No. S076175

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ELOY LOY,
Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

(HONORABLE CHARLES D. SHELDON, of the Superior Court

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JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

No. S076175

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,	)	
v.	)	(Los Angeles County Superior Court No. NA029308)
ELOY LOY, Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

In an Amended Information filed on September 22, 1998, appellant was charged with the murder of Monique Arroyo on May 9, 1996, in violation of Penal Code section 187, subdivision (a). It was further alleged that the murder was committed while appellant was engaged in the commission of a lewd and lascivious act on a child under age 14, in violation of Penal Code section 190.2, subdivision (a)(17). (2 CT 403-404.)

Jury trial began before Judge Charles Sheldon on November 3, 1998. Jury selection was conducted on November 9 and 10 and was concluded on November 12, when the jury and alternates were selected and sworn. (2 CT 465-466, 468-469, 483.)

On November 13, 1998, opening statements were given by both the prosecution and defense. (2 CT 484-484A; 5 RT 1071-1084.)

The prosecution guilt phase case-in-chief concluded on November 23, 1998. (2 CT 498-499; 8 RT 1842.) A defense motion for judgment of acquittal based on insufficiency of the evidence was made at the close of

the prosecution case, and was denied by the trial court. (8 RT 1843-1845.)

The defense case began on November 23 and concluded on November 30, 1998. (2 CT 506-507; 9 RT 2129.) The prosecution rebuttal case was presented on November 30. (2 CT 506-507; 9 RT 2156.)

On December 1, 1998, prosecution and defense closing arguments were given. (10 RT 2189-2215; 2215-2273; 2273-2294) The court instructed the jury. (10 RT 2184-2189; 2295-2339.) The jury retired and deliberated for about twenty minutes. (10 RT 2339, 2343; 2 CT 513-514.)

The jury deliberated for a full day on December 2, 1998. (2 CT 518-524; 10 RT 2344-2345.) On December 3, the jury asked for read back of the following information:

1. A re-read of the court reporter's notes of testimony supporting Mr. Larkin's final argument regarding "Monique was in defendant's car. We think it might be in Joey Arroyo's testimony."
2. A re-read of Dr. Faulkner's testimony about how he arrived at his 84-88 hours estimate.
3. A re-read of "Erin Riley's testimony of item no. 52, bloodstain in trunk. Explanation of Ratio 1 over 125,000 and 1 over 5,100."
4. "Reread of Erin Riley's testimony relating to the testing of the comforter, item 13." (2 CT 518-524.)

Following consultations between Court and counsel, and this read back, the jury continued deliberating at 10:36 A.M. (10 RT 2353.)

Mid-day on December 4, the jury returned a verdict finding Mr. Loy guilty and finding the special circumstance allegation true. (2 RT 528, 534-535; 10 RT 2361-2365.)

On December 7, the penalty phase began. The prosecution made an opening statement (10 RT 2390-2391), but the defense did not. On the same day, the prosecution presented its case in aggravation. (3 CT 546-547; 10 RT 2455.)

On December 8, the defense made an opening statement and began to present its case in mitigation of penalty. (11 RT 2489-2490; 3 CT 548-549.)

On December 9, additional mitigation evidence was presented and the defense rested. (12 RT 2672.) Both sides presented closing arguments. (12 RT 2687-2708, 2714- 2727.) The jury was instructed, and began deliberating at 2:40 P.M. (12 RT 2678-2687, 2727-2750; 3 CT 550-552.)

On December 11, 1998, the jury returned at 2:43 P.M. with a verdict of death. (12 RT 2758-1762; 3 CT 683, 684-685.)

Formal sentencing took place on January 14, 1999, in Mr. Loy's absence.[1] Judge Sheldon denied motions for a new trial and to modify the verdict, and sentenced Mr. Loy to death. (12 RT 2788-2805; 3 CT 723-728.)

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a sentence of death. (Pen. Code., § 1239, subd. (b); Cal. Rules of Court, rule 13.)

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[1] A personal waiver of appearance was filed, pursuant to Penal Code section 977. (2 CT 253.) Mr. Loy waived his appearance due to problems he encountered in the jail when his case received media attention. (12 RT 2768-2789.)

STATEMENT OF FACTS

Introduction

The prosecution's guilt phase theory was that Mr. Loy touched with lewd and lascivious intent and then murdered his twelve-year-old niece, Monique Arroyo, in her bedroom while her parents and brothers slept in nearby bedrooms, and then left the body in a vacant lot less than a mile away. This part of the prosecution case was entirely speculative and circumstantial. In fact, there was no physical evidence proving how Monique left her house that night.

The physical evidence which allegedly tied Mr. Loy to the crime - two tiny spots of genetic material - could potentially have been connected to other family members, but the prosecution never tested any other family member during the investigation of this case. Other trace evidence collected at the crime scene and in Monique's bedroom exculpated Mr. Loy and could not be connected to him.

In order to make up for the evidentiary gap in its underlying case, the prosecution presented testimony from two women whom Mr. Loy had previously been convicted of sexually assaulting. A friend of Monique's testified that Monique accused her uncle of having fondled her in the week before she disappeared.

The guilt phase defense case was that Mr. Loy had nothing to do with Monique's death and that the forensic evidence was weak, unreliable, and insufficient to connect him with Monique's death.

The penalty phase aggravation case consisted of victim impact testimony and evidence concerning other criminal activity.

The penalty phase mitigation case was about Mr. Loy's good conduct in prison, and about his difficulties after being made a ward of the

state at a very young age.

PROSECUTION CASE - GUILT PHASE

A. The Circumstances Surrounding Monique's Disappearance

In 1995, Eloy Loy was released from prison. He went to live at 402 East M Street, in Wilmington, with his older sister, Rosalina Arroyo, her husband Jose Arroyo, and their children Josette, Joey, Gabriel and Monique. (5 RT 1085-1086, 6 RT 1206, 7 RT 1506, 1508.) Mr. Loy lived at the Arroyo house for some time after being released, though family members had differing recollections of how long he lived there. Their estimates ranged from a few weeks to a few months. (5 RT 1107, 1176, 6 RT 1214.)

Mr. Loy lived in the front room of the house, and slept on a couch there. His nephew Gabriel had a bedroom and bathroom downstairs, which Mr. Loy used. Josette and Monique shared a bedroom upstairs. The parents, Rosalina and Jose, had a bedroom directly across the hall from Josette and Monique. Joey had a bedroom next door to Monique and Josette. (5 RT 1095, 1098-1103, 1105.)

Members of the Arroyo family testified that Mr. Loy was supposed to have a reason to go upstairs when he lived with them. However, Rosalina testified that she never told her brother that he could not go upstairs. (5 RT 1105, 6 RT 1214, 7 RT 1531.) Eloy once asked to use upstairs bathroom and he was escorted up there. (7 RT 1551.)

All doors to the outside beeped from an alarm system if they were opened, even if the alarm was deactivated. There was a floodlight, porch light and front porch light on the driveway side of the house. (5 RT 1098-1100, 1104, 1142.)

The relationship between Eloy and Monique was "bittersweet".

Monique was very outspoken, and called Eloy names, such as dumb, stupid, pimp and loser. Monique had no respect at all for Eloy. (5 RT 1095, 1104-1107, 1117, 1139, 1142, 1150.) Josette once heard Eloy tell Monique that he'd had a date the night before, and that they had "gone all the way". Monique told her uncle that he was lying because no one would ever be with him. (5 RT 1178-1181.)

Rosalina paid Eloy for pulling out grass and he bought a car from another relative. He had the car for about two months. (7 RT 1525-1526.) After Eloy got a job and car, Joey did not see him at the house for a long time. He had not been to the house for a month and a half before the day Monique disappeared. Joey never saw Monique near, handling or touching the trunk of Eloy's car. He did see her in the front seat of his car once. (5 RT 1106, 1107, 1117.)

On the afternoon of May 8, 1996, Joey was working on a sprinkler system for the yard. His Uncle Eloy showed up and helped him put it in. (7 RT 1485.) While they were working on the sprinklers, a "movie guy" showed up and spoke to his mother. There was discussion about Monique being an extra in a film. Then twelve year old Monique arrived home in her school uniform, and was very excited about the movie prospect. She called her friends to tell them about it. (5 RT 1087-1089; 7 RT 1484, 1486.)

After Joey and Eloy put the sprinkler system in, they sat out on the front porch and drank some beers. Eloy wore jeans, work boots, and a 49ers jersey. They were dirty from working on the sprinklers. They did not shower. They drove around drinking beer that evening. They began drinking about 6 or 7 P.M. Over the evening, they consumed about 30 beers between them. Joey drank about 12. Christian, a friend of Eloy's who joined them for a while, drank some too. Joey may have told police

that he and Eloy split the beer. Eloy was low on money and put a little over a dollar's worth of gas in the car at one point. They stopped at Eloy's friend Yolanda's residence but Joey did not go inside with Eloy. When they got home, Joey stayed in Eloy's car while Eloy went inside. Eloy told Joey he had to be at work at 6:00 A.M. (5 RT 1089-1092, 1121-1128, 1131, 1136.)

Joey believed Eloy was not drunk that night. (5 RT 1153.)

Joey's brother Gabriel and Eloy helped Joey inside because he was pretty loaded. Joey ate something in the kitchen and then was helped upstairs by Eloy and Gabriel. When they got him to his room, Joey asked that they leave so he could go to sleep. He locked his door. (5 RT 1093-1094.)

On that night, Rosalina made dinner, did the dishes, told Monique to do her homework and stay off the phone. Monique came downstairs around 10:00 P.M., her usual bedtime, and Rosalina told her to go to bed. Gabriel, who was 18 at the time, came home from work right about this time. Then he and Rosalina watched television until 11:30 P.M., or so, and talked until midnight. (6 RT 1206, 7 RT 1486.)

Gabriel heard Eloy knock on the side door in order to get inside. Gabriel let him in after unlocking the door. Eloy said that Joey was drunk and he wanted help bringing him inside the house. Gabriel told Eloy it was a bad idea to try to bring him in and just to wait until he decided to come in on his own. (6 RT 1208-1209.)

Eloy went back to the car. Gabriel did not recall if he locked the door. Gabriel went to his room and then up to Joey's room to listen to music. Joey and Eloy came upstairs when Gabriel was in Joey's room. Eloy walked in behind Joey. Joey told Gabriel to leave. (6 RT 1210.)

Gabriel went downstairs, went through the kitchen and saw the tail

lights of Eloy's car outside. Gabriel thought that Eloy had followed behind him on the way out of the house. He did not see him leave the house. Gabriel did not hear front or side doors close. (6 RT 1211-1212.)

Gabriel was unsure if the doors were locked when he looked at them when he went downstairs. He went back to his room, dozed and fell asleep. (6 RT 1213.)

Rosalina's bedroom was directly across from Monique's bedroom. (7 RT 1486.) When she went upstairs, she looked outside through the office window and could see Joey and Eloy talking to each other. She could see them because there was a street light above them. (7 RT 1488.) Rosalina never saw Eloy or Joey come into the house that night. (7 RT 1488-1489.) Rosalina did not lock the doors that night. She told Gabriel to do it. (7 RT 1505.)

Rosalina checked on Monique. Monique was sound asleep, wearing a tank top and blue shorts, and was lying on top of the blanket with her face to the wall. Although Monique had been locking her door at night, it was unlocked. Rosalina turned off the lights in Monique's room and turned off her radio. Then she took a shower. She checked on Monique again and noticed the light on in Joey's bedroom. Then she locked her bedroom door and went to sleep. (7 RT 1490-1491, 1526.)

Around 1:00 A.M., Rosalina awoke when she heard a creak on the stairs. She called out to see if it was Joey or Gabriel and no one answered. Rosalina stood by her door for a few minutes to see if she heard anything else, but it was quiet, so she went back to sleep. Monique's door was still closed and the house was dark. (7 RT 1492-1493.) Rosalina could see part way down the stairs. She did not notice anything else unusual. Sometimes her sons would go downstairs to use the phone. (7 RT 1513-1515.)

On the night of May 8, Jose, Monique's father, went to bed about 9:30 or 10:00 P.M. He saw Monique on her bed, wearing jeans, a sweater, and sleeping face down to the left. (7 RT 1538.)

Jose woke up at 5:30 A.M., and left for work at 6:30 A.M. He checked Monique's bedroom and noticed she wasn't there. This was just after 6:00 A.M. The door to her room was open. Jose told his wife she was not there and Rosalina told him to look for her. Jose did not really look for her, because he thought she must be somewhere in the house - in the bathroom or watching television in another part of the house. (7 RT 1539-1541, 1545-1546.)

Jose left through the east side doors. Both were open and unlocked. The lights were on right outside the exit and the garage light was on. The garage has a light sensor. (7 RT 1541-1542.) It was unusual that the doors were unlocked and that the lights were on. Jose did not notice a sheet in the driveway. (7 RT 1548-1549.)

When her husband told Rosalina that Monique was not in her room, Rosalina told him to look in the bathroom and front room. He never came back and said anything, so she thought that Monique had been found. (7 RT 1512.)

Gabriel got up that morning around 7:00, and left for school at about 7:35 A.M. (6 RT 1213-1214.)

Josette Arroyo was Monique's older sister. Josette was ten years older than Monique. (5 RT 1167.) When Josette came home on May 8 with her boyfriend, Monique was excited about getting the movie part. Josette left and spent the night at her boyfriend's house. (5 RT 1167-1168.)

Josette came back to the house about 7:20 the following morning and noticed a sheet lying in the driveway. Josette and Monique had matching

bed sheets. Josette did not think anything about the sheet being in the driveway because sometimes her parents went to their ranch and things fell out of the car. (5 RT 1169-1172.)

Josette came into the house using her keys. She heard Monique's radio alarm going full blast. She went into their bedroom and noticed that it looked a little awkward. No sheets were on Monique's bed - they were on the floor. Josette and Monique had matching bed comforters. Monique did not often use her comforter to cover herself, and the comforter was usually on the side of the bed. (5 RT 1174-1175.)

Josette then knocked on her mother's door, which was usually locked. Her mother still asleep. Josette testified that she told her mother that Monique was not around, and that her alarm had been going since 7:00 A.M. Josette and her mother then searched the house for Monique. (5 RT 1175-1176.)

Rosalina testified that when Josette came home that morning,[2] Rosalina told her she could not find Monique. Rosalina called her husband, her other son, school, and Monique's friends because Monique was missing. Monique's door was open when she went to it. Rosalina did not notice anything unusual about the room at that time. (7 RT 1494.) Monique had never run away before. Monique carried a house key in her book bag. They found the book bag in the front room and her key on the bedroom dresser next to her bed. The key opened the front door, not the side door. (7 RT 1505-1507.)

Joey woke up about 7:00 A.M., when his mother knocked on his

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[2] There was some confusion between Josette's and Rosalina's testimony about which one first discovered Monique was missing.

door and asked about Monique. Joey's bedroom door was locked. He got up and began looking for her. (5 RT 1108, 1138.)

Josette called to talk to Eloy when she heard that he'd been there the night before. Eloy was staying at her aunt's house. Eloy told Josette that he'd gone straight home from their house. (5 RT 1183-1184.)

Monique's father, Jose, received a call from Rosalina about 9:15 A.M. Rosalina said that Monique was not there and that she was afraid someone had kidnaped her. Jose went home immediately. The doors did not appear to have any signs of forced entry. (7 RT 1542-1543.)

Leonard Loy is Eloy's brother. (7 RT 1554.) Eloy had been living with Leonard when these events occurred. Up until the last two months before Monique disappeared, Eloy had been living somewhere else. (7 RT 1555.)

Leonard usually went to bed about 11:30 P.M. The night of May 8, he got up twice and did not see Eloy on the couch. (7 RT 1557-1561.)

Maria Loy is Leonard's wife and Eloy's sister-in-law. She woke up the morning Monique disappeared at about 5:35 A.M., because Eloy's alarm went off. It kept ringing so Maria went and turned it off. She did not see Eloy at home then, and did not see Eloy's car in its usual location. Maria went back to bed and got back up a little before 7:00 A.M. When she got up, she saw Eloy on the couch. She had gone to sleep the night before between 10 and 11 P.M., and Eloy wasn't there. (7 RT 1568-1571.)

Leonard saw Eloy the morning that Monique disappeared. He was asleep on the couch where he usually slept. Leonard heard the call between his wife and Josette. Josette wanted to know if Eloy had seen Monique. (7 RT 1566.)

Maria had a conversation with Eloy about a month before Monique

disappeared. Eloy was very angry and said that Monique had been telling his girlfriends his life story. Eloy kept saying that she was a "brat", and that he "would get to her," he "just didn't know how." Maria told him to calm down, and that Monique was just a little girl. (7 RT 1576-1577.)

Although Maria was close to Monique's mother, she did not give this information to police until two days before she testified. The conversation happened about two and a half years earlier, maybe about a month before Monique disappeared. No one else was present. (7 RT 1578.)

The morning that Monique disappeared, Leonard saw Eloy's car parked to the left of their house. Otherwise, if their neighbor was not parked by the curb, Eloy would park there. Eloy parked in several different places. Sometimes he parked on the side, or in the driveway of the house on the right because it was empty. Leonard told the police that it was unusual for Eloy to park on the left. (7 RT 1563-1564.)

Eloy was a smoker and had to go outside to smoke. Leonard's wife insisted that Eloy smoke outside the house. Sometimes Eloy slept in his car. Once Leonard found him sleeping in his car in the morning after he'd been out partying. Leonard did not disturb him. Leonard saw Eloy sleeping in his car on two other occasions. (7 RT 1566-1567.)

Howard Wilson lived two doors down from Leonard and Maria Loy. On May 9, 1996, at about 2:30 A.M., Wilson saw a red Cadillac with a white roof drive by. He saw the driver, whom he identified as Mr. Loy, look at him as he drove by. Mr. Loy drove around the block three times, slowly. Wilson saw Mr. Loy walk by, in dark clothes, with his head down. He was wearing hard soled shoes, like work shoes. Mr. Loy walked by in a direction towards Leonard's house. (7 RT 1638-1641.)

Wilson noticed that Mr. Loy parked his car next door to his house

and on the street from time to time. Wilson stated that the spot where Mr. Loy left his car that night was one of the places he normally parked it. (7 RT 1641-1643.)

B. The Investigation

When the police arrived to look into Monique's disappearance, they treated it as a runaway situation. (5 RT 1133.)

Detective Stephen Watson was a detective assigned to the Los Angeles Police Department ("LAPD") homicide bureau. He was called to a vacant lot at the corner of Anaheim and Dominguez on May 13, 1996 at 11:25 p.m. (6 RT 1437-1438.) The lot was lit and surrounded by a chain link fence. An alley ran along the lot. (6 RT 1441, 7 RT 1458.) The police got inside the lot through a hole in the fence. They also had the fire department cut a hole for them to use. (7 RT 1452.)

The body was found about five feet from the fence on the south end of the lot, covered with a comforter. (7 RT 1451.) The left shoulder and right forearm were protruding from under the comforter. The body was not wrapped in the comforter. (6 RT 1439-1440.) Watson lifted the comforter and saw the supine body, with legs bent at about a 90 degree angle. The body was nude and decomposed. There was a lot of maggot activity in the face area and more around the rest of the body. There was a lot of debris in the lot, and some new looking trash bags around the body and stuck in weeds. (6 RT 1444-1445, 1460.)

Officers searched the area, and Watson and criminalist William Moore coordinated evidence collection at the scene. (7 RT 145.) They bagged the comforter, made casts of the tire tracks found there, photographed footprints, and fingerprinted plastic bags found near the body. (7 RT 1460, 1455-1456.) They took samples of paint found on the wall of a

building that bordered the lot. (7 RT 1457.) A lot of debris was not collected because Watson did not think it was associated with the crime. (7 RT 1460.)

