfair violate the due process clause of the United States Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62.) The combination of these errors tainted the entire trial and deprived appellant of a fair trial and due process of law. (*Mak v. Blodgett* (9th Cir.1992) 970 F.2d 614, 622.)

The Ninth Circuit case of *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 specifically held that the trial court's decision to allow in irrelevant and prejudicial evidence that petitioner had a fascination with knives and possessed knives that theoretically could have been used in the charged crime merited a reversal on his conviction for the stabbing death of his mother. The *McKinney* court held that evidence pertaining either to the general possession of the knives or petitioner's interest in them went only to the character of petitioner and had no relevance to the charged crime.

The McKinney court then applied the above stated *Estelle* standard and held that the injection of this improper character evidence rendered the trial fundamentally unfair and deprived petitioner of due process of law. (*Id.* at pp.1384-1386.) The court held that the improperly introduced evidence

painted the picture of petitioner as having "a fascination for knives and a "commando life-style." (*Ibid.*) The court considered this nothing less than "propensity evidence", which had substantial and injurious effect or influence in determining the jury's verdict.

The error, either standing alone, or in combination with the other errors complained of above, render this trial fundamentally unfair in that appellant was effectively found guilty of the murder based upon evidence that had no relation to the murder at all. This evidence related to either the unrelated charged offenses or to the unrelated uncharged incidents. (Arguments XI and XII.) As such, appellant was denied his right to due process of law and the judgment should be reversed.

XIII. THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL EVIDENCE THAT A RAPE VICTIM RECENTLY HAD A BABY, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION

Appellant respectfully submits that this issue has been sufficiently briefed by both counsel in Appellant's Opening Brief and Respondent's Response. This evidence is yet another example of how the trial was infused with irrelevant and prejudicial evidence against appellant which

violated his right to due process of law. (See Argument XII C, *supra.*)

XIV. THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO PRESENT "VICTIM IMPACT" EVIDENCE THAT FAR EXCEEDED THE LIMITS SET BY THIS COURT, THEREBY DENYING APPELLANT THE RIGHT TO A RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Appellant's Argument

Over appellant's objection, the trial court improperly allowed the prosecutor to present victim impact evidence that exceeded constitutionally imposed limits, causing the jury's emotion to hold sway over reason and denying appellant a reasoned determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution.

B. Summary of Respondent's Argument

Respondent argued that the victim impact evidence presented fell within the parameters set by this Court and was not so emotionally charged so as to deny appellant a fair trial.

C. Appellant's Reply

As stated in the AOB (Argument XIV), the genesis of the use of "victim impact" evidence in California lies in the United States Supreme

Court case of *Payne v. Tennessee* (1991) 501 U.S. 808.(See *People v. Edwards* (1991) 54 Cal.3d 781.)

In both *Payne* and *Edwards* any "victim impact" testimony related to the direct victims of the crime. The evidence related either directly to the crime itself [the helplessness, size, or vulnerability of the victims vis a vis the defendant], the uniqueness of the victim as a person, or to the physical or emotional pain directly suffered by a person who was present at the crime scene.

In the instant case, much of the victim impact evidence allowed by the trial court far exceeded the initial scope of *Payne* and *Edwards* in that it has little to do with the uniqueness of Ms. Kenny as a person. Instead, it related to the psychological reactions of the Kenny family. The victim's father was allowed to testify as to how he kept imagining how much his daughter suffered over the last hours of her life. The victim's sister, Mary, was allowed to testify how her family all slept in the same bed now and she was afraid to go out at night. Mary's husband also discussed in depth his obsession over his children's safety. Glenn Kenny, the victim's brother was allowed to testify only about how afraid his family was and how the children were affected by their father's fear. He told the jury he believed that "there really were monsters out there." Finally, the court allowed the

victim's mother to testify as to how it affected her finding her daughter's body.