The distance between the Arroyo house and the vacant lot was about one-half to three-quarters of a mile. The distance between the Arroyo home and the residence where Mr. Loy lived was five to ten miles. It would take about a minute to drive from the Arroyo house to the lot. It would take five to fifteen minutes to drive between the Arroyo house and Mr. Loy's residence. (7 RT 1463-1464.)

William Moore was a forensic toxicologist working for the LAPD scientific investigation division. (7 RT 1668-1669.)

Moore observed Monique's body under the comforter in the vacant lot. After he photographed the comforter, Moore performed serological examinations to determine the presence of blood and semen. He also did a series of enzyme tests used to characterize the stains. The comforter was covered with maggots, earwigs and other insects which impaired his ability to examine it. (7 RT 1686.) The comforter was negative for semen, but positive for human blood. Moore did not find any pubic hairs on the comforter. (7 RT 1698.) A sexual assault examination done on the body also did not detect semen. (7 RT 1675.) The absence of semen meant there was no evidence of ejaculate. (7 RT 1672-1673.)

Moore testified that much of the material on the comforter was fat and oil from the degradation of the body, transferred from the body to the comforter. (7 RT 1694.) However, he also asserted that because of the degrading process some of the fluid came out of Monique's vaginal and rectal areas and spread on the comforter. (7 RT 1674-1675.) He testified that PGM enzyme testing showed that the fluid was deposited more than an

hour after death. (7 RT 1680.)

Moore searched the Cadillac's trunk and examined it for trace evidence. There was a bright red stain about one eighth of an inch in diameter on the trunk lid of Mr. Loy's car which Moore did not notice initially because it was the same color as the car. (7 RT 1696.) After a latent print specialist pointed it out to him, Moore took a swab of the material and did a presumptive test for blood. When the test proved positive, he collected as much blood as he could and transported the sample to the crime lab. (7 RT 1676- 1678.) Moore could not determine how old the stain was or when the stain was placed on the trunk lid. (7 RT 1702.) The blood stain was bright red. Moore opined that this meant the blood was shed prior to death. (7 RT 1679.) Moore also testified the comforter had been processed before he examined the car and that the comforter never had any contact with the car. (7 RT 1679.)

Moore examined the trunk which was cluttered and filled with many different items. Among the trunk items were a spare tire, muffler, bags of cans, auto items, spark plugs, clothes, towels, floor mats, a car jack and jack stand. (7 RT 1687-1693.) Seven items in the trunk were given a presumptive test for blood. The result was negative. No hairs were found in the trunk. (7 RT 1697.) Moore did not examine the car for trace elements like weeds. He also did not examine the car for signs of dirt or dust and did not notice dust or dirt when the car was rolled for tire impressions. (7 RT 1704.)

Deputy Medical Examiner Lisa Scheinin was the forensic pathologist who performed the autopsy on Monique Arroyo. (6 RT 1231-1232, 1235.) The body was originally completely unidentifiable due to advanced decomposition and was classified as a "Jane Doe" until an identification

was finally made through dental records. (6 RT 1235-1237.) There was extensive maggot activity on the body. (6 RT 1240.)

Moderate to severe decomposition of all areas of the body limited Scheinin's ability to conduct the autopsy. Decomposition made it more difficult to identify the organs and to identify which organs samples came from because decomposition caused the cells to become shapeless and change color. (6 RT 1266, 1304.) Scheinin was not able to identify which organs the cells were from. (6 RT 1366-1367.)

There was no evidence of blunt force trauma. (6 RT 1369-1370.) Scheinin found a mark on the back of the wrist but was unable definitively to conclude that this mark was a defensive wound. (6 RT 1253-1254.)

Scheinin had difficulty examining the head and neck area due to decomposition. The neck skin was brown and that made it nearly impossible to see any marks on the neck. The soft tissue in the occipital area where the neck and scalp meet at the back of the head was decomposed. She did not find bruising upon visual inspection of the area. (6 RT 1245.) However, once she pulled the scalp back in autopsy, Scheinin found a small amount of hemorrhage or bruising. (6 RT 1341-1342.) The bruising was caused by the victim being struck or by the head hitting something. In Scheinin's initial autopsy report, she observed that she had a question about whether the slide with the hemorrhage was from the occipital area at all because of the decomposition of the area. These slides were not labeled at the time she made them. (6 RT 1338.) However, two years later she came to the conclusion that the hemorrhage she found really was in the occipital area and included that in a new report. (6 RT 1367-1369.)

Although the area was decomposed, she felt that some of the

substance in the occipital area was blood, noting that some blood cells still retained their globular character. (6 RT 1265-1269.) She also thought that there was blood in the tissue because the cells were present in some of the tissue, but not others. If the artifacts she saw were from decay, they should have been in all of the tissue. (6 RT 1268.) The results of the trichrome stain and the presence of formaldehyde pigment also indicated blood. (6 RT 1268-1270.) Scheinen admitted that when she had new slides made of the tissue from the occipital area, the new slides did not show the hemorrhaging she believed she saw in the first set of slides. (6 RT 1364.)

Although she suspected there might have been sexual assault because the body was found naked, the decomposition of the genital area obliterated the detail necessary to determine whether there had been trauma to these areas. (6 RT 1348.) She was also unable to detect blood in the area upon visual inspection. (6 RT 1333.) Scheinin took microscopic sections from the area around the labia and the vaginal opening in the peri-vaginal region. (6 RT 1381-1382.) Based upon her examination of these slides, Scheinin opined that there was blood in the peri-vaginal tissue. The areas of hemorrhaging were between a half an inch and an inch. Scheinen conceded that the substance in the peri-vaginal area was degenerating and she agreed the slides showed a lot of "gunk" she could not recognize. (6 RT 1351.) However, she thought that she found blood because she could see individual red balls on the slides. The color of the stained tissue also indicated blood, as did the way the substance spread through the tissue. (6 RT 1274-1284, 1304.) Scheinin also found putrification, which she agreed can sometimes look like hemorrhage. (6 RT 1331.) Scheinin did not label the original slides she made. She testified that the unlabeled slides showed decomposed tissue, but admitted that it was hard to tell what was on the

slides due to the decomposition. (6 RT 1336, 1339.)

Scheinin cut slides for another pathologist. Some of the cuts had tissue missing so they did not look like her slides. The slides she sent to the other pathologist did not show the hemorrhaging she saw. The slides she sent were not labeled to indicate from what part of the body they were taken. (6 RT 1364-1365.)

Scheinen testified that blood would not have been present on the peri-vaginal slides without some injury. However, she admitted that some of the blood present in other slides could have been caused from blood seeping out of blood vessels into the tissue. (6 RT 1320-1321.) Injury to the area could have been caused by sexual activity. She thought there was likely a sexual assault (6 RT 1256, 6 RT 1369) and there might have been penetration. (6 RT 1371.) She could not say whether the activity causing the injury had been non-consensual. (6 RT 1371.)

Scheinin testified she collected some maggots at the time of autopsy, on May 14, between 9:00 A.M. and noon. (6 RT 1343.) The maggots were put in a 70% ethanol solution so that an entomologist could determine age. All the maggots Scheinin found were in the pre-pupae stage. The maggots themselves, not a photograph, should have been sent to the entomologist for proper evaluation. (6 RT 1326-1330.)

Scheinin could only assign a cause of death by a process of exclusion. She reasoned that given absence of internal penetrating or blunt force trauma, the probable cause of death was asphyxia to face, neck or body compression, or all of the above. She concluded that nothing else explained the death, so asphyxia was likely the cause. (6 RT 1328, 1368-1370, 1381.) She thought that the evidence of hemorrhage in the neck showed that there had been asphyxia. However, she also found no evidence

of bruising in the front of the neck and the hyoid bone and larynx were intact. (6 RT 1358.) There was also no bruising to the neck muscle. (6 RT 1357.)

Susan Brockbank, a criminalist employed by the scientific investigation division of the LAPD, was responsible for examining and testing trace evidence seized in connection with this case. (7 RT 1580.) She removed trace evidence, such as hairs, fibers, dirt, plant material, and other debris from the comforter. (7 RT 1581, 1762-1763.) The lot had foxtails growing in it and there were a lot of these on the comforter. (8 RT 1763.)

Brockbank compared the material found on the comforter with fibers taken from Mr. Loy's car. She took fiber samples from all parts of the car, including from under the floor mat on the passenger floorboard and around a red floor mat in the back of the car, and from the area where some of the padding behind the carpet was exposed inside the car. (7 RT 1583-1587.) Brockbank concluded that twenty fibers found on the comforter were similar in microscopic characteristics and fiber type, and color variation to fibers found on the front floorboard area of the car. (7 RT 1588-1589.) A fiber from the passenger door panel was similar in color and shape to fibers found on the comforter. This area of the carpet was damaged and shed fibers easily. (8 RT 1735-1739.) A carpet fiber from the front floorboard area of the car also showed similarities to other fibers found on the comforter. (8 RT 1737, 1739-1740, 1741.) Brockbank did not find any fibers on the comforter which appeared to match the rear floor mats. (8 RT 1742.) Although Brockbank could not find any matches, there was a possibility that some fibers on the comforter came from a combination of fibers in the damaged padding area under the carpet. (8 RT 1743-1744.)

In making her color comparisons between the fibers, Brockbank used

a microspectrophotometer. (8 RT 1764.) The fiber shapes and cross sections of the samples could have interfered with the accuracy of her analysis, as could dye intensity. (8 RT 1764.) Brockbank opined that the fibers found on the comforter were not different dyes. However, Brockbank did not perform a thin layer chromatography on any of the fibers, which would have differentiated dyes. (8 RT 1764-1766.)

Brockbank testified that fibers could transfer from one piece of material to another through direct contact. For example, they could be transferred from shoes onto other things. Fibers do not necessarily stay where they have been transferred and they can be transferred again. This process is called secondary transfer. (8 RT 1761-1762.) She agreed there could have been a secondary transfer if there was a transfer onto someone's clothing, and the person then sat somewhere else. (8 RT 1763.)

Many of Brockbank's other tests of material from the comforter were negative. She did not find any fibers on the comforter matching the stairway carpeting in the Arroyo house. (8 RT 1743.) Brockbank did not find any of Monique's hair in the car. Moreover, she did not find any comforter fibers in the car. (8 RT 1750, 1751.) She also found many more fibers on the comforter that didn't match anything from the car than did. (8 RT 1748.)

Brockbank also examined trace evidence taken from Monique's room. She looked for hair from Mr. Loy but found none. (8 RT 1750.)

Other tests were also negative. Brockbank did not find any of Mr. Loy's hair on the sheet which was found in the driveway, or on the pink blanket on Monique's bed. Brockbank did find hairs belonging to other people on the blanket, but did not compare them with any other people. Additional hairs not belonging to Mr. Loy were found on the driveway

sheet and on the pink blanket, but no further analysis of these hairs was done. (8 RT 1752-1753.) There were three hairs on the sheet which were dissimilar from Mr. Loy. (8 RT 1766.) Both Monique's and Josette's beds were vacuumed for trace evidence. Pubic hairs and head hairs were found on both that did not belong to Mr. Loy. The hair roots could have been tested for DNA, but were not. (8 RT 1754, 1755-1759.) The pubic hairs did not match Monique. (8 RT 1759- 1760.)

Pubic and head hairs were found on the comforter at the crime scene which did not match Monique or Mr. Loy. (8 RT 1757-1760.) These hairs were only compared to Monique and Mr. Loy. (8 RT 1759.)

Brockbank did not conduct any fiber analysis of Mr. Loy's clothing. She did not examine his clothing at all. In fact, Brockbank did not know there was any known clothing for Mr. Loy. (8 RT 1751, 1761.)

Erin Riley worked for the LAPD scientific investigation division in the serology unit. (7 RT 1595) She tested two items for DNA evidence. One sample was from the lid of Mr. Loy's car trunk and the other was from the comforter which covered Monique's body at the crime scene. (7 RT 1599.)

The trunk lid stain was tested using the polymerase chain reaction method ("PCR"). Riley concluded that the DNA in the sample was consistent with Monique's. (7 RT 1600.) However, there were some unusual circumstances. Riley got results for all seven markers (the D1S80, the DQA1 and five polymarker loci) when she ran the PCR test on the trunk sample. However, she was only able to get results for six of the seven markers from the sample taken from Monique's body because of the degradation of the sample. (7 RT 1620.) This meant that the sample from the trunk had an extra marker, the D1S80 marker, that was not present in

the sample from Monique. (7 RT 1620.) Riley conceded that if Monique had a different D1S80 type than what was found in the trunk lid sample, she would be excluded as a source. (7 RT 1625.)

Riley agreed that it was very easy to cross-contaminate when one used PCR testing. For example, two open samples sitting next to each other can become contaminated. Also, if there is a large quantity of a sample, it can flake off and become airborne. (7 RT 1618.) She agreed that some DNA laboratories processed samples with very small amounts of DNA separately from samples with larger amounts. (RT 1619.) Riley did not know how the samples in this case were handled before she got them, so she could not be sure that there was no cross-contamination. (7 RT 1620.)

Riley also did a "slot blot" test to try to determine how much human DNA was in the sample. That test was negative, which meant that if there was DNA in the sample at all, then there was less than the test could detect, i.e., less than .3 nanograms, i.e., 300 trillionths of a gram. (7 RT 1609-1612). However, in running the PCR test on the sample, she used a Perkin Elmer kit, which was only guaranteed for accuracy if the sample is more than 2.0 nanograms. (7 RT 1613.) Despite this knowledge, Riley felt that her test was accurate because she used 20 microliters in the PCR test, rather than 5 microliters as she used in the slot blot test.

Riley also admitted that she had not run a product gel together with her sample. As part of the PCR procedure, small amounts of DNA are copied many times (or "amplified") so a scientist can get enough DNA to test. A product gel is done to assure the reliability of the amplification process. Because she did not do a product gel she only believed that the amplification was done properly because of the end result. (7 RT 1614-1615.)

Riley testified that there was a 1 in 125,000 chance of a random match between the trunk lid sample and Monique. (7 RT 1602.) Riley stated this statistic depends upon matching test results for all seven markers. (7 RT 1621-1622.) However, Riley agreed that she did not have a match for the D1S80 marker from the body sample. Riley agreed that if there was only a match between six markers, the chances of a random match increase significantly, i.e., only 1 in 5,100. Additionally, she stated that the statistics she gave referred to the analysis of random samples of non-related people. The statistical frequency would be much lower if the pool the sample was compared to included family members. (7 RT 1623.) However, Riley did not test the DNA of any other Arroyo family member. (7 RT 1620.)

Riley tested seven samples taken from the comforter (samples 12-18). (7 RT 1625.) Her results showed that DNA consistent with Monique's was found on the comforter samples. For a single one quarter inch square sample, sample 13, Riley asserted that she found a mixture of DNA consistent with a mixture of Monique's and Mr. Loy's DNA. However, the results from sample 13 consistent with Mr. Loy's DNA were very faint. The test results also varied. Riley tested sample 13 further, producing samples 13-A through 13-I. Sample 13 itself showed a faint "24" result. (7 RT 1634.) Samples 13-A and 13-B showed D1S80 results with a "very faint 25." (RT 1634.) No sample showed "24, 25," which Riley knew was Loy's DS180 type. (7 RT 1633.) Moreover, even for sample 13, not all of the tests on the sub-samples were evidence of a mixture consistent with Loy's DNA. Only sample 13-A and 13-B had a marker for D1S80; samples 13-C through 13-I did not. (7 RT 1633.)

Riley did not do a substrate test on the comforter. A substrate test is a test from a sample taken near where the stain was found. It assures that

the positive results from the sample are not due to what was in the material before the stain got there. (7 RT 1629.) Riley agreed that a substrate test is recommended whenever possible, but was not done here because it was not possible. (7 RT 1630.) She also agreed that it was more likely that the types were on the comforter before the tested stain was deposited because it is common for sheets and bedding to have DNA on them. (7 RT 1630.)

Riley never tested any other Arroyo family members' blood in order to determine if one of them might be the source of the weak type found on the comforter. (7 RT 1630-1631.)

Ruben Sanchez was a latent print examiner for LAPD. Sanchez went to the Arroyo home to try to obtain fingerprints. Sanchez lifted a palm print of Mr. Loy's from the doorjamb of Monique's room. It was located 54 inches above the ground and 4 inches from the left side of the door, on the outside of the door. (7 RT 1645-1646, 1651-1654.) The print was about one and one half inches wide and two and a half or three inches long and was of the outside, meaty part of the hand, with the fingers in an upward position. (7 RT 1654-1655, 1660-1661.) Sanchez concluded that someone put a hand on the outside frame of Monique's door, on the left side.

Sanchez printed many different areas in Monique's bedroom. However, he did not find any fingerprints from Mr. Loy. (7 RT 1655.)

David Faulkner was employed by the San Diego Natural History Museum as an entomologist. (8 RT 1770.) Mr. Faulkner examined insect samples sent to him by the LA County Medical Examiner's office.

He examined insects in three containers in connection with his testimony to determine what kind of insects were in the containers and what their stage of development was. (8 RT 1771-1772.) He found two species of larval flies or maggots, greenbottle flies and flesh flies. Mr. Faulkner

concluded that both species were at the most advanced stage of development - the third growth period or "instar." Faulkner stated that the insects had been on Monique's remains for between 3.5 and 3.7 days. (8 RT 1773.) He calculated this date by observing the developmental stage, determining the date on which the flies were collected, and working backwards. Faulkner did not collect the maggots, nor was he present when it was done. (8 RT 1793.) Faulkner believed from a letter he got from Joseph Muto[3] (an employee of the medical examiner) that the flies were collected and preserved on May 13 and May 14. (8 RT 1774, 1783.)

Faulkner concluded that the earliest time the flies appeared on the body was around 10:00 A.M. on May 9. The latest time the flies could have appeared on the body would have been around 2:00 P.M. on May 9. The time estimates could vary one or two hours. His calculation would be different if there was artificial light. In Faulkner's opinion, the flies could have been there earlier than 10:00 A.M. on May 9, but not later than sundown the previous day. (8 RT 1774-1776.)

Faulkner's testimony did not match the first report he did in the case, which he testified was mistaken. In the first report, he stated that the flies were in early third instar, not third instar. (8 RT 1827-1828.) He estimated that the flies had been on the body only 2.5 to 2.7 days, or 60 to 65 hours (8 RT 1777, 1800), not 3.5 to 3.7 days. In the report, he also stated that insect activity would have started on May 9, which did not match his 2.5 to 2.7 estimate. On the estimate in the first report, if the maggots were collected at 4:00 AM on May 13, then the flies must have gone on the body sometime between 11:00 AM and 4:00 PM on May 10, well after May 9, when

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[3] Joseph Muto did not testify at trial.

Monique disappeared from her bedroom. (8 RT 1801-1802.)

Faulkner testified that, after the first report, he found himself subpoenaed by both the defense and the prosecution in this case, which bothered him because he was usually only subpoenaed by one side. (8 RT 1815.) On November 6, 1998, Faulkner received a letter from the District Attorney which contained much more detail than the information he initially received. The letter included fifteen to twenty pages of police reports. He also consulted with James Webb, an entomologist who works for Orange County public health. (8 RT 1805-1806.)

Faulkner thought there was something wrong with the report, but could not figure it out. He believed that he had either made a mistake about 2.5 to 2.7 days or about the date the flies got on the body. (8 RT 1817.) Faulkner testified that in the wee hours on the morning before he was originally scheduled to testify, he found the problem and recalculated everything. His recalculated because of something Webb said to him and also because he'd been subpoenaed by both sides. He also got the photographs he requested, something which he usually gets early in the investigation, along with weather reports, investigative reports, and medical examiner's reports. (8 RT 1815-1817.) He testified that it was in part looking at the photographs of the maggots that convinced him that the maggots were older than he first thought. They had red star markings on the crop (a part of the stomach) that showed that they were well-fed and older than two days. (8 RT 1835-1837.) They were actually close to forty hours old, rather than ten to fifteen hours old, as he originally thought. This led him to believe that the maggots were deposited 3.5 to 3.7 days before they were collected rather than 2.5 to 2.7 days. (8 RT 1818.)

Faulkner admitted on cross-examination that in his notes of the

initial examination (Exhibit T) he stated that the maggots were "early" third instar, not simply "third instar." The notes also referenced 60 hours or 2.5 days. The notes did not have any reference to 3.5 to 3.7 days. (8 RT 1827-1828.) The only thing Faulkner changed in his report was the number of days or hours the flies had been on the body. (8 RT 1830.) Faulkner was also cross-examined about a previous meeting he had with defense counsel. During that meeting, Faulkner told attorney Larkin that his calculation was that the flies arrived between 60 to 65 hours before Monique's body was found and the maggots recovered. Faulkner told Larkin that there was a 5% margin of error in that figure. (8 RT 1834.) He also conceded on cross-examination that he could not tell by looking at the photographs of the maggots on the body which types of maggots they were. (8 RT 1827.)

Faulkner admitted that he was originally due to testify on November 16. He changed his report on the morning of November 16. (8 RT 1803-1804.) If someone had pointed out the discrepancies in the report four or five months ago, he would have discovered the problems earlier. He sent his report in to the coroner's office, but nobody picked up the mistakes he made in the original report. (8 RT 1832.)

C. Witnesses About Other Crimes

Ramona Munoz was 16 years old in 1975. She met Mr. Loy in San Fernando when she was out with her sister Gloria. Mr. Loy was with his two nephews when they all stopped to talk to each other. (6 RT 1413.) She had never met these boys before. (6 RT 1426.)

They eventually drove away with the boys. Ramona's sister Gloria was in the car with her, and also Mr. Loy's nephew Nino. Mr. Loy followed the other car for a while but then made a U turn and got on the freeway.

Ramona begged him to turn around, but he refused. (6 RT 1414-1415.) While they were in the car, she kissed Mr. Loy and her sister kissed Nino. She got into and out of the car several times voluntarily. (6 RT 1430-1434.)

They drove to Wilmington, to the house of two men named Fred and Stan. While Ramona and Mr. Loy were in the kitchen, Mr. Loy told her that they had to escape because one of the guys had a gun and wanted to kill him. Mr. Loy told Ramona her sister would meet them around the corner. He grabbed her hand and said, "Run!" (6 RT 1416.)

They got to the car, locked it and drove off without the others. Mr. Loy drove them to a place close to a swamp, and Ramona became afraid. When the car stopped, Mr. Loy locked the doors and put the seats down. He grabbed her hand, bit her finger and started taking her clothes off with the other hand. (6 RT 1417-1418.)

Ramona knew he was going to rape her. The area was isolated and dark. Mr. Loy told her to take the rest of her clothes off. He hit her when she struggled. He would not let go of her finger until she scratched him on the face. He said he had a weapon at one point. (6 RT 1419-1420.)

Mr. Loy told her that if she did not do as he wanted, he would kill her. He fondled her, bit around her breasts, and took his clothes off and demanded that she orally copulate him. (6 RT 1421.)

He repeatedly sexually assaulted her orally, vaginally and anally. Mr. Loy told Ramona that if she did not make him ejaculate in 50 seconds, he would kill her. Mr. Loy choked her. (6 RT 1422-1423.) Her thumb was bitten almost to the bone, and she suffered bite marks on her breasts and nipples, a blood clot in her throat, vaginal bleeding, and anal hemorrhaging. (6 RT 1434.)

When early morning came, Mr. Loy told Ramona to turn around and

he put something next to her head. He said it was a gun. He told her to get out of the car within one minute or she would be left dead. Ramona was only able to grab her blouse and pants, and was partly naked. Mr. Loy left. Ramona saw a security truck with a black man in it. She begged him for help but he was afraid she would blame him. He then took Ramona to his office, put her under the table and locked the door. Ramona saw Mr. Loy coming back. She waited for the police to arrive. (6 RT 1424-1425.)

Ramona was convicted of grand theft in 1982 and petty theft in 1993. (6 RT 1425.)

Lillian Segredo, who was then 32 years old, met Mr. Loy on November 10, 1980. Ms. Segredo was living with her cousin. They went to Howard Johnson's, where she met Mr. Loy, who was there with a friend. They met and talked. The four of them went out dancing together for about three hours. Then they all agreed to go to Mr. Loy's house for coffee and breakfast. (7 RT 1468-1469, 1478-1479.)

Mr. Loy told her he had to get something quickly at his apartment. He got on the highway and drove fast. This worried Ms. Segredo and she began having a bad feeling about the situation. They ended up at a first floor apartment. Mr. Loy said he lived there. Ms. Segredo wanted to stay in the car but Mr. Loy convinced her to go inside. (7 RT 1470.)

Ms. Segredo became frightened and said she wanted to find her cousin. Mr. Loy told her that they would be there soon. She saw Mr. Loy take something from the top of the refrigerator and swallow it. (7 RT 1471.)

Ms. Segredo told Mr. Loy she wanted to leave. Mr. Loy turned the lights off. Ms. Segredo was very scared and asked him to turn them on. Mr. Loy said he was going to make love to her. When Ms. Segredo said no, Mr. Loy punched her in the stomach, and she fell on the floor. She tried to break

a window to escape, and Mr. Loy got angry. (7 RT 1472.)

Mr. Loy punched and hit Ms. Segredo. He put his penis in her mouth. He knocked her out and choked her. He put his hand around her neck. Ms. Segredo thought she was going to die. Mr. Loy was mean and mouthy. He kept trying to hit her. He had sex with her many times. He sodomized her. She struggled but he kept hitting her. He bit her breasts. (7 RT 1472-1473.)

Ms. Segredo did not know how long this all took. Mr. Loy told her to dress. He drove her to her cousin's place, carried her to the door and left her there. She was in pain, in shock and bleeding. She went to the hospital and was put in intensive care. She did not recall how long she was there. Mr. Loy broke her ribs. She was most concerned about seeing her two-year-old son this way. (7 RT 1475-1477.)

Sara Minor was a friend of Monique's in 1996. They spoke to each other every other day. (7 RT 1723.)

Ms. Minor stated she telephoned Monique about a week before she disappeared. Monique answered and spoke in a low tone of voice, as if something was bothering her. Ms. Minor asked her what was wrong. Monique said, "Nothing." After further inquiry by Ms. Minor, Monique said she did not feel comfortable around her Uncle Eloy. Monique said that he would give her weird looks and sneak up to her room and touch her in her chest and crotch area. Monique was "crying, but not heavily." She testified that, "You could just hear her trying to hold back tears." Monique said she was afraid of her uncle because of this behavior and the looks he gave her. She said her uncle had been there that day. Monique also asked Ms. Minor not to tell anyone about what she had confided. (7 RT 1723-1726, 1729-30.)

When Ms. Minor was interviewed by police, she never told them that Monique had said Mr. Loy had snuck upstairs to her room. (7 RT 1726-1727.)

Monique also told Ms. Minor that boys who were older - around 18 or 19 - had been coming to her house frequently. Monique said they would come to the house late at night, and make noise outside her window. They tried to get her to go out with them. Monique told Ms. Minor about the boys a short time before she disappeared. (7 RT 1727-1728.)

DEFENSE CASE - GUILT PHASE

On May 12, 1996, Kathleen Ledesma lived at 729 Sanford Avenue. She was cooking in her house that day. (8 RT 1846.) Her daughter went outside to play with friends, and to her father's house, which is also on the same street. (8 RT 1847.) Sanford Avenue is one street over from the vacant lot where Monique's body was found. There is an alley between Sanford Avenue and Dominguez. Ledesma's daughter's father lived on the alley. Ms. Ledesma went to the lot that evening because of something her daughter told her. Then she called the police. Ms. Ledesma saw a blanket and her daughter told her that was where the body was. (8 RT 1847-1851.) The body was about five feet from the fence. Ms. Ledesma could not go inside because there is a big fence, and it is taller than she is. After the police arrived, Ms. Ledesma returned to the lot. The police gained entry to the lot by ripping through the fence. The lot was not accessible, and it was not possible to jump over the fence. (8 RT 1852-1854.)

Michael Mastrocovo was a criminalist with the Scientific Investigation Division of the Los Angeles County Police Department (hereafter "LAPD SID".) (8 RT 1873.) Mr. Mastrovoco tested a flat bed sheet (Exhibit 1) and a pink blanket (Exhibit 25; also Exhibit W) for

purposes of this case. Mr. Mastrocovo tested both the blanket and sheet for seminal fluid. None was found. (8 RT 1873-76.)

William Arndt was a mechanic for LAPD. (8 RT 1878.) On May 18, 1998, Mr. Arndt checked the amount of fuel in Mr. Loy's Cadillac. It had less than a gallon left. When the key to the car was turned on, the fuel tank gauge was just a tiny bit above empty. Mr. Arndt estimated that, due to its poor condition, this vehicle would get less than 10 miles to the gallon. (8 RT 1878-81.)

Christine Sanders was a criminalist with LAPD SID, employed in the serology unit. She was assigned to search Mr. Loy's car on May 10, 1998, while this was still a missing person case. She also vacuumed Monique's bedroom, and various items in the bedroom, for trace evidence. Ms. Sanders assisted in taking red paint from a metal fence by the lot where the body was found, in order to determine if the paint on the fence came from Mr. Loy's car. Ms. Sanders concluded that the paint on the fence had not come from Mr. Loy's car. (8 RT 1893.)

LAPD Sgt. Chris Waters was assigned to the homicide unit in May, 1998. He took a statement from Monique's brother, Gabriel Arroyo. Gabriel signed each page and read the report back to Sgt. Waters. Gabriel told Sgt. Waters that on the night Monique disappeared, he made sure that the back door was locked and that the lights were off. Gabriel said he turned the lights off himself. Gabriel said his uncle had walked downstairs in front of him, and walked out the front door. (8 RT 1909-1911.) The statement was taken on May 13, 1996. (6 RT 1391-1394.)

LAPD Sgt. Michael Rogers testified that he went to the Arroyo residence around 1:00 P.M. on May 9. (8 RT 1917.) Mr. Loy had been at the house earlier and was taken into custody before Sgt. Rogers arrived at

the house. Sgt. Rogers left the Arroyo house and went to the home where Mr. Loy lived in Carson with his brother and sister-in-law. Mr. Loy's vehicle was in front of the house and Sgt. Rogers searched it. (8 RT 1912-15.) When Sgt. Rogers and other officers searched the car for evidence that would link Monique to the car, they found no such evidence. Sgt. Rogers was unable to find any evidence in Mr. Loy's car or in the house where he was staying which showed Monique had been in either place. (8 RT 1916-17.)

LAPD criminalist William Moore testified that he was involved in the search of Mr. Loy's car in May, 1996. Print specialist Miguel Rivera brought the spot on the trunk lid to Moore's attention. Item 15 is the swab of the trunk lid spot that was taken that day. (8 RT 1921.) Moore's notes identify the red stain as Item 15. Moore's notes indicate that he performed a presumptive test for evidence of blood on a number of items from Mr. Loy's car, but not on Item 15. Moreover, it is Moore's habit and custom to take a photograph when he does a presumptive blood test, but there is no photograph of the trunk lid swab - Item 15 - showing a positive result for the existence of blood. (8 RT 1921-1924.) Despite this evidence and the fact that he conducts hundreds of such tests each year, Moore testified that he recalled conducting the test in this case. (8 RT 1924-1925.)

LAPD Detective Richard Simmons got involved with the Arroyo case on Friday, May 10. He went to the Arroyo house and searched it. He was looking for evidence of Monique. Det. Simmons had Mr. Loy's car impounded and brought to the LAPD print shed on May 12. He'd seen the car at the family residence in North Long Beach. Some of Mr. Loy's clothing was taken from his home. He seized a 49ers jersey and a blanket from the trunk of Mr. Loy's car. (8 RT 1926-1931.) Detective Simmons

had the family view some videotapes taken from Burger King and AM/PM Market, and then returned them to the businesses when the family was done. (8 RT 1931-1932.) There was no definite identification made of Monique on the videotapes. (8 RT 1933.)

Pursuant to stipulation, the parties agreed that LAPD Detective Taylor interviewed Joey Arroyo, Jr. on May 21. Joey told Detective Taylor that on the evening he was drinking with his Uncle Loy, that he may have gone to Harbor Park, and dropped Christian off at home. Joey did not remember stopping at Yolanda's house, and next remembered being at home. (8 RT 1962.)

Peter Barton owned a business in the Wilmington area located at 824 East Anaheim, Unit A, right by Dominguez. His business was there for five years. On the weekend of May 11 and 12, Mr. Barton was working seven days a week. Mr. Barton kept notes about the work he did on a daily basis, and had been doing so since 1964. (8 RT 1962-1963.)

He saw a lot of people up and down the alley that weekend. People use the alley both on foot and in cars about 18 hours a day. (8 RT 1968.) Mr. Barton had smelled the smell of death around May 13, and smelled it for three days after that. (8 RT 1969-1971.)

Mario Soto testified through an interpreter. Mr. Soto worked at AM/PM Mini Market on May 8 and 9, 1996. It is located at 950 North Avalon in Wilmington, at the corner of Avalon and Opp Streets. Mr. Soto saw a girl come into the store sometime after midnight. She was with some girls in a car, one of whom Mr. Soto noticed was very pretty. The next day, someone came into the market with a flyer. They were looking for the girl in the flyer. He thought the girl he saw might be the one in the flyer. Mr. Soto told the police that some girls had come into the market the night

before and one of them looked like her. The police said she had been missing since the night before. Mr. Soto thought he saw the girl around 2 or 2:30 A.M. Mr. Soto recalled that she looked like the girl in the photo and that she seemed to be between 11 and 13 years old. Mr. Soto told the police the girl may have been as old as 14. Mr. Soto reviewed video tapes taken from the store and was able to identify the girl who came into the store. The other girl was not on the tape. (8 RT 1979-1986.)

Susan Brockbank testified that foam was taken from Mr. Loy's car for purposes of comparison with other foam which was collected as evidence in the case. Foam was found on the blanket comforter which was seized at the crime scene. None of the foam located on the comforter matched any of the multiple foam samples taken from different locations in Mr. Loy's car. (8 RT 1987-1990.)

Ronald Raquel was a criminalist with LAPD SID, and conducted trace analysis testing. In May of 1996, Mr. Raquel analyzed paint scraped off a fence at the crime scene. He concluded that the paint sample did not come from Mr. Loy's Cadillac. (8 RT 1990-1994.)

Gary Kellerman was a coroner's investigator in May, 1996. On May 13, 1996, he was called out to investigate a death. His job was to examine the body for any external trauma and try to determine the cause of death. He is not a physician, but has a major in biology and has conducted autopsies as a forensic technician. He had nothing to do with the autopsy in this case, however. Mr. Kellerman found maggots gathered mostly around the face, neck and upper chest. He did not collect any maggots in this case, including the maggots contained in Exhibit 10B, a specimen jar. The notation on the evidence jar gives the date and time as May 13, 1996, at 4:00 A.M., but does not say that the specimens were collected then. Mr. Kellerman had not

seen the jar before testifying and had nothing to do with it. (9 RT 2009-2012.) The bottle with the maggots in it has a time and date but does not indicate who collected the specimens. Mr. Kellerman did not fill out the label and could not identify the handwriting on it. (9 RT 2017-2018.)

Mr. Kellerman identified photographs that he said accurately showed the maggots on the body at the crime scene. The jar (Exhibit 10B) had an LA County Coroner's label on it. These labels are used by evidence people. (9 RT 2013.) Mr. Kellerman did not take the photographs, nor did he direct that they be taken. These events happened two and a half years ago, and a lot went on at the scene that Kellerman could not recall. (9 RT 2019.)

When he went to the scene, Mr. Kellerman believed that the decedent had been the victim of possible neck, facial and head trauma. The body was not visible from under the blanket, and it was not easily visible from the street or the walkway at the south end of the lot. (9 RT 2014-2015.)

Dr. Sharon Van Meter was a physician licensed to practice medicine in California. She had been a doctor for twenty-seven years. (9 RT 2020.)

After college, Dr. Van Meter attended four years of medical school at Washington University in St. Louis and got her medical license there. She did five years of residency in anatomic and clinical pathology, and a fellowship in forensic pathology. She is Board certified in all three areas. Dr. Van Meter than did an internship in pathology in 1967-1968 at Upstate Medical Center in Syracuse, New York. Then Dr. Van Meter was a resident in pathology at Columbia Presbyterian Medical Center in New York City. She finished her residency at Michael Reese Hospital at the University of Chicago. She is Board certified by the American Board of Pathology. (9 RT 2021.)

Dr. Van Meter has been Board certified since 1972 by the American Board of Anatomic & Clinical Pathology and for forensic pathology since 1973. She received her California medical license in 1973, her Illinois medical license in 1970, and her Missouri medical license in 1967. (9 RT 2022.)

Dr. Van Meter ultimately joined a pathology group in Oakland and was a hospital pathologist at Alameda Hospital for number of years. (9 RT 2022.)

At the time of trial, Dr. Van Meter's practice only involved forensic pathology. Her duties included teaching pathology residents at Stanford and teaching a criminalistics course at the University of California at Berkeley. She had contracts with the Alameda County Sheriff's Department to provide pathology services for the coroner's office. Dr. Van Meter had been doing autopsies for Oakland for fifteen years. (9 RT 2023.)

Dr. Van Meter did autopsies almost every day, about 350 to 400 autopsies a year. She autopsied about twenty bodies each year that were decomposed. Dr. Van Meter was contacted by Attorney Larkin about a case that had been autopsied by the LA coroner's office and he asked her to review materials, findings, autopsy and reports. She did not read anything else about the case. (9 RT 2027-2028.)

The body in this case was a typical decomposed body. Dr. Van Meter requested the microscopic slides. She was sent a duplicate set and she reviewed them. There was a note with the slides that said that in doing the recuts, some of the things that were on the original slides did not appear on the new ones. (9 RT 2029-2030.)

After looking at the slides, Dr. Van Meter wanted to see the original slides in order to do a proper evaluation. She went to the LA coroner's

office to look at the original slides because a number of special stains were done which hadn't been sent to her. (9 RT 2030.)

Dr. Van Meter explained that in order to reach conclusions in an autopsy, a piece of tissue is placed on a slide. It is a very thin piece - only 2 or 3 microns. A micron is a millionth of a millimeter. The piece of the tissue is a very small part of the organ. The first thing that Dr. Van Meter noticed was that all of the tissues were in a very advanced state of decomposition. Some pieces were not identifiable as to what organs they came from. All showed an extensive falling apart of the organ. A lot of the structure was no longer cohesive. There was little fine detail. (9 RT 2031.)

When a decomposed body is found, the first thing that is done is to examine the body for identifying characteristics, and to look for signs of injury or disease in order to evaluate the state of decomposition. During the external examination, all organs are removed, cut, opened and examined. Small samples of anything abnormal are taken, or random samples are taken. (9 RT 2032.)

The samples are put on slides and examined under a microscope for information about what might have contributed to death - things such as injuries, disease, or toxicological reasons related to the ingestion of substances. Most of the time, it is possible to identify what a specimen is, and what part of the body it comes from, when you put it under the microscope. But this may not be true with a decomposed body, unless the slide has been labeled beforehand. Dr. Van Meter would label a slide if she needed to examine it. (9 RT 2033.)

The slides Dr. Van Meter received were simply labeled 1-8 through 8-8. These slides included two separate groups: one was labeled 1-3, 2-3, 3-3, and the other was labeled 1-2, 2-3, 3-3, center, right, left. A number of

slides had two, three or four pieces of tissue on them. (9 RT 2033.) Dr. Van Meter was able to identify the tissue in some of the slides, but in others, the tissue was so destroyed that she could find no identifying characteristics. She accepted the labels the coroner's office gave to the tissue on some of the labeled slides, but there was nothing about the tissue that told her it was what it was represented to be. (9 RT 2034.)