This type of evidence is far removed from the type of evidence approved in *Payne* and *Edwards*. As stated in the AOB, it deals far more with the details of the reactions of extended family members and the generic psychological affect of violence than it does the unique character of the victim. In his concurring opinion in *People v. Robinson* (2005) 37 Cal.4th 592, 657, Justice Moreno warned against the expansion of the scope of allowable victim impact evidence beyond the original vision of *Payne* . Justice Moreno stated that *Payne* left intact the holding of *Booth v. Maryland* (1987) 482 U.S. 496 that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. In explaining why the admission of such characterization and opinion evidence was unconstitutional, Justice Moreno stated: "One can understand the grief and anger of the family caused by the brutal murders in this case, and there is no doubt that jurors generally are aware of these feelings. But the formal presentation of this information by the State can serve no other purpose than to inflame the jury and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." (*Id* at p. 656 quoting

Booth, supra, 482 U.S. at p. 508.)

The evidence disapproved of by Justice Moreno included testimony from one of the murder victims' father who testified: " Even though [Brian] was 18 years old and now an adult, as a father you always feel that you are there to protect your children and it is very difficult to think that at the time when he most needed somebody I couldn't be there to help him. How can I ever escape the image of my son's terror as he defenselessly pleaded for his life and not by accident, not in anger, not in fear, but for a few hundred dollars someone could look my son in the eye, and without feeling or mercy, in a point-blank range shoot him in the face, then put the gun against the side of his head and shoot him again."

Justice Moreno stated that the above testimony was only minimally related to the valid purpose of reminding the jury that the victim is an individual whose death represents a unique loss to society and in particular to his family. (*Robinson, supra,* 37 Cal.4th at p.657 , citing to *Payne, supra,* 501 U.S. at p. 825.) Rather, it is quite plainly "the admission of a victim's family members' characterizations and opinions about the crime [and] the defendant," which violates the Eighth Amendment. (*Ibid.*)

Justice Moreno cited to other testimony by another victim's mother who stated "All of these things that you have heard about replay in our

minds like videotape, the events of what happened at Subway. I can see James and what his terror must have been like in seeing his best friend shot. How afraid he must have been on his knees asking for his life. I can feel the gun to his head. To this day I don't understand how I slept so soundly and didn't know. You'd think that you would. I don't understand anybody being able to do that. I can hear him moaning as he lay on the ground and bled from his wound and there wasn't anybody there to help him." (*Robinson, supra,* at p. 657.)

Again, Justice Moreno found this statement to be only minimally related to the purpose of victim impact evidence discussed above and concluded "In fact, I would hold as a general rule that testimony of victims' friends and family regarding their imagined re-enactments of the crime be excluded. Such testimony is too far removed from victim impact evidence's central purpose of explaining the loss to the family and society that resulted from the victim's death, and can too easily lend itself to improper characterization and opinion of the crime and defendant, to pass muster under the Eighth Amendment. Of course, if the victim impact witness actually witnessed the crime occurring, such testimony would be admissible." (*Robinson, supra,* at pp. 657-658.)

Under Justice Moreno's wise limitations on "victim impact

evidence" much of the testimony of the victim's parents would have been excluded as violative of the Eighth and Fourteenth Amendments. This "victim-impact" testimony is such a departure from the original intent of *Payne* and *Edwards* that the trial court erred in not excluding it. Unless some practical restriction is put on this type of testimony, there will soon be no limitations at all. Any collateral consequence of the crime will be admissible to show the damage that a defendant caused and the uniqueness of the victim will be lost underneath an avalanche of feelings, opinions and fears of any number of penalty phase witnesses who were neither percipient witnesses nor even members of a victim's nuclear family.

While all of the above described testimony in the instant case exceeded Justice Moreno's limitations on "victim-impact" testimony, the testimony of the victim's father was particularly egregious. Respondent argued that "there was nothing improper or prejudicial about Kenny's father's testimony." (RB at p. 127.) It considered Mr. Kenny's testimony nothing more than testimony by a grief stricken father as to the impact on him of his daughter's death. (*Ibid.*)

What the respondent did not state is that Mr. Kenny's testimony did not relate to his daughter's "uniqueness as a human being" but was, in essence, an imagined re-enactment of the crime. As Justice Moreno said in

Robinson, this testimony is such a departure from the original intent of *Payne* and *Edwards* that it must be excluded.