Dr. Van Meter examined the slides that are contained in Exhibits CC 1- CC 6. These were photographs Dr. Van Meter took of the slides sent to her, so she was able to explain to the jury the problems she encountered reviewing the slides sent from the coroner's office. (9 RT 2040-2041.) Dr. Van Meter was unable to tell what was depicted in the slides. She did not see any blood in any of the slides. She also examined Exhibit 19, which was labeled "occipital tissue - trichrome". She could not tell that the tissue came from that area of the body by looking at it. She also could not tell if there was blood in the tissue. Dr. Van Meter explained that in advanced decomposition cases, the staining characteristics are not necessarily normal, nor are blood architecture and structure necessarily normal. Just because something round was found in the tissue does not mean it is blood when there is an advanced state of decomposition. (9 RT 2041-2050.) Also, just because something stains red does not mean it is blood. (9 RT 2067-2068.)

Dr. Van Meter also examined Exhibit 17, which was labeled "occipital soft tissue", and Exhibit 18, which was labeled "occipital soft tissue, in blood". She could not find any blood in either location. (9 RT 2050.) Dr. Van Meter examined Exhibit 25 and was also unable to find any blood in this sample. She explained that when a body decomposes, the architecture breaks down, tissue planes are gone and everything becomes commingled. Dr. Van Meter reviewed Exhibit 25, and could not tell if there

was decomposed blood in it based on its overall appearance. (9 RT 2050-2052.)

Likewise, Dr. Van Meter's review of Exhibit 29, labeled "right side of neck," did not show blood. Exhibit 14, labeled "decomposing artery," might contain some decomposing white blood cells but the surrounding tissue did not really contain any structure. There were some ghost red cells that were out of the vessel but this was from the lung area and not from the neck or perivaginal area. When a blood cell decomposes, it loses what is inside of it. (9 RT 2052- 2053.) When Dr. Van Meter reviewed the other Exhibits in the 20 series (Exhibits 20-29), she could not tell what they were, and could not tell if the material in the exhibits was blood. Literature about decomposing blood explains that decomposing muscle can look like stacks of red cells. (9 RT 2055-2056.)

Dr. Van Meter was unable to see any blood in the neck area slides either. She did not see any evidence of hemorrhage in the slides. (9 RT 2056-2059.)

Dr. Van Meter looked at Exhibit 21, which was labeled "perivaginal area." She was unable to tell where this tissue came from. Notes sent from the coroner's office identified these slides, but Dr. Van Meter could not independently determine where they came from. She did not see any signs of hemorrhaging in the slides from the perivaginal or vaginal area. (9 RT 2059-2065.)

Dr. Van Meter's conclusion about the cause of death in this case was undetermined. There was no evidence of medical disease. There was no obvious injury such as shooting, stabbing, etc. The body was in such an advanced state of decomposition that no further conclusion about the cause of death could be reached. Based on the pathological findings, there was no

evidence of sexual assault. (9 RT 2070-2072.)

Cheryl Will was a criminalist for the LAPD. (9 RT 2103.) Ms. Will did comparisons of shoe and tire prints. (9 RT 2104.)

Exhibits DD 1-3 are photos of the comforter found at the scene. The comforter has shoe prints on it. Ms. Will compared the shoe prints with three pairs of shoes belonging to Mr. Loy. There were no matches. (9 RT 2104-2114.)

She also compared tire tracks with Mr. Loy's tires. Mr. Loy's car was excluded as having left the tire tracks at the scene. (9 RT 2116-2117.)

Lolina Tuisloo worked at the Harbor City Burger King on March 9, 1996. She saw four girls come into the store around 6:30 P.M. that evening. The next day, family members came in with a photograph and she recognized the girl in the photo as having been there the evening before. (9 RT 2121-2128.)

PROSECUTION GUILT PHASE REBUTTAL CASE

Trinity Steele was an officer for the LAPD. (9 RT 2130.) He went to the crime scene on May 12. Officer Steele entered the lot through a gap between two fence poles. Officer Steele believes the Fire Department was already on the scene. He moved the comforter on the body. The wind was blowing towards the east that day. (9 RT 2130-2133.)

Dr. James Ribe was a Senior Deputy Medical Examiner for the LA Coroner's office. He has been working there ten years and has performed over two thousand autopsies, including autopsies on 100 to 200 decomposed bodies. About a dozen or two of those cases involved slides. (9 RT 2133-2135.)

Dr. Ribe is familiar with Dr. Scheinin. He reviewed the slides in this case related to the occipital region, the neck region and the vaginal area that

were examined by Drs. Scheinin and Van Meter, and found hemorrhaging in all three areas. (9 RT 2136-2143.) Dr. Ribe was unable to tell from looking at some of the slides which areas the tissue had been taken from. (9 RT 2143-2144.)

Kathleen Ledesma smelled the foul odor coming from the lot area about three days before the body was found. (9 RT 2151-2152.) Ms. Ledesma told the police that she first smelled the odor on May 11. (9 RT 2154.)

PROSECUTION PENALTY PHASE CASE

Jose Arroyo, Monique's father testified about Monique and the impact of her death on the family. (10 RT 2392-2402.) Mr. Arroyo described events from Monique's life that were portrayed on photos contained on a large banner. The banner was made by Monique's godfather for Monique's 13th birthday - the birthday after her death. (10 RT 2392-2393.)

Mr. Arroyo explained that many photos were taken of Monique from the time of her birth because she was unexpected due to her mother's age at the time of conception. One photo showed Monique's tenth birthday, at a park across the street from their house. Others depicted Monique when she was one year old, riding a horse, and at her First Communion. (10 RT 2394.)

Additional photos showed Monique about a year before her death, and at the age of five, when she started school. A photo showed her when she was in a wedding. Other photos showed Monique at the park, and when she was a baby, and included the last photo ever taken of her. (10 RT 2395.)

Mr. Arroyo and his daughter were very close. He spent as much time with her as he could, and helped her with her homework. The family

went camping together at least once a year.(10 RT 2395.)

Just before she died, Monique decided she wanted to be a singer. She joined the church choir. Monique's parents were infected with her enthusiasm so they also joined the choir and encouraged her. This brought them closer together. Their close relationship helped Monique to think about her plans for the future. (10 RT 2396.)

Monique was concerned about her father, and often checked up on him when he worked late in their garage. (10 RT 2398.) The holidays have been difficult since Monique died. Mr. Arroyo testified that it feels as though there is a big hole in their lives at that time of the years. On her 15th birthday, the family let fifteen pigeons go in her memory. Monique last confided in her father that she wanted to be a police officer. (10 RT 2399.)

Rosalina Arroyo, Monique's mother, also testified about the impact of Monique's death. (10 RT 2402-2407.) Monique's death left a big hole in her heart. Monique was her mother's pride and joy, the baby of her family. (10 RT 2403.)

During the time she was missing, it was terrible. It seemed like months passed before Monique was found. Monique was found on Mother's Day, thrown in a field like trash. Mrs. Arroyo spent hours searching for Monique. (10 RT 2403.)

Mrs. Arroyo spoke to her brother Eloy after he was arrested but before Monique was found. (10 RT 2407.) She asked him if he knew anything. He said, "No." Mrs. Arroyo testified that all Eloy was worried about was trying to get himself out of jail as soon as possible. He did not even mention Monique, ask how they were doing, or if Monique had been found. (10 RT 2403-2404.) .

Fliers were put together for Monique when they were looking for

her. Kinko's donated the fliers at no cost. The whole neighborhood gave donations for t-shirts, and they passed out thousands of them in hopes of locating Monique. (10 RT 2404.)

A karate teacher gives a self defense class for kids in Monique's memory, because the karate teacher also lost a child to murder, and Monique's death touched him. (10 RT 2404.) A local chiropractor holds a day-long event each year in Monique's name, where children can have their fingerprints taken, and videos made of them, in case anything ever happens to them. (10 RT 2404.) A tree was planted in Monique's memory at the park across the street from their house. (10 RT 2405.)

Monique was glad to help people in the neighborhood. She teased her brothers and sister, but they loved her very much and let her get away with everything. She was very close to her extended family too. (10 RT 2405.)

Mrs. Arroyo did not work so she could take care of her children and their day-to-day needs. She learned how to shop for groceries, for clothes, and how to run the computer. Monique was learning piano. Monique's life looked bright. (10 RT 2406.)

Gloria Munoz, the sister of Ramona Munoz, gave additional testimony about the encounter with Mr. Loy in 1975. She testified that she and her sister ran into Mr. Loy in a park in San Fernando one night in 1975. Gloria and her sister got in a car to go cruising with Mr. Loy and someone else, so that they could look for some friends of the Munoz sisters. (10 RT 2433-2434.)

Instead of taking them to find their friends, the men took the Munoz sisters to a dark mountaintop. Then they were driven to a house. Gloria's sister kept asking to be let out and taken home. Gloria was concerned.

Gloria was 19 years old and her sister was 16. (10 RT 2435.)

The house they went into had a big front door with the glass missing. There were men sleeping on the floor. One of them told Gloria to go into a bedroom off to the side. Gloria asked for her sister, and one of the men said that she had gone with Eloy in order to try to help them get out of there because someone in the front room had a gun. Gloria had never met any of these people before. (10 RT 2435-2436.)

Gloria stayed in the bedroom and waited for her sister to return. One of the men came in and said, "He promised me he wasn't gonna ever do this again." Gloria left when she saw that all the men had fallen asleep. Her sister did not come back. (10 RT 2436-2437.)

Gloria left the house and walked. She was scared because she was not sure where she was and she wanted to get back to the valley. Then a little white four door Toyota drove up and Eloy was driving it. He asked Gloria to get into the car. She did not want to get in, but he told her that she had better get in or she would not see her sister again. Gloria got into the car. She laid a sweater across her chest and moved close to the car door. Then Eloy began laughing and told Gloria that her sister was okay, that they were at a party, and that he'd come to pick her up. Eloy turned to look at Gloria, and she saw that he had a big cut on his face which was bleeding. Gloria became very frightened. (10 RT 2437-2438.)

When she saw his wound, Gloria became very concerned that something had happened. They drove on streets that she did not recognize. They ended up on a gravel road. Eloy turned to Gloria and said that she wasn't going to see her sister again because he had killed her. Gloria closed her eyes and prayed that this was not true. When Eloy stopped the car, she noticed that there was a hill in front of her and the area smelled like a

garbage dump. Eloy kept trying to touch her, and finally she rolled out of the car in order to get away from him. He grabbed at her but did not catch her. Gloria kicked towards him as he leaned over to try to catch her. She got up and ran away. (10 RT 2438-2441.)

Gloria could hear Eloy calling her name. She fell to the ground and tried to find something to hit him with if that became necessary. Eloy began driving towards her. She ran and fell again. Eloy said to her, "I'm just kidding. Sorry. Get back in the car. Come back here." (10 RT 2441-2442.)

Gloria eventually reached a street and saw a car. An elderly Mexican man was in the car. She asked him to help her, and told him what happened. He let her in the car and took her to a donut shop. The police came to the donut shop. Gloria saw her sister sitting in the back seat of the police car. (10 RT 2442-2443.) Dawn was breaking about this time. (10 RT 2453.)

Gloria spoke to her sister about this incident at the time it happened. She had not spoken to her about it recently because she hasn't been in communication with her family since her mother passed away in April. Prior to their mother passing away, Gloria had not seen her sister for six or seven years. (10 RT 2450.)

The prosecutor also presented documentary evidence showing that Mr. Loy was convicted of attempted burglary in 1972. (10 RT 2423, 12 RT 2751-2752 .)

DEFENSE PENALTY PHASE CASE

Eloy was born at home on July 27, 1951, in Silver City, New Mexico. His older brother Leonard was there when Eloy was born. Eloy was the ninth of ten children, and the youngest boy. His siblings, from

oldest to youngest, were: Lupe, Ann, Leonard, Sonny, Victor, Rosie, Betty, Joe and Angie. (11 RT 2490-2492.) Their parents are now dead, as are siblings Victor and Ann. (11 RT 2506.)

The family moved to San Pedro, California, in 1952. They stayed with an uncle for a few months, and then moved to the projects in Wilmington, after their father got a job at a lumber yard. The entire family lived together. Then their mother died on August 1, 1958. (11 RT 2493, 2494.)

Eloy was seven when his mother died. They had been very close. Their father had been a controlled drinker while their mother was alive, but after she died, he drank a lot more. Their father did not know how to take care of a house and children, so Leonard and his sisters Rosie and Betty tried to do it. Their father loved and spoiled Eloy. (11 RT 2494, 2495, 2500.)

There had been no problems with Eloy before their mother died, but after she was gone, he began having problems at home and at school. About three years after the death of their mother, Eloy started getting into trouble with Joe, his brother who was three years older. They started sniffing glue. Eloy began missing school. The family lived in the Harbor City projects at this time. Eloy started hanging around with the other kids in the projects and got into trouble with them. But when the glue sniffing started, things got much worse. Someone called the police about Eloy. The police came and talked to their father, and said that their father couldn't control Eloy and that he should go to juvenile hall. Both Eloy and Joe were placed in juvenile hall. Eloy was about ten years old. (11 RT 2494-2496.)

Eloy was placed in juvenile custody for a "long, long" time, because he didn't attend school. He was in and out of juvenile hall during his

younger years. One time, police officers brought Joe and Eloy home, and their father got mad and slapped them. Leonard smelled them and realized they had been sniffing glue. Leonard went to the stores where they were buying it and asked the owners not to sell it to them. The owners said they would not stop, because someone else would just sell it to them. Leonard tried to enlist the assistance of the police about the glue sales, but they said it was legal and there was nothing they could do either. (11 RT 2497-2498.) Leonard would tell Eloy to stop sniffing glue. Eloy would stop for a while and then start again, but Leonard chalked this up to Eloy's youth. Eloy would also say he'd go to school and then he would run away from school. (11 RT 2511-2512.)

Eloy was in and out of juvenile custody until he was old enough to go to jail for whatever he did. During the times he was out of custody, Eloy sometimes stayed with Leonard. He was respectful to Leonard and his family. Eloy was kind and gentle, and was not violent with family members. (11 RT 2498, 2503.) But after he got into adult prison, Eloy began committing more violent crimes. He committed burglaries. Leonard was not aware of all of Eloy's activities. (11 RT 2511.) Leonard was aware of the crimes against Ramona Munoz, but he did not know about what happened to her sister, Gloria. Leonard did not know the details of the injuries Ramona Munoz experienced. (11 RT 2512-2513.)

Leonard was unaware of the nature of the crimes against Lillian Segredo. Eloy never spoke to Leonard about his crimes when he went to prison. (11 RT 2514-2515.) Leonard denied knowing that his sister-in-law had been raped by Eloy. He knew that she claimed Eloy had beaten her. (11

RT 2515.)[4]

Eloy was in prison in the 1980's and 1990's. Leonard visited Eloy at the various prisons where he was in custody. Eloy went to prison when he was twenty or twenty-one. Their father died on November 1, 1985. Eloy was in prison when he died so he could not attend the funeral. (11 RT 2499-2500.)

They have a very supportive family. (11 RT 2506.) The last time Eloy was released from prison was July 5, 1995. Eloy came to live with Leonard when he got out. Eloy lived with Rosie for a month and a half or two months, in February and March, 1996. Then he lived with Leonard again. Eloy was cleaning yards during this time, including working at Rosie's house. (11 RT 2501-2503.) Rosie helped Eloy when he got out by letting him live with her. She bought the Cadillac for him. She gave him money for clothes and also helped him when his paychecks ran short. Eloy left her house because he was keeping Rosie's husband up with late parties. (11 RT 2508-2509.)

Leonard has not seen evidence that Eloy is guilty of this crime. He does not want his brother to be put to death. Leonard will still visit Eloy in prison. (11 RT 2505-2506, 2510.)

Beatrice "Betty" Montiel, one of Eloy's older sisters, also testified about Eloy's family history. (11 RT 2517.) For the first five years of Eloy's life, he lived in a two bedroom home with his parents and nine siblings. Eloy and his little sister Angie slept in a bed in the washroom with their parents. One of their sisters died about five years ago. A brother died

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[4] The prosecution presented no evidence that this event actually occurred.

in 1964. Eloy was about eleven years old when his brother died. (11 RT 2518-2520.)

After their mother died, their father tried to raise them. When they were little, he would take the children to school. Sometimes Eloy would turn around and walk back out and look for his dad. Eloy always wanted to be with his father. Father and son would spend time together on the weekends, with Eloy helping his father with whatever he was doing. Their father had only one arm, yet he would still pick Eloy up and carry him around, even as he got older. Eloy had a special place in his father's heart. When not with his father, Eloy was taken care of by Aunt Virginia. Their father also drank heavily during this time, and always at night after a day of junk collecting. (11 RT 2520-2523, 2529.)

Their father tried to teach them right from wrong, and how to be good people. He tried to put food on the table and did not want to be on welfare. (11 RT 2530.)

Betty married a military man when she was 19 and moved away. Eloy was 15 at this time, and came to stay with them in Lompoc. She had just had a baby. Betty worried she would have trouble with Eloy, but there was none. He always helped her around the house and was attending high school. (11 RT 2523-2524, 2526.)

One day Betty saw an ad in the local paper about some missing foreign coins. She'd found some foreign coins on Eloy's dresser and asked him about them. Eloy said he'd gotten them from the son of a military man who had traveled in Germany, France and Spain. Betty called the police and they came to look at the coins. Eloy's coins were not the missing coins. During their visit, the police talked with Betty and her husband. Her husband said he was being assigned to a military base in Labrador. The

police said that Betty was too young to take care of her baby and Eloy too. They took Eloy away in handcuffs. (11 RT 2524-2525.)

Betty went to see Eloy two times at a boys' club in Santa Barbara, but by the third visit, he'd been removed. When she asked where he had been taken, they refused to give her any information. (11 RT 2525-2526.)

Betty visited Eloy twice in Tehachapi at Christmas. During these visits, Eloy would try to make them laugh and forget about the prison surroundings. Betty never saw Eloy hurt anyone, including children. If he was sent to prison again, and it was close enough, Betty testified that she would visit him. She would also stay in touch if he received a sentence of life without parole. She testified that she loved her brother, as well as the Arroyos and Monique. (11 RT 2526-2527, 2529.)

One night when she could not sleep, Betty watched television. She watched a movie with people in prison garb in it. She thought one of the men in the movie was Eloy. He was stabbed to death in the movie. Betty thought she was having a nightmare, and told her husband about the movie. (11 RT 2528.) Eloy had written her about being in a movie, but she had forgotten about it. She believes she saw the movie in 1993. (11 RT 2537-2539.)

When Betty first moved out of the house, she was 16. Eloy was only 11 at the time. Betty didn't know him as he went in and out of juvenile camps and the California Youth Authority. She only knew him well when he came to live with her when he was 15. There were no charges holding him at the juvenile hall, and they wanted him to live with a family member. Eloy lived with her for about eight months and then went back into custody. (11 RT 2531-2532.) Betty was unaware of Eloy getting into trouble for robbery, burglary, grand theft auto, battery on a police officer, grand theft

or for escaping from the youth authority. (11 RT 2532.)

Betty and her sister Rosie went to court in the 1970's for one of Eloy's cases. They did not hear the details about the rape and sodomy of Ramona Munoz. (11 RT 2533.) Betty knew that Eloy went to prison between 1975 and 1980 for the Munoz case. He got out in 1979 and then committed another crime in 1980. Betty did not know about the facts of the Lillian Segredo case. (11 RT 2534.)

The longest time Betty spent with Eloy since he was 12 years old was the eight months he lived with her in Lompoc. Her exposure to Eloy as an adult has been limited. (11 RT 2535.)

Betty listened to the testimony of the "three coroners."[5] Based on that testimony, Betty concluded that Eloy was not responsible for Monique's death. She understood the testimony to mean that the blood was not blood, but a grey substance; and that the DNA was inconclusive as to Eloy's semen. (11 RT 2535.) Betty testified that she believed it was possible that Eloy committed this crime, but that it was also possible for any man to engage in this kind of conduct. (11 RT 2536.)