However, it was not excluded. Instead, the jury heard testimony that could only have had the effect of encouraging them to also speculate as to Ms. Kenny's final moments and to conjure up the worse possible factual scenario. This testimony could only have caused the jury to substitute emotion and revulsion for facts. The prejudicial impact of this could only have been enormous.

As such, appellant urges this Court to find that the victim impact evidence allowed by the trial court was so far removed from the original scope of *Payne* that appellant's Eighth and Fourteenth Amendment rights were violated and that he was deprived of a fair determination of penalty.

XV. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD.

Appellant demonstrated in his opening brief that California's statute violated the Eighth and Fourteenth Amendments because the statute does not meaningfully narrow the pool of murderers eligible for the death penalty. (AOB, Argument XV.) Appellant also demonstrated that long

established United States Supreme Court precedent holds that to avoid the Eighth Amendment's proscription against cruel and unusual punishment the state must rationally and objectively narrow the class of murderers eligible for the death penalty. (AOB Argument XV, citing *Zant v. Stephens* (1983) 462 U.S.862, 878.)

This core constitutional principle was most recently reiterated in *Kansas v. Marsh* (2006) 548 U.S. 163, where in an opinion by Justice Thomas, the High Court held that while states had wide discretion to determine the parameter's of their death penalty laws, a death penalty scheme must at an absolute minimum ensure that the procedure "rationally narrow[s] the class of death-eligible defendants." (*Id.* at pp. 173-174.)

This Court has not considered whether Penal Code section 190.2's all embracing special circumstances, together with the Court's ever more expansive interpretation of those special circumstances, fails to rationally narrow the eligibility pool. In light of the increasing role the United States Supreme Court has given narrowing in its death penalty jurisprudence, it is time this Court did so.

XVI. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Appellant respectfully states that this Argument has been sufficiently briefed in Appellant's Opening Brief.

XVII. THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

Appellant proved his death verdict is unconstitutional because it was not premised on findings beyond a reasonable doubt by unanimous jury. (AOB, Argument XVII.) Respondent relied on this Court's precedent in the argument that his claim should be rejected. Appellant writes here only to urge that his claim must be considered in light of *Cunningham v. California* (2007) 127 S.Ct. 856. This case, supports appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt and by unanimous decision of the jury. Because of *Cunningham*, this Court's effort to distinguish *Ring v. Arizona* (2002) 536 U.S. 584 and *Blakely v. Washington*

(2004) 542 U.S. 296 should be re-examined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731 [same].)

The *Blakely* Court held that the trial court's finding of an aggravating factor violated the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466, entitling a defendant to a jury determination of any fact exposing a defendant to greater punishment than the maximum otherwise allowable for the underlying offense. The Court held that where state law establishes a presumptive sentence for a particular offense and authorizes a greater term only if certain additional facts are found (beyond those inherent in the plea or jury verdict), the Sixth and Fourteenth Amendments entitle the defendant to a jury determination of those additional facts by proof beyond a reasonable doubt. (*Blakely v. Washington, supra,* 542 U.S. at pp. 303-304.)

In *Cunningham v. California, supra,* the United States Supreme Court considered whether *Blakely* applied to California's Determinate Sentencing Law. The question was does the Sixth Amendment right to a jury trial require that the aggravating facts used to sentence a noncapital defendant to the upper term (rather than to the presumptive

middle term) be proved beyond a reasonable doubt? The High Court held that it did, reiterating its holding that the federal Constitution's jury trial provision requires that *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt, including the aggravating facts relied upon by a California trial judge to sentence a defendant to the upper term. In the majority's opinion, Justice Ginsburg rejected California's argument that its sentencing law "simply authorize[s] a sentencing court to engage in the type of fact finding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p. 868, citing *People v. Black* (2005) 35 Cal.4th 1238, 1254) so that the upper term (rather than the middle term) is the statutory maximum. The majority also rejected the state's argument that the fact that traditionally a sentencing judge had substantial discretion in deciding which factors would be aggravating took the sentencing law out of the ambit of the Sixth Amendment: "We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions." (*Id.* at p. 869)

Justice Ginsburg's majority opinion held that there was a bright line rule: "If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied. (*Ibid.* citing to *Blakely*, *supra,* 542 U.S., at 305, and n. 8.)

In California, death penalty sentencing is parallel to non-capital sentencing. Just as a sentencing judge in a non-capital case must find an aggravating factor before he or she can sentence the defendant to the upper term, a death penalty jury must find a factor in aggravation before it can sentence a defendant to death. (*People v. Farnam* (2002) 28 Cal.4th 107, 192; *People v. Duncan* (1991) 53 Cal.3d 955, 977-978; see also CALJIC No. 8.88.) Because the jury must find an aggravating factor before it can sentence a capital case defendant to death, the bright line rule articulated in *Cunningham* dictates that California's death penalty statute falls under the purview of *Blakely*, *Ring*, and *Apprendi*.

In *People v. Prieto* (2003) 30 Cal.4th 226, 275, citing *People v. Ochoa* (2001) 26 Cal.4th 398, 462, this Court held that *Ring* and *Apprendi* do not apply to California's death penalty scheme because death penalty sentencing is "analogous to a sentencing court's traditionally discretionary

decision to impose one prison sentence rather than another." However, as noted above, *Cunningham* held that it made no difference to the constitutional question whether the fact finding was something "traditionally" done by the sentencer. The only question relevant to the Sixth Amendment analysis is whether a fact is essential for increased punishment. (*Cunningham v. California, supra*, 127 S.Ct. at p. 869.)

This Court has also held that California's death penalty statute is not within the terms of *Blakely* because a death penalty jury's decision is primarily "moral and normative, not factual" (*People v. Prieto, supra*, 30 Cal.4th at p. 275), or because a death penalty decision involves the "moral assessment" of facts "as reflects whether defendant should be sentenced to death." (*People v. Moon* (2005) 37 Cal.4th 1, 41, citing *People v. Brown* (1985) 40 Cal.3d 512, 540.) This Court has also held that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32, citing *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn.14.)

None of these holdings are to the point. It does not matter to the Sixth Amendment question that juries, once they have found aggravation, have to make an individual "moral and normative" "assessment" about what weight to give aggravating factors. Nor does it matter that once a juror finds facts, such facts do not "necessarily determine" whether the defendant will be sentenced to death. What matters is that the jury has to find facts – it does not matter what kind of facts or how those facts are ultimately used. *Cunningham* is indisputable on this point.

Once again there is an analogy between capital and non-capital sentencing: a trial judge in a non-capital case does not have to consider factors in aggravation in a defendant's sentence if he or she does not wish to do so. However, if the judge does consider aggravating factors, the factors must be proved in a jury trial beyond a reasonable doubt. Similarly, a capital juror does not have to consider aggravation if in the juror's moral judgement the aggravation does not deserve consideration; however, the juror must find the fact that there is aggravation. *Cunningham* clearly dictates that this fact of aggravation has to found beyond a reasonable doubt.

The United States Supreme Court in *Blakely* as much as said that its ruling applied to "normative" decisions, without using that phrase. As Justice Breyer pointed out, "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p.328.) Merely to categorize a decision as one involving "normative" judgment does not exempt it from constitutional constraints. Justice Scalia, in his concurring opinion in *Ring v. Arizona*, *supra*, 536 U.S. at p. 610, emphatically rejected any such semantic attempt to evade the dictates of *Ring* and *Apprendi*: "I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be found by the jury beyond a reasonable doubt."

Because California does not require that aggravation be proved beyond a reasonable doubt, it violates the Sixth Amendment.

A second recent United States Supreme Court case also supports appellant's argument that a sentence must be based on the findings beyond