Betty testified she did not know about any complaints Monique made to Sara Minor about Eloy touching her, or threatening her. (11 RT 2537.)

Yolanda Cabrera met Mr. Loy at a sandwich shop in Carson. He was very friendly and struck up a conversation with Ms. Cabrera and her friend. They talked about the weather, and exchanged phone numbers. Ms. Cabrera invited Mr. Loy to attend church. (11 RT 2560-2561.)

They had a friendship and spent time together. Ms. Cabrera spoke to

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[5] She appeared to be referring to witnesses Scheinin, Van Meter and Ribe.

Mr. Loy about her personal relationship with God. They would go on dates, but did not have a sexual relationship. (11 RT 2552-2553.)

Ms. Cabrera lived with her four children in an upstairs apartment. By May, 1996, they had known each other for about two and a half months. They had made a date to go out around 8 or 8:30 P.M. on May 8 for ice cream - after church services. Mr. Loy showed up at her apartment around 11 or 11:30 P.M. He woke her up when he came to her door. (11 RT 2554.)

Mr. Loy looked like he'd had a little to drink. He asked if he and his nephew could come inside to hang out. Ms. Cabrera said that was not possible. She told him not to come by late or when he had been drinking. They said a few things to each other and then said a friendly good-bye. There was no anger and Mr. Loy was very apologetic. She believes Mr. Loy had a bottle of beer in his hand. (11 RT 2555.)

Mr. Loy called her about half an hour later on the phone. He apologized for coming so late and said he did not realize he would so upset her. Ms. Cabrera told Mr. Loy that now he knew the rules, that it was late, and that they both had to work the next morning. She was upset with him but not angry. (11 RT 2556.)

Ms. Cabrera visited him in Chino and at the Los Angeles County jail. She visited him about two times a month. (11 RT 2557-2558.)

The last time Ms. Cabrera visited Mr. Loy was around Christmas, 1997. She stopped visiting because it took too much time, and interfered with her commitments to her children and her work. She asked a friend to take over ministering to Mr. Loy. (11 RT 2559.)

Crita Stiles is Mr. Loy's niece, the daughter of his sister, Angie. She has known him her whole life. She testified that she loves him and loved seeing him. Her Uncle Eloy was funny, and she looked forward to seeing

him. (11 RT 2562-2564.) Ms. Stiles was about nine or ten years old when she was around her uncle for a number of months in 1979-1980. He would come by a couple of times a week, sometimes to borrow her mother's van. Ms. Stiles also visited him at prison once on a trip with her mother and Uncle Leonard. (11 RT 2565-2566.)

There was a family party for her uncle when he got out of prison in 1995. Even though he had been in trouble, the family said they would help him. Ms. Stiles still supports her uncle, and does not believe he killed Monique. Ms. Stiles acknowledged that what happened to Monique was indeed very bad, and it would be particularly bad if it was her uncle, and if he committed the crime in his sister's home. If Ms. Stiles believed that her uncle had done this, she would not be supporting him. She has spoken to people who sat through the trial, and has not heard anything that changes her mind about his innocence. Not all family members were supportive of him. (11 RT 2567-2569.)

Eloy's younger sister, Angela Hernandez, testified that Eloy was very protective of her as they grew up. He taught her to run to their car if a dog chased her. He taught her to run home and go to the front door and call for their father if a stranger followed her. They would go to school together, but half the time Angie did not go back because she was teased so much about not having a mother. Eloy would comfort her after this happened. (11 RT 2571-2572, 2573.)

Eloy fed her when she was hungry. When Angie was about nine years old, they would go to the old oil wells that rocked back and forth. Eloy would climb up the wells and sit there for hours. He told Angie that he did this because the rocking made him think of their mom rocking him, and it made him feel closer to her. Sometimes they would stay out there

until 11:00. He would climb down and then they would go home. (11 RT 2572.) They would go fishing together under the bridge in Wilmington, or Eloy would make up little fantasy games about picnics or being at the beach. (11 RT 2574.) Sometimes she and Eloy and another brother played at being shop keepers. (11 RT 2576.)

If Eloy left the house when their father was not home, he told her to lock the doors and not to let anyone inside. (11 RT 2574.)

Their sister Rosie took them in, along with two other brothers. She spoiled them and babied them. Eloy had a guitar and a wig and used to act like a clown and make them laugh. One time they went to the store and Eloy bought the two of them baby food - "because we're still babies!" he told her. Eloy told Angie they should call Rosie mama because she loved them like a mama. This made Angie cry. (11 RT 2573.)

When Angie was a teenager, she had two children. Eloy helped her with them. He would talk to her when she needed someone to talk to. He told her he'd always be there for her. (11 RT 2571.)

When Christmas 1995 came around, Eloy told her he wanted to get something for her because he'd been unable to do so for so many years. He got her some perfume. Angie and Eloy went to Tijuana to buy gifts too. Eloy spent quite a bit of time finding the right gift for Monique - a poncho. (11 RT 2574-2575.)

Angie was only able to visit Eloy once in prison because she was having babies and had to take care of her family. Eloy was around her family and never acted inappropriately. Even her children picked up the habits he had taught her about going to the door and calling for a parent if a stranger followed you. Her daughter Jennifer had to do that once. (11 RT 2576-2577.) Angie testified that she loved her brother very deeply, and

believes it would be wrong to put him to death. (11 RT 2577-2578.)

Angie testified that she had not heard the evidence so she believes he is not responsible for this crime. She never knew Eloy to harm the family. (11 RT 2579.)

Angie testified that the morning Monique disappeared, Eloy came inside and said he didn't have enough gas to go to the house. Angie didn't either, but she drove him over to the house. Angie told Eloy to take a shower before they went because he was so dirty. The shower only took a few minutes. (11 RT 2579-2580, 2583.)

Angie cannot recall why Eloy went to prison either time. She has had memory problems and migraines ever since a car accident in which her brain was bruised. (11 RT 2583.)

At the time of trial, Anthony Casas was a criminal justice consultant and a private investigator. (11 RT 2598.) Prior to that, Mr. Casas had a long career with the California Department of Corrections (CDC). He worked his way up from correctional casework trainee beginning in 1964, and ultimately retired in 1987 as an Associate Warden at San Quentin Prison. (11 RT 2598-2602.)

Most of the work Mr. Casas did in his career with the CDC involved inmate classification. He has testified as an expert on the prison system. He dealt with gangs throughout his institutional career. He was the founder of the state prison gang task force. (11 RT 2604-2605.)

Mr. Casas wanted to do something about keeping first timers in the prison system - young people - from being recruited into gangs. He was unable to do anything about this until he had a position where he did not have to travel. This occurred when he became the Associate Warden at the California Men's Colony at San Luis Obispo, where he was assigned to

handle custody and security. (11 RT 2601, 2605-2606.) He wrote a grant to do propaganda films that argued against inmates getting involved in the gangs run by the Mexican Mafia and the Nuestra Familia, the Black Guerilla Family, and the Aryan Brotherhood. He received grants for the Mexican Mafia and Nuestra Familia movie, and for the movie about the Black Guerilla Family, and set about having the films made. (11 RT 2606.)

The most dangerous prison gang at that time was the Mexican Mafia. If someone joined the gang and did not carry out orders, they would be killed. Mr. Casas wanted to show inmates that they did not have to join, and that if they did, the only way out was to die or get killed themselves. (11 RT 2607-2608.)

It was hard finding a film company that would assist in making the movie, but they finally found a company from Los Angeles. Then Mr. Casas wrote a script for the movie with a select group of inmates. He needed current slang, and people who knew how the gangs operated. He was eventually able to create a script for a thirty-four minute film. Then he recruited inmates to appear in the film. About one hundred inmates showed up to learn about it. When they heard about its controversial and dangerous content, about sixty left. The remaining forty inmates appeared in the film. (11 RT 2609-2611.)

The movie shows two youngsters going to prison for the first time. One gets involved with gangs and the other does not. In the end, the new recruit is asked to kill someone on the yard who is the friend of his brother. He refuses. The movie shows how he is set up by the gang for balking at the order to kill, and how he is stabbed seventeen times in the yard at the end. Mr. Loy was picked to play the part of the young, new recruit because he looked vulnerable. (11 RT 2611-2614.)

Filming was done at the prison and at the reception center in Chino. The movie was difficult to make because this prison was considered the most racist prison in California at the time. Neither the inmates nor the guards liked the fact that a movie was being made at the prison. There was a great deal of tension. The movie was made, but due to political infighting, it was never shown at the prison reception centers, as intended. (11 RT 2615-2618.)

A limited number of copies were sent to law enforcement agencies and schools. They would copy it and send it to others. Mr. Casas got hundreds of letters about the film from police departments and schools. At the time of trial, it was still being used to train some police departments that deal with gang members. It has also been shown on public television. (11 RT 2618-2619.)

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I

BECAUSE THE PROSECUTION EVIDENCE ABOUT HOW MONIQUE ARROYO DIED WAS SO INCONCLUSIVE, AND THE EVIDENCE CONCERNING APPELLANT'S INVOLVEMENT WAS SO WEAK, IT WAS PREJUDICIAL ERROR TO ADMIT EVIDENCE OF APPELLANT'S OTHER CRIMES UNDER EVIDENCE CODE SECTION 1108

A. Factual Background

On February 25, 1998, the prosecution filed a Notice of Intent to Introduce Evidence of Another Sexual Offense by Defendant. (1 CT 314.) The notice stated that, pursuant to Evidence Code Section 1108[6], the prosecution intended to introduce evidence of the November 10, 1980, sexual assault against Lillian Ber[7], and the March 24, 1975, sexual assault of Ramona Munoz.

On September 28, 1998, the defense filed an Opposition to Section 1108 Evidence. (2 CT 409-413.) Appellant's objections to the admission of this evidence were threefold. He argued that the evidence was not relevant because appellant was not charged with a sexual offense; that the evidence should be excluded under Evidence Code section 352; and that section 1108 was unconstitutional.

On October 23, 1998, the prosecution filed a Response to Defendant's Opposition to Section 1108 Evidence. (2 CT 457-461.) The prosecutor argued that the decision in *People v. Falsetta* (1998) 64 Cal.App.4th 291,[8] permitted introduction of the prior sex offense evidence.

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[6] Hereafter section 1108.

[7] Lillian Ber was previously known as Lillian Segredo.

[8] In 2000, the Court of Appeal decision in *People v. Falsetta* (1999) (continued...)

The prosecution also argued that similarities between the priors and the capital offense supported admissibility.

Just before trial began, the court heard argument on the admissibility of the predisposition evidence. Defense counsel argued that the prosecution's guilt phase case was very weak and was based on contested forensic evidence. He argued that the prior sex offense evidence was highly inflammatory, and that the facts of the priors differed significantly from those in the capital case. (1 RT 400-403, 404-405.) One of the priors involved a 16 year old, when Mr. Loy was just in his 20's. The other prior involved a woman in her 30's, when Mr. Loy was in his late 20's. Neither involved a pre-teen girl, as was Monique. He argued that the prosecution wanted the prior sex offenses to come in so that its weak capital case evidence would be overlooked by the jury.

The trial judge ruled that evidence of the prior offenses could be presented to the jury. (1 RT 405-407.) He stated:

> My conclusion in this regard is that it will not mislead the jury. It will not confuse the issues. It will not necessitate undue consumption of time. And as Mr. Larkin has pointed out, his best argument is that he claims it will create substantial danger of undue prejudice. Of course in every case evidence that will make it more difficult for the defendant to defend is going to be prejudicial to his cause. The question is, on balance, with everything considered, should the court exclude either or both of this [*sic*] items of evidence or developments of an area of evidence concerning two other cases on the language substantial danger of undue prejudice when I balance everything out.
>
> In this case, certainly I have to – I don't say certainly, I do agree with

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[8](...continued)
64 Cal.App.4th, was vacated by this Court. (*People v. Falsetta* (2000) 21 Cal.4th 903.)

> Mr. Larkin that when he takes on Miss Ingalls' comment that it is calm or tame, that it is not calm or tame, but I believe what she was talking about was calm or tame in comparison to the facts of this case if the jury were to conclude that the defendant is responsible for the charge which is leveled against him by the district attorney filing of an Information after the magistrate's decision. Certainly is just not as emotional, not as difficult to deal with as the facts of this case if they are proved.

(1 RT 406-407.)

Defense counsel renewed his objection to Ramona Munoz's testimony before she took the stand. (6 RT 1406.) Before she testified, and over further defense objection (6 RT 1407), the court gave the following instruction to the jury:

> Evidence is going to be introduced at this time for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case.
>
> Sexual offense insofar as the way I'm using it at this time for your instructions means a crime under the laws of the state of California that would involve something that would be a felony crime in the state of California.
>
> And at the end of the case, I'll give you elements of any crime that's discussed, in addition to the crime that is part of the Information that you're making a decision on after all the evidence is in in this case.
>
> *If you were to find that the defendant did commit a prior sexual offense, you may, as jurors, but are not required to, infer that the defendant, had a disposition to commit the same or similar type of sexual offense. If you were to find that the defendant had this disposition, you may, but are not required to, infer he was likely to and did commit the crimes for which*

> *he's accused in this case. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.*
> [emphasis added.]
>
> So, in effect, what I've told you about with the language I told you, some evidence is allowed for a limited purpose in a case but not for all purposes. I've given you the limited purpose, and you'll get more instruction on this issue and maybe elements of the crime or crimes at the end of the case.

(6 RT 1411- 1412.)

The details concerning the Munoz incident have been described above, in the Statement of Facts, at pp. 28 -29.

Defense counsel also objected to Lillian Segredo Ber's testimony before she took the stand. Judge Sheldon overruled the objection. (7 RT 1467-1468.) The details concerning this incident have been described above, in the Statement of Facts, at pp. 29 - 30.

At the conclusion of the guilt phase, the jury was instructed about its consideration of the predisposition evidence. (3 Ct 565-566; 10 RT 2305-2306.)[9]

B. The Prior Offense Evidence Should Not Have Been Admitted Because It Was More Prejudicial Than Probative

In *People v. Falsetta* (1999) 21 Cal.4th 903, this Court held propensity evidence could properly be admitted against a criminal defendant in sex crimes cases pursuant to newly enacted Evidence Code section 1108 ("Section 1108"). Appellant contends that the admission of

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[9] See Argument II, which concerns the unconstitutionality of the 1108/predisposition instruction given in this case.

propensity evidence in his case amounted to prejudicial, reversible error.

Section 1108 was enacted in 1995. The crime charged in this case occurred in 1996, on the heels of this new legislation. The case was tried in 1998, just as the appellate courts were issuing their first decisions about section 1108 and its concomitant jury instruction. This Court did not decide *Falsetta* until a year after trial in this case. As a result, the attorneys and the trial judge did not have a great deal of authority to guide them in deciding how to proceed in this case. The legal developments since the time of trial establish the error in admitting the predisposition evidence under the particular facts and circumstances of this case.

A review of the factors set forth in *Falsetta* demonstrates that the trial court abused its discretion in admitting evidence of appellant's conduct under Evidence Code section 1108. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915-916.) The trial court here failed to:

> "engage in a careful weighing process... [T]rial judges must consider such factors as its nature, relevance and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading or distracting the jurors from their main inquiry, its similarity to the charged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant but inflammatory details surrounding the offense."

(Id., at p. 917.) (See also *People v. Balcom* (1994) 7 Cal.4th 414, 427) [finding that the probative value of the evidence was increased by the relative similarity between the offenses and the close proximity in time.]

1. Admission of the Evidence Distracted Jurors From Their Main Inquiry

The main inquiry in this case should have been whether Mr. Loy was

responsible for Monique's death. But it was not. That is because the jury in this case was permitted to rely solely on the predisposition evidence in order to determine who committed these acts and how the acts were committed.[10] The jury was told from the second day it heard evidence, through the guilt phase jury instructions, that they could rely on Mr. Loy's prior crimes in order to determine that he was likely to and did commit the crime in this case. As a result, the evidence about the priors became a competing, if not primary, focus of the case for both the prosecutor and the jury.

> Our Supreme Court has recognized the possibility that propensity evidence may reduce the burden of proof. In a capital murder case it noted that if the jury used evidence of an uncharged killing to show the defendant's propensity to kill, "the prosecution's burden of proof as to the central issue in the case, the identity of [the victim's] slayer, arguably was lightened, thus raising the possibility that defendant's constitutional right to due process of law was impaired. (*People v. Garceau* (1993) 6 Cal.4th 140, 186, 24 Cal.Rptr.2d 664, 862 P.2d 664.)

(*People v. Fitch* (1997) 55 Cal.App.4th 172, 183.)

2. The Priors Bore No Similarity To The Capital Case

As stated above, the trial court must also consider whether the prior offenses bore any similarity to the underlying crime in order to pass muster under *Falsetta*. The prior crimes bore no similarity whatsoever to the facts of this case. In fact, the trial judge made such a finding in connection with some other evidence the prosecutor sought to get admitted.

The prosecutor wanted to present evidence from Gabriel Arroyo,

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[10] See Argument II, concerning the constitutionally improper instructions the jury received regarding the predisposition evidence.

Monique's 17-year-old brother,[11] that he had seen Mr. Loy flirt with teenage girls who came to the Arroyo house to visit with Gabriel. The prosecutor wanted to show that Mr. Loy was "sexually interested" in "girls who are 30 or so years younger than him..." (6 RT 1226.)

The court excluded the evidence concerning under section 352, stating:

> I think I'd have an easier time with your proffer if they were younger than they are, but I'm not sure I wouldn't find the same difficulty with it.
>
> I think under 352, there is a danger of confusing issues, a substantial danger of unfair or undue prejudice, misleading the jury under relevancy, and what it means and adds up to as far as this charge is concerned.
>
> With that balancing, I'm going to decline allowing admissibility of the evidence that this witness has given us at this 402 hearing. (6 RT 1227).
>
> The judge also stated:
>
> Frankly, I think it's common knowledge that some older men are interested in younger girls, more likely to be 17, 18, more developed girls, obviously, than a very young girl than the alleged – the victim in this case. (6 RT 1228.)

If the age difference between Mr. Loy and the teenage visitors was decisive with respect to excluding evidence about appellant's behavior with Gabriel's friends - girls who were around 17 years of age - then it was even more decisive with respect to the prior sex offense testimony. The trial

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[11] Just before Ramoa Munoz testified, a further Evidence Code section 402 hearing was held regarding the admissibility of Gabriel's testimony. (6 RT 1220-1228.)

judge acknowledged a clear distinction between sexual interest in girls in their late teens and a sexual interest in pre-teen girls.

If the jury would be confused and unduly prejudiced by Gabriel's testimony about his uncle's flirtatious, perhaps obnoxious but definitely non-criminal, behavior with teenage girls, how could they not be highly inflamed and unfairly prejudiced by the graphic and disturbing testimony of Ramona Munoz and Lillian Segredo? The age factor was of even greater significance where Monique was concerned.

In a very recent case, this Court concluded that the trial court in a capital case rightly excluded section 1108 evidence that the defense sought to introduce in order to prove that the co-defendant was the perpetrator of the rape-murder for which the two defendants were on trial. In *People v. Abilez* (2007) 41 Cal.4th 472, 498-503, this Court found that the co-defendant's prior juvenile adjudication for sex with a minor was not admissible under section 1108 because it bore no similarity to the capital crime - the rape and sodomy of an older woman. The same is true in this case: Mr. Loy's prior convictions were for the rape and sodomy of two females who were close in age to him. The facts of the prior cases showed plain violence. No sexual violence was apparent in the underlying capital case facts, nor was any evidence of sodomy found. There was no evidence of oral copulation found. Moreover, Mr. Loy's niece was much younger than he - and a completely different type of victim than the ones in the prior offenses. *Abilez* therefore supports exclusion of the 1108 evidence in this case.

This Court found in *Falsetta* that the prior offense testimony was similar to the charged crime, and was not inflammatory. Neither is true in this case. There are no similarities. The stark and truly unfortunate reality is

that the facts of the prior offenses as presented at this trial were brutal, violent and obvious. Incontrast, the "trauma" evidence of injury to Monique was so hard to find that the coroner spent months trying to locate it - and whether she did in fact find physical trauma perpetrated upon Monique was hotly disputed. This is hardly the handiwork so prominently highlighted by the prosecution through the testimony of Ms. Munoz and Ms. Segredo. As for inflammatory, both witnesses described the hours-long sexual assaults in great detail. They also reported they had to seek medical attention, and described the extensive injuries they suffered as a result of the sexual assaults.

3. The Predisposition Evidence Was Far More Prejudicial Than Probative

Where *Falsetta* supports reversal in this case, *People v. Harris* (1998) 60 Cal.App.4th 727, compels it. The facts of the *Harris* case are similar to those here. In *Harris*, the defendant was on trial for having committed what the court described as "breach of trust" sex crimes against several women who were residents at a mental health treatment facility. Pursuant to section 1108, the prosecution was permitted to introduce evidence that defendant had previously committed a very violent prior sexual assault, which left the victim unconscious, and bleeding from her mouth and vagina. The appellate court contrasted the evidence the *Harris* jury heard about the underlying crime and the prior offense this way:

> The trial court found the evidence [of the prior offense] was "inflammatory." We agree, but clarify that the evidence was inflammatory *in the extreme*. Without minimizing the trauma suffered by each victim, at worse the defendant licked and fondled an incapacitated woman and a former sexual partner, both of whom were thereafter on speaking terms with him. Although the assaults described by Tracy and Brenda are criminal, involving a breach of trust by a care giver, the abuse the victims suffered is, unfortunately,

> not unusual or shocking. On the other hand, the evidence of the 1972 incident described a viciously beaten and bloody victim who as far as the jury knew was a stranger to the defendant.

(*People v. Harris, supra,* 60 Cal.App.4th at p. 738; emphasis in original.)

The *Harris* court considered four factors in concluding determination that the prior offense evidence should not have been admitted at trial. Those factors were: probability of confusion; remoteness; consumption of time; and probative value. (*People v. Harris, supra,* 60 Cal.App.4th at pp. 738-741.) The court found that the consumption of time factor weighed in favor of admission.

However, the court found that the remoteness, risk of confusion[12] and probative value factors required the exclusion of the prior sex offenses. The court found that the prior offense evidence was not probative because it "...did little more than show defendant was a violent sex offender." (*People v. Harris, supra,* 60 Cal. App.4th at p. 740.) The court also found that there were no similarities between the offenses. Last of all, the court found that the state's argument on appeal, which highlighted the weak nature of the evidence of the underlying crime, actually supported exclusion of Harris' prior sex offense. (*People v. Harris, supra,* 60 Cal.App.4th at p. 741.) Like *People v. Harris, supra*, the evidence in this case was not similar to the prior offenses, as explained above.

The weak evidence in the underlying case also militates in favor of

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[12] Risk of confusion is a significant factor in considering whether the prior sex offense evidence should have been admitted at Mr. Loy's trial. This issue will be discussed in connection with the instructions given to the jury concerning how to evaluate the predisposition evidence, in Argument II, below.

exclusion. The prosecution theorized that the intoxicated Mr. Loy stayed inside the Arroyo house after helping his drunken nephew to bed, then climbed the admittedly creaky wooden stairs and went inside his niece's bedroom - which was directly across from her mother's (his sister's) bedroom. He somehow got inside the bedroom and killed and sexually assaulted his niece, without anyone hearing anything. According to the prosecution theory, Mr. Loy took off Monique's clothes and bundled her up in a sheet and comforter, opened her bedroom door, clambered down the stairs with this dead weight, opened a door and walked outside with the body and deposited it inside his car - all without being heard by her parents across the hall, by her brother in the room next door, or her brother whose bedroom was on the first floor. The prosecutor theorized that Mr. Loy then put her into his car, drove to a vacant lot, and left her there, covered with the comforter. (10 RT 2189-2215, 2273-2295.)

Although this was the prosecution theory, the evidence presented at trial did not support it. The evidence showed that Monique disappeared from her bedroom. The prosecution presented no evidence to prove when and under what circumstances she left. The prosecutor theorized that Monique was killed by her uncle in her bedroom during a sexual assault. There was no evidence recovered from the bedroom which supported this theory. Several criminalists looked for trace evidence left by Mr. Loy in Monique's bedroom, but they found none. None of Mr. Loy's fingerprints were found in Monique's bedroom. (7 RT 1655.) No head or pubic hairs of Mr. Loy's were found on the crime scene comforter, Monique's pink blanket, or her bed sheet - all of which were in her room that night. (8 RT 1750, 1752, 1753.) No semen was found on the sheet and blanket. (8 RT 1873-1875.)

In fact, trace evidence was recovered from the comforter, blanket, and sheet, and it exculpated Mr. Loy because it could not be connected with him. Hairs were found on the pink blanket from Monique's room, but they were not Mr. Loy's. (8 RT 1753.) Pubic hairs were found on both beds in Monique's room, but they did not belong to Mr. Loy or Monique. The pubic hairs had roots which could have been tested for DNA. (8 RT 1754, 1760.) The prosecution only compared the pubic hairs to Mr. Loy and Monique, and not anyone else. (8 RT 1759.) Clothing and shoes Mr. Loy wore the night Monique disappeared were seized, but were not tested. (5 RT 1131, 8 RT 1929-1930, 8 RT 1761.)

There were three hotly disputed items of forensic evidence which the prosecution argued proved Mr. Loy committed this crime. These items were the trunk lid stain which was only an eighth of an inch in diameter (7 RT 1696), the one quarter inch square fluid stain on the comforter (7 RT 1634), and the fibers found on the comforter.

This evidence was just as weak as it sounds. Trial testimony showed that the trunk lid stain *might* have come from Monique, but the evidence in no way conclusively proved this. First of all, as testimony throughout the trial showed, Mr. Loy and Monique belonged to a large, extended family. Mr. Loy purchased his car from another family member. (7 RT 1525-1526.) Erin Riley - the prosecution DNA expert - testified that there was some sort of bodily fluid on the trunk stain swab. Although Riley could have done further tests in order to determine what kind of fluid was on the swab, she did not conduct any other test. (7 RT 1609-1610.) Riley was able to match 6 of 7 of Monique's genetic markers on the trunk stain swab, but could not confirm the seventh due to blood degeneration. The prosecution never tested the blood of any other Arroyo family members to see if their blood

was a better match to the trunk stain swab. (7 RT 1620.)

Riley testified that one of the markers found in the trunk stain swab contained a D1S80 profile frequency for type A, type 18, but she was unable to determine if Monique was a type 18. Therefore, the trunk stain swab contained a statistical frequency that could not be found for Monique. (7 RT 1622.) Riley never testified that Monique's blood was found in the trunk. It was her testimony that Monique could not be excluded as a contributor to the trunk stain. (7 RT 1600.) But Riley also testified that if Monique was found to have a different D1S80 marker than that found in the stain, she would be excluded as the source. (7 RT 1625.) Therefore, the fact that Riley found a frequency type in the stain which did not match Monique's profile strongly suggests that the material may have come from another source.

Moreover, Riley testified that 1 in 5100 people would have this frequency type. She admitted that family members were more likely to have a closer match than that and that her 1 in 5100 figure did not take family relationships into account. Riley testified that the statistical frequencies are lower among biologically related people. (7 RT 1623.) The fact that those statistical frequencies are lower is crucial in this case where another family member had owned the Cadillac before Mr. Loy, where other family members had access to the car, and could have left this trace evidence themselves - and where the prosecution never tested any other family members to see if they might have been the source of the stain. It was the prosecution's duty to prove Monique was the source of the stain. It was not the duty of the defense to disprove it.

The tiny stain on the comforter suffers from the same evidentiary weaknesses. Riley found very faint, weak test results concerning a second

contributor to fluids on the comforter, which could possibly have been Mr. Loy. (7 RT 1601.) Out of the entire comforter, the area on the comforter in which fluid foreign to Monique was found was less than 1/4 inch in size. (7 RT 1628.) Riley could not tell if the fluid was blood or saliva. Riley testified that the stains could have been present on the comforter even before Monique's death. (7 RT 1627-1633.) Riley also testified that it is more likely that the material was on the sheets and comforter before the stain was deposited because it is common for bedding and sheets to have DNA on them. (7 RT 1630.) She admitted she could have conducted a substrate test in order to determine if the genetic material had been left on the comforter before the fluid stain got there, but did not do so. (7 RT 1629.) And, like the trunk stain, Riley never conducted any tests to determine whether any other family members might have been the source of the weak type found on the comforter stain. (7 RT 1630-1631.) Most importantly, no genetic sample taken from the comforter which Riley tested showed a D1S80 result of "24, 25" which is the D1S80 type of Mr. Loy. (7 RT 1633.) Thus, the prosecution failed to conclusively prove when the material was deposited on the comforter or that the genetic material on the comforter belonged to Mr. Loy.

The carpet fibers found on the comforter are of even less evidentiary significance than the other forensic evidence. Susan Brockbank testified that she found fibers on the comforter which had similarities to the fibers from the front floorboard of Mr. Loy's car. (8 RT 1737, 1740.) She concluded that the fibers "could have" come from the Loy car. (8 RT 1748.) Brockbank also stated that just looking at the fibers on their own, she could not tell if they came from a vehicle carpet or a residential carpet. (8 RT 1763.) Brockbank could have conducted additional testing in order to

determine if the dyes in the fiber samples she took from the car and the dyes in the fibers she found on the comforter were different, but she did not conduct those tests. (8 RT 1763-1766.) The comforter also had fox tail type material attached to it from the field where it was found. None of the foxtail material was found any place else. (8 RT 1762-1763.) In other words, no foxtails from the field were found in Mr. Loy's car.

Last of all, Brockbank testified that fibers could transfer from one piece of material to another through secondary transfer. (8 RT 1761-1762.) The fibers from the car could have been transferred to the comforter after someone was in Mr. Loy's car and then sat on the comforter. Gabriel testified he saw Monique in the front seat of Mr. Loy's car once. (5 RT 1117.) The carpet fibers could have been transferred from the car to the comforter on this occasion. Brockbank also testified that she did not find any comforter fibers in the car. (8 RT 1751.)

The evidence connecting Mr. Loy with the prior offenses came from first hand testimony from the victims of those crimes. The detailed testimony they gave was graphic and disturbing. On the other hand, the evidence in the capital case failed to prove that Mr. Loy had any direct connection with his niece's disappearance and death. The prosecution's theory was speculative at best.

Under these circumstances, allowing the jury to learn the sordid facts of Mr. Loy's prior crimes can hardly be deemed harmless error. This is especially so here, where the prosecutor exacerbated the impact of the improper evidence by repeatedly referring to it in closing argument. (10 RT 2200-2201 2293-2294.)

At the beginning of her closing argument, the prosecutor said:

"That's what he does. That's what we know about him. And we

know that not only from Lillian, we know it from Ramona Munoz.

You will get an instruction that tells you what you can do with this evidence. It shows that he has a propensity to commit these types of acts. He is a man that does this. This is his character. This is what we know about him.

You can use that to plug it in to decide, first of all, who, who did it, and then what did he do? What did he do?

He raped her, choked her, and trying to control her, killed her because she knew him, just like he tried to do with Lillian Segredo and Ramona Munoz."

(10 RT 2201.)

At another point, the prosecutor again referred to the prior crimes:

Rape and choking of Ramona Munoz, again, propensity to commit rape, propensity to commit sexual assault, propensity to get your own sexual gratification any way that you can.

(10 RT 2206-2207.)

During the guilt phase rebuttal argument, the prosecutor stated:

Does that make any sense? Or do you just say, I'm not going over because I'm the one that did it, and I don't want to be anywhere near the cops because I did it and I am a two-time rapist?

(10 RT 2293.)

During her final remarks to the jury in rebuttal the prosecutor said:

You can't keep out the rape and choking of Lilian Segredo. You can't keep out the rape and choking of Ramona Munoz.

(10 RT 2294.)

The importance of the evidence to the state's case is amply

demonstrated by the prosecutor's substantial reliance on it. The prosecutor's "actions demonstrate just how critical the State believed the erroneously admitted evidence to be." (*Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1131; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [prosecutor's reliance in summation on erroneously admitted aggravating evidence critical factor in finding error prejudicial]; *People v. Quartermain* (1997) 16 Cal.4th 600, 622 [error in admitting evidence prejudicial due in large part to prosecutor's reliance upon it in summation]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [same]; *People v. Powell* (1967) 67 Cal.2d 32, 56-57; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 444 ["The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments . . ."].) This evidence was the centerpiece of the prosecutor's guilt phase case. It had to be, given the evidentiary gaps in her underlying case.

Moreover, the objective record of jury deliberations show this was a close case. The jury deliberated over four days, and asked for testimony to be read back concerning the most hotly disputed items of forensic evidence. (2 CT 513-528.) These indicia have long been recognized as showing a close case. (See, e.g., *People v. Woodard*, *supra*, 23 Cal.3d at p. 341 [six-hour deliberation shows close case]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [juror questions and requests for read-back show a close case].)

The admission of the shocking prior rape testimony allowed the jurors to fill in the evidentiary gaps in the underlying capital case with assumptions and inferences that Mr. Loy committed this crime. Moreover, the prosecutor's exhortation that the propensity evidence told the jury that this is "who he is;" that this is "what he does;" that this is "his character;"

and finally, that the propensity evidence can be used to decide "who did it," all run afoul of constitutional protections afforded the defense even when section 1108 evidence is properly admitted. As the *Harris* court said:

> As the trial court in this case realized, and as we held in *Fitch*, section 1108 passes constitutional muster if and only if section 352 preserves the accused's right to be tried *for the current offense.* [emphasis in original]. "A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not who he is." (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044, 42 A.L.R.Fed. 855; *see People v. Garceau* (1993) 6 Cal.4th 140, 186 [use of such evidence may dilute presumption of innocence].)

(*People v. Harris, supra,* 60 Cal.App.4th at p. 737.)

C. This Court Should Reconsider Its Decision in *Falsetta*

Evidence Code section 1101 contains a broad proscription on the admission of other crimes evidence to prove a defendant's general criminal disposition to commit a charged crime. Evidence Code section 1108, enacted in 1995, contains an exception to this proscription. Under section 1108, the prosecution may in any sexual offense case introduce "evidence of the defendant's commission of another sexual offense." This evidence is admissible to prove the defendant's general criminal disposition, or propensity, to commit the charged crime. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 911.) As more fully discussed below, section 1108 violates Due Process.[13]

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[13]Like virtually every other provision of the Evidence Code admitting evidence, section 1108 is subject to the weighing process of section 352. (See *People v. Falsetta, supra*, 21 Cal.4th at p. 911.) Section 352 provides that a court "in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (1) necessitate undue consumption of time or (b) create

(continued...)

In *People v. Falsetta, supra,* 21 Cal.4th 903, this Court upheld section 1108 against a Due Process challenge. The Court concluded that it was "unclear whether the rule against 'propensity' evidence in sex offenses should be deemed a fundamental historical principle of justice." (*People v. Falsetta, supra,* 21 Cal.4th at p. 914.) The Court explained that historically courts "have been more 'ambivalent' about prohibiting admission of defendants' other sex crimes in sex offense cases." (*Ibid.*) This was so, the Court reasoned, because courts "permit admission of . . . sexual misconduct [for the purpose of showing] motive, identity, and common plan . . ." (*Ibid.*) Given the Court's conclusion that it was unsure whether historical practice reflected a categorical exclusion of such evidence, the Court held that the limitations imposed on the admission of section 1108 evidence were sufficient to avoid offending whatever historical practice existed. (*Id.*, at pp. 915-918.) The chief limitation to which the Court referred was the fact that the trial court had discretion to exclude propensity evidence under section 352. (*Id.*, at p. 917 ["In summary, we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge."].)

Appellant requests the Court to reconsider *Falsetta* for three reasons. First, to the extent it relies on a conclusion that historical practice was "ambivalent" about excluding propensity evidence in sexual assault cases, it fails to consider adequately that for more than a century the Supreme Court itself consistently applied the rule against disposition evidence even in sexual offense cases. (See, e.g., *People v. Bowen* (1875)

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[13](...continued)
substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

49 Cal. 654, 655; *People v. Stewart* (1890) 85 Cal. 174, 175; *People v. Anthony* (1921) 185 Cal. 152, 157; *People v. Guerrero* (1976) 16 Cal.3d 719, 724; accord, *People v. Huston* (1941) 45 Cal.App.2d 596, 597-598; *People v. Bruce* (1989) 208 Cal.App.3d 1099, 1105.) In fact, the legislative history to section 1108 makes clear that the purpose of section 1108 was to change existing law on this issue. (See Report of Assembly Committee on Public Safety on AB 882, as amended May 4, 1995, p. 1 ["Current law in part bars the admission of evidence of other crimes or acts committed by the defendant when offered to show that the defendant has a disposition to commit sexual offenses, including child molestation."]; Assembly Third Reading of AB 882, as amended May 15, 1995, p. 1, [same].) Of course, there would be no need to change existing law if it already allowed the use of prior sex crimes to prove propensity.

Second, although *Falsetta's* observation that evidence of prior sexual offenses has been allowed for reasons other than propensity -- like motive, intent, identity or common plan -- is true, it is beside the point. This fact does not say anything about the historical exclusion of such evidence for propensity purposes, nor does it demonstrate any widespread rejection of the general rule against propensity evidence.

Finally, *Falsettas's* conclusion that "section 352 provides a safeguard that strongly supports the constitutionality of section 1108" is unfounded. (*People v. Falsetta, supra,* 21 Cal.4th at p. 915.) Section 1108 alters the traditional balancing process of section 352 by establishing a presumption in favor of admissibility of prior sex offenses to prove disposition. Because section 1108 makes prior sex offenses presumptively admissible, such priors may now be excluded under section 352 only if they are unduly prejudicial for some reason other than their tendency to prove

disposition.

As the Court itself noted, propensity evidence has historically been "deemed objectionable, not because it has no appreciable probative value, but because it has too much." (*People v. Falsetta, supra,* 21 Cal.4th at p. 915.) Thus, based on its "appreciable probative value," in addition to its presumption of admissibility, it is clear that prior sex offenses will only be excluded under section 352 in the rarest of circumstances. This cannot be considered an adequate "safeguard" against the admission of evidence that has traditionally been considered inherently prejudicial. (See *United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201, 204 ["[O]nce prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."].)

Moreover, experience has shown that section 352 is no safeguard at all. In *Falsetta*, the Court relied heavily on *People v. Fitch* (1997) 55 Cal. App.4th 172, in holding that section 1108 did not violate due process:

> In summary, we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in *Fitch*: [S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under section 352. (...§1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (...§352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. *With this check upon the admission of uncharged sex crimes in prosecutions for sex crimes, we find that ...section 1108 does not violate the due*

> *process clause."* [emphasis in original.]) (*Fitch, supra,* 55 Cal.App.4th at p. 183.)

(21 Cal.4th at pp. 917-918.)

The *Falsetta* opinion also relied on the earlier court of appeal decision in *People v. Harris* (1998) 60 Cal. App.4th 727, to demonstrate that the section 352 exclusion remedy is both vital and legally viable:

> Contrary to defendant's assumption, section 352 affords defendants a realistic safeguard in cases falling under section 1108. For example, in *Harris, supra,* 60 Cal.App.4th 727, 70 Cal.Rptr.2d 689, the appellate court reversed a conviction under that section, concluding the trial court abused its discretion under section 352 in admitting an altered version of the defendant's past violent sex offense. In its discussion, the *Harris* court carefully examined, and applied to the facts before it, the factors included in the trial court's discretionary decision to admit propensity evidence under sections 352 and 1108. (See *Harris, supra,* 60 Cal.App.4th at pp. 737-741, 70 Cal.Rptr.2d 689.)