a reasonable doubt by a unanimous jury. In *Brown v. Sanders* (2006) 546 U.S. 212, the High Court clarified the role of aggravating circumstances in California's death penalty scheme: "Our cases have frequently employed the terms 'aggravating circumstance' or 'aggravating factor' to refer to those statutory factors which determine death eligibility in satisfaction of *Furman's* narrowing requirement.(See, e.g., *Tuilaepa v. California,* 512 U.S., at 972.) This terminology becomes confusing when, as in this case, a State employs the term 'aggravating circumstance' to refer to factors that play a different role, determining which defendants *eligible* for the death penalty will actually *receive* that penalty." (*Brown v. Sanders*, *supra*, 546 U.S. at p. 216, fn. 2, italics in original.) There can now be no question that one or more aggravating circumstances above and beyond any findings that make the defendant eligible for death must be found by a California jury before it can consider whether or not to impose a death sentence. (See CALJIC No. 8.88.) As Justice Scalia, the author of *Sanders,* concluded in *Ring:* "wherever factors [required for a death sentence] exist, they must be subject to the usual requirements of the common law, and to the

requirement enshrined in our Constitution in criminal cases: they must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at p. 612.)

In light of *Brown* and *Cunningham,* this Court should re-examine its decisions regarding the applicability of *Ring v. Arizona* to California's death penalty scheme.

XVIII. THE DIRECTIVE OF CALJIC NO. 8.84.1 AND 8.85 TO THE JURY TO DETERMINE THAT FACTS FROM THE EVIDENCE RECEIVED DURING THE ENTIRE TRIAL VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO LIMIT THE AGGRAVATING CIRCUMSTANCES TO SPECIFIC LEGISLATIVELY-DEFINED FACTORS

Appellant respectfully states that this Argument has been sufficiently briefed in Appellant's Opening Brief.

XIX. THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

Appellant respectfully states that this Argument has been sufficiently briefed in Appellant's Opening Brief.

XX. EVEN IF THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

Appellant respectfully states that this Argument has been sufficiently briefed in Appellant's Opening Brief.

XXI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully states that this Argument has been sufficiently briefed in Appellant's Opening Brief.

XXII. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

There were numerous penalty trial errors in this case. There were also significant guilt phase errors. This Court has recognized that guilt phase errors that may not otherwise be prejudicial as to the guilt phase may

nevertheless improperly and adversely impact the jury's penalty determination. (See, for example, *In re Marquez* (1992) 1 Cal.4th 584, 605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on the sentencing outcome. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 ; People v. Holt (1984) 37 Cal.3d 436, 459.)

The cumulative weight of the guilt and penalty phase errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief in respect to various guilt phase errors, appellant's rights were violated under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, appellant was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Together, the cumulative effect of the errors was prejudicial.

It is both reasonably probable and likely that both the jury's guilt and penalty determination were adversely affected by the cumulative errors. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In the absence of the errors, the outcome would have been more favorable to appellant. It certainly cannot be said that the errors had "no effect" on the jury's penalty verdicts.

CONCLUSION

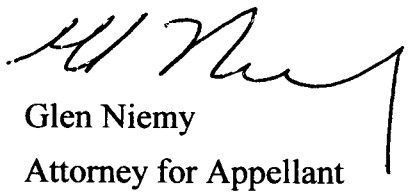
By reason of the foregoing, appellant David Lynn Scott respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter remanded to the trial court for a new trial.

Appellant was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of guilt and a reliable determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

Dated: June 8, 2008

Respectfully submitted,



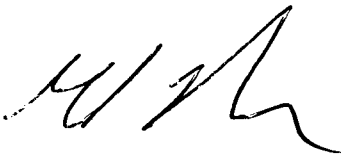
Glen Niemy
Attorney for Appellant

CERTIFICATION OF COMPLIANCE

I Glen Niemy, certify that the attached Appellants Reply Brief used a 13 point Times New Roman type and contains 20,646 words.

June 8, 2008

Respectfully submitted,



Glen Niemy

DECLARATION OF SERVICE

re: People v. David Scott
S068863

I, Glen Niemy, declare that I am over 18 years of age, not a party to the within action, my business address is P.O. Box 764, Bridgton, ME. I served a copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing the same in envelopes addressed respectively as follows;

Clerks Office
California Supreme Court
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Original and 14 copies

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Each said envelope was then on June 11 2008, sealed and deposited in the United States Mail in Bridgton, ME, with the postage thereof fully prepaid.

I declare under the penalty of perjury and laws of the State of California and Maine that the foregoing is true and correct.

Executed on June 11, 2008
Bridgton, ME

Glen Niemy