(*Falsetta*, 21 Cal.4th at pp.918-191.)

Harris was decided in January, 1998 – almost ten years ago. It is the only *pre-Falsetta* case holding that a trial court erred in admitting evidence under section 1108. Although this Court found that there was "no reason to assume, as defendant suggests, that 'the prejudicial effect of a sex prior will rarely if ever outweigh its probative value to show disposition'" (*People v. Falsetta, supra,* 21 Cal.4th at p. 919), no reported appellate decision since *Falsetta* has found reversible error in the admission of other crimes evidence proffered by the prosecution under section 1108. The *Harris* rule has become just that - the rule for Mr. Harris only.

A practice which admits other crimes evidence when offered to prove a defendant's disposition to commit the charged offense -- even when

subject to the empty safeguard of section 352 -- violates Due Process.[14]

D. Reversal Is Required

There is a reasonable probability that the guilt phase result would have been different had the section 1108 evidence not been admitted. Additionally, the introduction of this evidence violated Mr. Loy's Sixth Amendment right to a fair trial, his Eighth Amendment right to a reliable result in the guilt phase of his capital trial, and his Fourteenth Amendment rights to due process and fundamental fairness. Under these circumstances, respondent cannot shw that the erroneous admission of the evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The improper and unconstitutional admission of the section 1108 evidence requires that Mr. Loy's guilt phase convictions be reversed.

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[14]To the extent that the unconstitutionality of section 1108 controls resolution of this issue, it is being raised here to preserve Appellant's rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be asserted again in order to preserve the issue for federal habeas corpus review].)

II

THE JURY INSTRUCTIONS CONCERNING THE PREDISPOSITION EVIDENCE WERE UNCONSTITUTIONAL AND REQUIRE REVERSAL

A. Introduction

Several inter-related instructions were given to the jury concerning how to evaluate the sex offense predisposition evidence.[15]

As mentioned in Argument I, the first instruction came just before the testimony of Ramona Munoz, on the second day of trial. The instruction stated:

> Evidence is going to be introduced at this time for the purpose of showing that the defendant engaged in a sexual offense other than that charged in the case.
>
> Sexual offense insofar as the way I'm using it at this time for your instructions means a crime under the laws of the state of California that would involve something that would be a felony crime in the state of California.
>
> And at the end of the case, I'll give you elements of any crime that's discussed, in addition to the crime that is part of the Information that you're making a decision on after all the evidence is in in this case.
>
> If you were to find that the defendant did commit a prior sexual offense, you may, as jurors, but are not required to, infer that the defendant had a disposition to commit the same or similar type of sexual offense. If you were to find that the defendant had this disposition, you may, but are not required to, infer he was likely to commit and did commit the crime for which he's accused in this case. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

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[15] Defense counsel objected to these instructions. (9 RT 2164-2165, 2168.)

So, in effect, what I've told you about with the language I told you, some evidence is allowed for a limited purpose in a case but not for all purposes. I've given you the limited purpose, and you'll get more instruction on this issue and maybe elements of the crime or crimes at the end of the case.

(6 RT 1411- 1412.)

When the judge instructed the jury at the end of the guilt phase, he gave several instructions with respect to the other crimes evidence. CALJIC No. 2.50 (1998 Revision) - Evidence of Other Crimes - was modified[16] to state:

> Evidence has been introduced for the purpose of showing that the defendant committed another or other crimes other than that or those for which he is on trial.
>
> If you find the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offense. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused.
>
> It may also be considered for the limited purpose of determining if it tends to show:
>
> > the existence of the intent which is a necessary element of the crime charged; or
> >
> > The identity of the person who committed the crime, if any, of which the defendant is accused; or
> >
> > A motive for the commission of the crime charged.

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[16] The instruction the trial judge gave is actually a combination of CALJIC No. 2.50 (6th. Ed. 1996) - Evidence of Other Crimes, and CALJIC No. 2.50.01 (6th Ed. 1996) - Evidence of Other Sexual Offenses.

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.

You are not permitted to consider this evidence for any other purpose.

(3 CT 565-566; 10 RT 2305-2306.)

The jury was also instructed pursuant to CALJIC No. 2.50.1 - Evidence of Other Crimes by the Defendant Proved by a Preponderance of the Evidence:

The prosecution has the burden of proving by a preponderance of the evidence that a defendant committed a crime or crimes, or sexual offense or sexual offenses other than that for which he is on trial.

Do not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other crime or crimes or sexual offense or sexual offenses.

(3 CT 576; 10 RT 2311.)

No instruction was given at the guilt phase defining preponderance of the evidence, as was then found in CALJIC No. 2.50.2.[17]

The jury also was given CALJIC No. 10.43 - Lewd Act With Child - Evidence of Other Offenses - Same Child:

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[17] CALJIC No. 2.50.2 states:

Definition of Preponderance of the Evidence

"Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to find that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

You should consider all of the evidence bearing upon every issue regardless of who produced it.

> Evidence has been introduced for the purpose of showing lewd or lascivious acts between the defendant and the alleged victim on another occasion other than that charged in the case.
>
> If you believe this evidence, you may use it only for the limited purpose of tending to show the defendant's lewd disposition or intent toward the child.
>
> You must not consider this evidence for any other purpose.

(3 CT 601; 10 RT 2324-2325.)

B. Legal Standards

The predisposition instruction the jury received in this case violated Mr. Loy's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Instructions - such as the one given in this case - which allow a jury to find a defendant guilty by a mere preponderance of the evidence violate due process. (*In re Winship* (1970) 397 U.S. 358; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) The Due Process Clause of the Fourteenth Amendment protects a defendant from being convicted except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*In re Winship, supra,* 397 U.S. at p. 364.) Any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." (*Cool v. United States* (1972) 409 U.S. 100, 104.) If a jury is not properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, the defendant has been deprived of due process. (*Middleton v. McNeil* (2004) 541 U.S. 433.)

"[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a

misdescription of the burden of proof, which vitiates *all* the jury's findings." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.) The Supreme Court in *Sullivan* tied the Fifth Amendment requirement of proof beyond a reasonable doubt to the Sixth Amendment right to a trial by jury, and found that both were violated when the burden of proof was unconstitutionally reduced. (*Sullivan v. Louisiana*, *supra,* at p. 278.) *Sullivan* also found that where such an error exists, it is considered structural and thus is not subject to harmless error review. (*Id.,* at pp. 280-282.) Alternatively, if a jury instruction is deemed "ambiguous," it will violate due process when a reasonable likelihood exists that the jury has applied the challenged instruction in a manner that violates the Constitution. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

1. California Cases

After Evidence Code section 1108 was enacted, a number of cases in the appellate courts condemned the initial instructions formulated by CALJIC for use in section 1108 cases. The first version of CALJIC No. 2.50.01 was contained in the 1996 edition of CALJIC. Responding to appellate challenges, CALJIC modified this instruction, as will be discussed below.

Three cases in the Courts of Appeal found that the 1996 CALJIC instruction was unconstitutional. In *People v. Vichroy* (1999) 76 Cal.App.4th 92, the court found unconstitutional an instruction that was even more favorable to the defendant than that used in Mr. Loy's trial. The court stated:

> We do not believe proof beyond a reasonable doubt of a basic fact, that appellant committed prior sexual offenses, may act as a proxy or substitute for proof of the ultimate fact, i.e., appellant's guilt of the currently charged offenses. The constitutional infirmity arises in this

> case because the jurors were instructed that they could convict appellant of the current charges based solely upon their determination that he had committed prior sexual offenses. CALJIC 2.50.01, as given, required no proof at all of the current charges.

(*People v. Vichroy, supra,* 76 Cal.App.4th at p. 99.) The jury in *Vichroy,* received an instruction that required it to find that the prior offenses were proven beyond a reasonable doubt. (*Id.,* at pp.98-99.) Mr. Loy's jury did not receive such an instruction. Despite the additional instruction given in *Vichroy,* the appellate court found that the other instructions did nothing to cure the constitutional problem created by 2.50.01, and Vichroy's conviction was reversed.

In *People v. Orellano* (2000) 79 Cal.App.4th 179, the court reversed the defendant's conviction for the similar reasons. The court found:

> Because Evidence Code section 1108 permits admission of disposition evidence in this unprecedented manner, we believe it *especially* important that the jury be fully and fairly instructed on its permissible use. In this context, the 1999 revision to CALJIC No. 2.50.01 in our opinion, is more than just a desirable improvement or "useful nugget" of additional information (*People v. Falsetta, supra*, 21 Cal.4th 903, 923, 89 Cal.Rptr.2d 847, 986 P.2d 182), it is *essential* to the jury's proper understanding of disposition evidence. In the 1999 revision, the jurors are told in the same instruction that although they may infer from the defendant's commission of prior sex crimes that he "did commit" the charged crimes, "that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes." *Without* the 1999 revision, as here, the jurors are told they may infer the defendant's guilt of the charged crimes from the preponderance of evidence that he committed prior sex crimes, and they are forced to surmise from all the other instructions that this inference is subject to the reasonable doubt standard.

(*People v. Orellano, supra,* 79 Cal.App.4th at pp. 185-186; emphasis in

original.)

The 1996 version of the 2.50.01 instruction was responsible for another reversal in *People v. Frazier* (2001) 89 Cal.App.4th 30. Like the courts in *Vichroy* and *Orellano*, the court found that the original version of 2.50.01 was constitutionally infirm because it instructed the jurors that they could convict the defendant of the current charges solely based on the determination that he had committed prior sex offenses. The court held that no other instruction effectively countered the misstatement of law contained in 2.50.01. (*People v. Frazier, supra,* 89 Cal.App.4th at p.35.)

In *Frazier*, the court noted that the propensity instruction provided an improper evidentiary shortcut to conviction. The court stated:

> Given the confusion which results from attempting to apply the court's instructions "as a whole,"it would be very tempting for a jury to take the path of least resistance which leads directly from evidence of the defendant's disposition to a guilty verdict and thereby avoids the troubling waters represented by the remainder of the evidence and instructions. Such a deliberative process is reasonably likely given the strong appeal of propensity evidence, particularly where the other evidence is closely balanced or there is disagreement among the jurors over the strength of the other evidence. As observed in *People v. James*, "if the court seems to approve a faster and shorter path to conviction, which coincides with the natural inclination to assume guilt from propensity, it is unrealistic to believe the jury will correct the wrong turns in that path by reasoning from other, more general instructions." [footnotes omitted.]

(*People v. Frazier, supra,* 89 Cal.App.4th at p. 37.)

In 1996, a mirror statute to section 1108 was enacted to deal with domestic violence cases. Evidence Code section 1109 authorizes the admission of prior incidents of domestic violence as propensity evidence in domestic violence cases. A CALJIC instruction identical to the 1996

version of CALJIC No. 2.50.01 was formulated, and was also found unconstitutional for the same reasons.

In *People v. Younger* (2000) 84 Cal.App.4th 1360, a section 1109 case with the identical CALJIC predisposition instruction, the court stated:

> A jury cannot fail to understand that if it determines the defendant has committed other similar offenses, it may infer that he was disposed to commit and did commit the charged offense. The inference of guilt is as faulty as it is unambiguous; neither prior offenses nor propensity prove guilt of a charged offense.

(*People v. Youn ger, supra,* 84 Cal.App.4th at p. 1382.)

The *Younger* decision also recognized the danger that jurors would use propensity evidence in order to avoid resolving disputes about the weight and significance of evidence where the case was close - exactly as Mr. Loy claims occurred here. Reversing Younger's conviction, the court stated:

> However, such an extreme application of the instruction's literal terms is not the only way for the erroneous inference to infect a verdict. If the prosecution's case is weak, or if the strength of the evidence advanced by the defense closely balances the prosecution's evidence, the instruction permits the jury to take an impermissibly easy way out of its deliberations by deciding that, after considering all the evidence, it may resolve its doubts simply by relying on the propensity evidence. While a jury could properly weigh the propensity evidence together with the other evidence to reach an ultimate determination whether the elements of the charged offense have been proven, it could also reasonably interpret the instruction to allow a direct leap from the defendant's disposition, over the troubling aspects of the rest of the evidence, to a guilty verdict. Such an improper deliberative process is more than a remote possibility, particularly if there is disagreement among jurors on the strength of the other evidence. If a reviewing court cannot be confident that the deliberations took the proper course, the error cannot be deemed harmless. (*James*, *supra*, 81 Cal.App.4th at p. 1362.)

(*People v. Younger, supra,* 84 Cal.App.4th at p. 1384.)

In *People v. Reliford* (2003) 29 Cal.4th 1007, this Court found that the 1999 version of the CALJIC predisposition instruction did not violate constitutional due process protections because the revision contained the cautionary statement that:

> ...the uncharged offense is not sufficient by itself to prove beyond a reasonable doubt that the defendant committed the charged crime.

(*People v. Reliford, supra,* 29 Cal.4th at p. 1014.)

The *Reliford* decision also acknowledged that yet another revision of CALJIC No. 2.50.01 in 2002 further improved the instruction. The 2002 revision eliminated the sentence: "The weight and significance of the evidence, if any, are for you to decide." The 2002 revision added the statement:

> If you determine an inference can properly be drawn from this evidence, this inference is simply one item for you to consider, along with all the other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

(*People v. Reliford, supra,* 29 Cal.4th at p. 1016.) Of course, this sentence was not included in the instruction Mr. Loy's jury received.

Neither of these critical cautionary instructions were given in this case. This Court must now squarely confront the constitutional problems posed by the 1996 version of CALJIC No. 2.50.01.

2. Ninth Circuit Law

In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, the Ninth Circuit held that giving CALJIC No. 2.50.01 together with CALJIC No. 2.50.1 (6th ed. 1996), the same instructions given in this case, violated the Sixth Amendment, because the instructions permitted the jury to find the

defendant guilty of the charged offenses by relying on facts found only by a preponderance of the evidence. There, the defendant was charged with several sexual offenses against his spouse and a child. Evidence of prior uncharged sexual assaults Gibson had allegedly committed against his spouse were admitted under Evidence Code section 1108. For this reason, the trial court instructed the jury pursuant to CALJIC Nos. 2.50.01[18] and 2.50.1.[19] (*Id.* at p. 817.)

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[18] At the time of Gibson's trial, CALJIC No. 2.50.01 read in pertinent part:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. . . . If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 817.)

[19] At the time of Gibson's trial, CALJIC No. 2.50.1, as modified, read as follows:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses and/or domestic violence other than those for which he is on trial. You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses and/or domestic violence.

(continued...)

The jury in *Gibson* "received only a general instruction regarding circumstantial evidence [CALJIC No. 2.01], which required proof beyond a reasonable doubt, and a specific, independent instruction [CALJIC No. 2.50.1] relating to previous sexual abuse and domestic violence, which required only proof by a preponderance of the evidence." (*Id.* at pp. 821-823.) CALJIC No. 2.50.1 carved out of the general reasonable doubt standard a specific exception for other crimes evidence, which carried only a preponderance burden. (*Ibid.*)

The Ninth Circuit held that the interplay of the two instructions allowed the jury to find that the defendant "committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the *charged* acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." (*Id.* at p. 822, emphasis in original.) The instructions provided "no explanation harmonizing the two burdens of proof discussed in the jury instructions." (*Id.* at p. 823.) Therefore, Gibson's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Ibid.*)

Indeed, CALJIC Nos. 2.50.01 and 2.50.1 "told the jury exactly which burden of proof to apply. However, contrary to the Supreme Court's clearly established law, the burden of proof the instructions supplied for the permissive inference was unconstitutional." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 822.) The inference that CALJIC No. 2.50.01 carved out an exception to the reasonable doubt burden was exacerbated by the

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[19](...continued)
(*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 817-818.)

prosecutor's argument that the defendant was "[t]hat kind of guy," and therefore he "did in fact commit [the charged sex] crimes." (*Id.* at p. 824.)

Finally, the Ninth Circuit noted that Gibson's jury was instructed *without* the addition of cautionary language that was added to CALJIC No. 2.50.01 in 1999, "to clarify how jurors were required to evaluate the defendant's guilt relating to the charged offense if they found that he had committed a prior sexual offense."[20] (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 818.)

Although it did not deal with the instructions at issue in this case, in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, reversed on other grounds, *Woodford v. Garceau* (2002) 538 U.S. 202, the Ninth Circuit found prejudicial constitutional error where the jury was improperly given a predisposition instruction about other crimes evidence. The Ninth Circuit found that the prosecution case was not strong, but the evidence of propensity was very strong, and the prosecutor heavily relied upon the graphic details of the other crimes evidence throughout the trial. Under

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[20] The language that was not given in *Gibson*, but was added to CALJIC No. 2.50.01 in 1999, reads:

> However, if you find by a preponderance of the evidence that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 818, quoting CALJIC No. 2.50.01 (7th ed. 1999).)

these circumstances, the Ninth Circuit held that the jury instruction concerning other crimes evidence had a substantial and harmful effect on the jury's verdict, which required that Garceau's guilt phase judgment be set aside.

C. The Challenged Instructions Combined With The Prosecutor's Argument Permitted Appellant's Jury To Resolve This Close Case On Predisposition Evidence

The predisposition instruction given in this case runs afoul of numerous constitutional guarantees. In contrast to *Reliford,* Mr. Loy's jury was told, "it may rest a conviction solely on evidence of prior offenses." (*People v. Reliford, supra,* 29 Cal.4th at p. 1013.) The instruction in this case also stated, "If you were to find the defendant had this disposition, you *may*, but are not required to, infer that he was likely to commit and *did commit the crime* for which he's accused in this case." Because a finding of predisposition need be based only on a preponderance of the evidence, the instruction diluted the proof beyond a reasonable doubt standard. Furthermore, no jury instruction defining preponderance of the evidence was given, so the jury was left without any meaningful standard with which to guide their decision-making about these facts and issues.

Additionally, the instruction focused jury consideration on the predisposition evidence for resolution of most of the disputed issues in the case - who did it, how did he do it, and why did he do it. The jury was permitted to substitute the predisposition evidence as proof of the facts of the underlying crimes. This created two problems: (1) critical and constitutional fact finding requirements were removed from jury consideration, and (2) the predisposition instruction turned into a "permissive inference" instruction, further eroding the prosecution's burden of proof.

In *Ulster County v. Allen* (1979) 442 U.S. 140, 157, the Court stated:

> When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him. Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier of fact could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination.

The modified instruction in this case did exactly what *Ulster County* prohibits. The instruction told the jury that if they found Mr. Loy was predisposed to commit a sex offense, that they could rely on that predisposition finding in order to resolve numerous hotly disputed factual issues at the heart of the guilt phase case. This interpretation of the instruction was a prominent feature of the prosecutor's closing argument. (10 RT 2201, 2206-2207, 2293-2294.)

Where there is a misdescription of the burden of proof, all jury findings are vitiated, and structural error exists. Such a case is not subject to harmless error review. *(Sullivan v. Louisiana, supra,* 508 U.S. at pp. 280-282.) The predisposition instruction given in this case incorrectly described the burden of proof, and therefore is subject to automatic reversal.

The instructional error in this case is also prejudicial under *Stromberg v. California* (1931) 283 U.S. 369-370, because the case was presented to the jury on two theories, one of which was erroneous. Because the Court cannot determine upon which theory the jury relied to convict, the guilt phase conviction cannot stand.

Even if the error is not structural error or prejudicial under

Stromberg, there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." (*Estelle v. McGuire, supra*, 502 U.S. at p. 72.) A defendant does not need to establish that it is "more likely than not" that the instruction affected the verdict in order to satisfy the "reasonable likelihood" standard. (*Boyde v. California* (1990) 494 U.S. 370, 380-381.)

There can be no doubt that the jury in this case reasonably understood that they could rely on the predisposition evidence in order to resolve disputed facts about the identity of the perpetrator and the cause and means of death. The instruction told them that they could. The prosecutor repeated and emphasized that interpretation of the instruction and evidence. In fact, it would be unreasonable to state that the instruction and argument meant anything other than what it plainly expressed.

The error in this case was exacerbated because of yet another instructional twist. As the Ninth Circuit found in *Gibson v. Ortiz, supra,* the Fifth and Sixth Amendments were violated here because the jury was told that it could resolve the predisposition facts using a preponderance of the evidence standard, rather than the beyond a reasonable doubt standard. In Mr. Loy's case, the jury never received any instruction defining preponderance of the evidence. The jury was left rudderless in determining what that standard meant and how it should be used. They were left to rely on the prosecutor's closing argument guidance, which simply told them the predisposition evidence solved the entire case for them.

In Argument I, Appellant has explained in detail why the evidence in this case was very weak. A tiny stain in Mr. Loy's trunk of disputed origin, some disputed fibers, a minute amount of bodily fluid on the comforter which does not with any certainty belong to Mr. Loy - these are the slim

strands of evidence upon which Mr. Loy's alleged connection with this case are based. Despite the prosecutor's vehement exhortations otherwise, no evidence was presented which proved how Monique Arroyo got from her bedroom and ended up in the vacant lot a short distance from her home.

But the prosecution provided a way for the jury to fill in crucial evidentiary gaps, and that was the predisposition evidence. Unfortunately for the state, it is unconstitutional to use the predisposition evidence in this manner.

In the opening days of the trial, this jury heard sordid and disturbing evidence about violent sexual assaults on Lillian Segredo and Ramona Munoz. The jury was then instructed that they could rely on the Segredo/Munoz evidence in order to determine that Mr. Loy was responsible for Monique's capital murder. The instruction specifically permitted the jury to make this evidentiary connection.

During her closing argument, the prosecutor also emphasized that the jury could use the Segredo/Munoz evidence in order to decide if Mr. Loy was guilty of the capital murder. She said:

> "That's what he does. That's what we know about him. And we know that not only from Lillian, we know it from Ramona Munoz.
>
> You will get an instruction that tells you what you can do with this evidence. It shows that he has a propensity to commit these types of acts. He is a man that does this. This is his character. This is what we know about him.
>
> You can use that to plug it in to decide, first of all, who, who did it, and then what did he do? What did he do?

> He raped her,[21] choked her, and trying to control her, killed her because she knew him, just like he tried to do with Lillian Segredo and Ramona Munoz."

(10 RT 2201.)

This jury deliberated over two half days and two full days. They asked for testimony to be read back about Monique being in Mr. Loy's car, about the gestation of the maggots, about the trunk stain, and about the forensic testing of the comforter. (10 RT 2346-2355.) They were struggling over the evidence which was the subject of most dispute in the case. This was a weak circumstantial evidence case, with flimsy forensic evidence. The only direct evidence of any strength and magnitude was the Segredo/Munoz testimony. The predisposition instruction permitted this jury to solve any evidentiary quandary by referring back to that testimony, and relying upon Mr. Loy's prior history rather than confront the weakness of the prosecution case.

This is just the sort of appealing deliberative short cut condemned in *Frazier, Orellano,* and *Younger*. And Mr. Loy's case presents the most troubling sort of case for a jury. He was convicted and sentenced to prison

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[21] Although the prosecutor argued that Mr. Loy raped Monique, no evidence of rape was presented. The coroner, Dr. Scheinin, testified that there was some trauma around the vaginal area which she could only see with a microscope, and not the naked eye. (6 RT 1332-1333.) The defense pathologist testified that Monique's blood was so decomposed it was impossible to tell if there was trauma in the vaginal area. (9 RT 2070-2072.) In any event, the special circumstance in this case was lewd and lascivious conduct with a person under the age of 14 - not rape. Apparently, the prosecutor felt compelled to argue that Monique was raped so that the jury would rely on the propensity evidence as the basis for conviction, and leave any misgivings about the problems with the forensic evidence behind.

twice for a brutal sexual assault. The evidence showed he was released and did it again. The victims - from crimes that occurred a decade or decades before - gave very damaging testimony at the guilt phase. A jury would have a natural tendency to want to be convict in this situation, to ensure that Mr. Loy was never released to the public again, and to fill in the factual gaps in the capital case with the strength of the Segredo/Munoz evidence. That is exactly what the instruction authorized them to do.

Additionally, the attempt to craft an instruction which combined consideration of both "other crimes" evidence and the predisposition evidence, resulted in an instruction which created even greater constitutional mischief.[22] This instruction allowed the prior crimes evidence to be used in a completely unfettered fashion. Although the instruction says it can only be used for the "limited purposes" listed in the instruction, in fact the purposes for which the prior offenses could be used were limitless. The instruction states that the other crimes may be used to prove: (1) predisposition to commit this offense; (2) as evidence of the identity of the perpetrator of the charged crimes; (3) as evidence of intent; and (4) as proof of motive to commit the charged crimes. Virtually every evidentiary use was allowed in this laundry list. Indeed, the jury was permitted to rely on the predisposition evidence - and to use the preponderance of evidence standard - in order to resolve all of the crucial issues which were in dispute in this case.

In any event, the Munoz/Segredo evidence was not admissible under Evidence Code section 1101 for these purposes. First of all, the prosecutor

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[22] The prosecutor specifically suggested that the instructions be modified so that they would be combined. (9 RT 2163-2165.)

never sought to have the evidence presented pursuant to Evidence Code section 1101. She only sought to have it considered as such when instructions were discussed. Secondly, the Segredo/Munoz offenses do not prove identity, intent or motive. As noted in Argument I, in *People v. Abilez* (2007) 41 Cal.4th 472, 498-503, this Court found that the co-defendant's prior juvenile adjudication for sex with a minor was not admissible under section 1108 because it bore no similarity to the capital crime - the rape and sodomy of an older woman. *Abilez* relied on an Evidence Code section 1101-type analysis in deciding the evidence was inadmissible. The same reasoning applies in this case with respect to 1101 admissibility: Mr. Loy's prior convictions were for the rape and sodomy of two females who were close in age to him. The facts of the prior cases showed plain violence. No sexual violence was apparent in the underlying capital case facts, nor was any evidence of sodomy found. There was no evidence of oral copulation found. Moreover, Mr. Loy's niece was much younger than he - and a completely different type of victim than the ones in the prior offenses. The charge in this case was not rape - it was lewd and lascivious behavior with a child under 14. The facts and circumstances of the prior offenses in no way mirror the charges in this case. *Abilez* therefore establishes that the Munoz/Segredo evidence was also inadmissible under Evidence Code section 1101 in this case.

The Supreme Court has recognized that, although arguments of counsel generally carry less weight with a jury than do instructions from the court, they may sometimes "have a decisive effect on the jury." *(Boyde v. California, supra,* 494 U.S. at p. 384.) The prosecutor's argument is relevant in assessing prejudice in this situation. (See *People v. Edelbacher* (1989) 47 Cal.3d 983, 1035 and fn.16 [prosecutor's statements in argument

appropriately considered in assessing prejudice from other error, regardless of whether independent claim of prosecutorial misconduct would be meritorious or was preserved by objection].)

Reviewing courts have long relied on prosecutorial argument in assessing the impact of instructional error on jurors. (See, e.g., *Taylor v. Kentucky* (1978) 436 U.S. 478, 486-490 [prosecutor's arguments critical in assessing impact of instructional error on jurors]; *People v. Wims* (1995) 10 Cal.4th 293, 315 [same]; *People v. Davenport* (1985) 41 Cal.3d 247, 280-281 [same]; *Coleman v. Calderon* (9th Cir. 1999) 210 F.3d 1047, 1051 [same].

Both Supreme Court and Ninth Circuit authority recognize that:

> When a court gives the jury instructions that allow it to convict a defendant on an impermissible legal theory, as well as a theory that meets constitutional requirements, "the unconstitutionality of any of the theories requires that the conviction be set aside.

(*Boyde v. California, supra,* 494 U.S. at p. 379-380, quoted in *Gibson v. Ortiz, supra,* 387 F.3d at p. 825.)

The predisposition instruction in this case removed from the jurors the need to sort out ambiguous and contested facts in a difficult case. Rather than resolving the hotly disputed evidence regarding the charged offense, the jury could rely on the evidence of prior misconduct to convict. The prosecutor took maximum advantage of the unconstitutional instructions and urged the jurors to apply the law to the facts in a way that distorted the truth seeking process in this case. For this reason and all of the other reasons stated herein, reversal is required under any legal standard.

III

THE IMPROPER ADMISSION OF HEARSAY EVIDENCE VIOLATED MR. LOY'S RIGHTS TO CONFRONTATION, DUE PROCESS OF LAW, A FUNDAMENTALLY FAIR TRIAL AND A RELIABLE DETERMINATION OF GUILT AND PENALTY

A. Factual Background

The prosecution sought to introduce the testimony of Sara Minor during the guilt phase as an excited utterance or fresh complaint, pursuant to Evidence Code section 1240. (7 RT 1711.)

The defense objected to the testimony at the time the prosecutor described the contents of Sara Minor's testimony to the court. (7 RT 1704-1717.) During an Evidence Code section 402 hearing held to determine the admissibility of this evidence, Ms. Minor testified that she was a close friend of Monique's. About a week before Monique disappeared, Ms. Minor spoke with her on the telephone. During that phone call, Monique allegedly told Ms. Minor that she "was uncomfortable around her uncle because he would touch her," and referred to her uncle Eloy. (7 RT 1717-1718.) Monique was "holding back tears, crying." (7 RT 1718.) No testimony was presented at the 402 hearing about when the alleged touching incident occurred.

After reviewing the cases cited by the prosecutor, and engaging in an Evidence Code section 352 analysis, the court admitted Ms. Minor's testimony as an excited utterance. (7 RT 1706-1709, 1712-1716, 1721.)

When she testified in front of the jury, Ms. Minor stated she telephoned Monique, who answered and spoke in a low tone of voice, as if something was bothering her. Ms. Minor asked her what was wrong, and Monique replied, "Nothing." After further inquiry by Ms. Minor, Monique

said she did not feel comfortable around her Uncle Eloy. Monique said that he would give her weird looks and sneak up to her room and touch her in her chest and crotch area. Monique was "crying, but not heavily". She testified that, "You could just hear her trying to hold back tears." Monique said she was afraid of her uncle because of this behavior. She told Monique her uncle had been at her house that day. Monique also asked Ms. Minor not to tell anyone about what she had confided. (7 RT 1723-1726, 1729-30.)

In contrast to her testimony before the jury, when Ms. Minor was interviewed by police, she never told them that Monique had said Mr. Loy went upstairs to her room. (7 RT 1726-1727.)

Significantly, Ms. Minor never testified that Monique said she had recently been touched by Mr. Loy, and it was never proven that the touching and her complaint about it were so nearly contemporaneous as to qualify Monique's comments as excited utterances. The exchanges about when the touching allegedly occurred were limited to the following:

> Q: (by Mr. Larkin): Did she tell you that that had happened a week before or that it had happened sometime previous to that?
>
> A: What are you talking about?
>
> Q: Did she tell you that he had been there that day?
>
> A: Yeah, she did.
>
> Mr. Larkin: Nothing further. (7 RT 1729.)
>
> Q: (by DA Ingalls): In her conversation, did she say it had happened that day? Or did the conversation happen a week before the disappearance? Do you understand my question?
>
> A: No.

Q: In that conversation *did you get the feeling* [emphasis added] from what she said that the conduct, her uncle's conduct, happened that day?

A: Yeah. (7 RT 1730.)

Additionally, Jose Arroyo, Monique's brother, testified that Mr. Loy had not been in the house for a month to a month and a half before Monique disappeared. (5 RT 1107.)

B. Monique's Statements To Sara Minor Did Not Qualify For Admission As Spontaneous Statements

To render a statement admissible as a spontaneous declaration, the proponent of the evidence must satisfy three conditions: "(1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it." (*Showalter v. Western Pacific R.R. Co.* (1940) 16 Cal.2d 460, 468; accord, *People v. Washington* (1969) 71 Cal.2d 1170, 1176.)

Evidence Code section 1240 is the codification of the common law evidentiary rule discussed in *Showalter. (People v. Washington, supra,* 71 Cal.2d at p. 1176.)

> The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.] The basis for this circumstantial probability of trustworthiness is 'that in the stress of nervous excitement the reflective faculties may be stilled and the utterance may become the unreflecting and sincere expression of one's actual impressions and belief.

(People v. Poggi (1988) 45 Cal.3d 306, 318, quoting *Showalter v. Western Pacific R.R. Co., supra,* 16 Cal.2d at p. 468.) Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. (See, e.g., *People v. Washington, supra,* 71 Cal.2d at pp. 1176-1177.)

The determination of the question is vested in the court, not the jury. (E.g., *People v. Tewksbury* (1976) 15 Cal.3d 953, 966, fn. 13.) In performing this task, the court "necessarily [exercises] some element of discretion ...." *(Showalter v. Western Pacific R.R. Co., supra,* 16 Cal.2d at p. 469; quoted in *People v. Poggi, supra,* 45 Cal.3d at p. 318.)

The first prerequisite for admissibility under section 1240 is that there must be some occurrence startling enough to produce nervous excitement and render the utterance spontaneous and unreflecting. In this case, there is no evidence of such an event other than Ms. Minor's hearsay testimony that, in response to her questions, Monique said she was touched by Mr. Loy. Further, there was no evidence presented at the 402 hearing or during the trial to establish when Mr. Loy had inappropriately touched Monique or that it occurred right before Monique made these statements, while she was under the "immediate influence" of the touching *(People v. Poggi, supra,* 45 Cal.3d at p. 3.).

California authorities emphasize the importance of a temporal relationship between the exciting event and the spontaneous statement. For example, in *People v. Keelin* (1955) 136 Cal.App.2d 860, 869 (quoting *Keefe v. State* (1937) 50 Ariz. 293), the Court of Appeal explained:

> "A spontaneous exclamation may be defined as a statement or exclamation made *immediately after* some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him. The admissibility of such

> exclamation is based on our experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled combination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the facts just observed by him."

(Emphasis added.)

Similarly, in *In re Daniel Z.* (1992) 10 Cal.App.4th 1009, 1022, the Court of Appeal held that the record did not support the admission under Evidence Code section 1240 of hearsay statements of children about acts of abuse which were contained in Department of Social Service reports. The record contained no evidence "as to when the claimed acts of sexual abuse occurred or whether the children were still in a dominating state of nervous excitement when they made the hearsay statements." (*Id.* at p. 1022; see also *People v. Kons* (2003) 108 Cal.App.4th 514, 522-526 [statements of victim made one day after the assault did not qualify as spontaneous utterances].)

The cases upon which the prosecutor relied in arguing for admissibility of the Minor testimony all involve situations in which there was overwhelming evidence of the underlying event itself, and that the statement was made in the moments immediately following that event. Additionally, in the prosecution's cited cases, the person who testified about the spontaneous statement personally observed the declarant in a demonstrably excited, agitated state.

In *People v. Arias* (1996) 13 Cal.4th 92, pp., this Court found that

statements made by the victim of a kidnaping and violent sexual assault to another victim in the immediate aftermath of her escape from her captor were admissible as spontaneous statements. The Court noted that the statements were both spontaneous and made at a time when there was no opportunity for reflection because they were made just moments after her escape.

In *People v. Garcia* (1986) 178 Cal.App.3d 814, a witness received a phone call from a friend who had left her residence earlier in the day with the defendant. The caller said that the defendant had "gone crazy," and asked the witness to come to get him and bring a gun. The witness then heard angry yelling on the other end of the phone, and then heard the phone go dead. The Court of Appeal found that the caller's statements were "virtually the victim's last words before he was murdered." (*People v. Garcia, supra,* 178 Cal.App.3d at p. 821.) The yelling in the background supported this inference, as did the evidence found at the crime scene. Thus, the statements were admissible because they were made at the moment of the precipitating event.

In *People v. Jackson* (1986) 178 Cal.App.3d 694, the crime victim approached a police officer right after he was violently assaulted, and described the assault and identified his attacker. The officer in fact observed the assault taking place. The victim appeared to be very excited and frightened, and was shaking when he made the statements. The court found these statements properly admitted as spontaneous declarations.

In *People v. Trimble* (1992) 5 Cal.App.4th 1225, a two-year- old child made frantic and highly agitated statements to her aunt about her mother's murder by her father a day earlier. The child's mother was missing, and this was apparently the first time the child had been left alone

with an adult since the murder. The court found that the child was in a state of extreme agitation and excitement when she spoke to her aunt. The mother's body was found shortly thereafter. The passage of a day since the event did not preclude admission of the statement because it was the first chance the child had to speak to someone about it. (*People v. Trimble, supra,* 5 Cal.App.4th at p.1235.)

In *People v. Raley* (1992) 2 Cal.4th 870, two girls were kidnaped and sexually assaulted by the defendant. The defendant later stabbed them, put them in his car trunk, and forced them to stay there overnight. The next morning the defendant drove the girls to a ravine and threw them down it. One victim was able to crawl up to a road and obtain assistance. While one of the people who found her comforted her and waited for medical assistance, the victim made statements about her ordeal. The Court found that the passage of time between the assault and the statements did not create a bar to admissibility because they were plainly made during the on-going stress of the event and while her reflective powers were still in abeyance. (*People v. Raley, supra,* 2 Cal.4th at pp. 893-894.)

In *In re Anthony O.* (1992) 5 Cal.App.4th 428, statements were made to police officers by the victim of a shooting just moments after it happened. The officers were close enough that they heard the gunshots. When they arrived at the scene, the officers saw blood spewing from the victim's face. The court found these facts justified a finding that the statements were made after an exciting event, and before a significant lapse of time, all of which supported the reliability of the victim's statements. (*In re Anthony O., supra,* 5 Cal.App.4th at pp. 534-539.)

Each of these cases establishes that a highly traumatic event actually occurred or had just ended in the moments before the spontaneous

statement was uttered. The witnesses who testified about the statements saw or heard evidence that supported that a traumatic event had just happened. Therefore, in the absence of proof that the touching actually occurred or when it occurred, there is no justification for admitting these statements in this case as excited utterances.

This Court is permitted to assess the trial court's ruling only on the facts known to it at the time its ruling concerning admissibility was made. (*People v. Hernandez* (1999) 71 Cal.App.4th 417, 425; *People v. Barnard* (1982) 138 Cal.App.3d 400, 405; *In re James V.* (1979) 90 Cal.App.3d 300, 304.) Here, the trial judge was provided with no evidence during the 402 hearing which showed that an event had just occurred which caused Monique to speak without reflection or fabrication. In the absence of preliminary evidence that an event had occurred in close proximity to the telephone call, and proof that Monique was suitably affected by the stress of excitement and commented to Ms. Minor without time to contrive, the court was not presented with sufficient evidence to justify the admission of this conversation. Therefore, the trial court erred when it admitted Sara Minor's testimony.

C. The Statements Were Not Admissible Under The Fresh Complaint Exception

The trial judge also considered the fresh complaint hearsay exception discussed in *People v. Brown* (1994) 8 Cal.4th 746, as a basis upon which to admit the Sara Minor testimony. The trial judge did not rely on this exception when he ruled the testimony admissible. Sara Minor's testimony would not have been admissible under that exception, in any event. *Brown* permits testimony about the fact of the complaint being made, not about the content of the complaint. (*People v. Brown, supra,* 8 Cal.4th at p. 760.) As

a result, Sara Minor's substantive testimony about Monique's comments would not and should not have been admitted under this legal theory.

D. Sara Minor's Testimony Was Not Admissible Under Evidence Code Sections 1108 or 1101

When the trial prosecutor argued in favor of admitting Sara Minor's testimony, she said it was admissible to prove Mr. Loy's lewd and lascivious intent towards his niece. (7 RT 1711-1712.) The prosecutor also said that the defense was disputing intent, so the evidence should be admitted on that basis. (7 RT 1711.)

Then, when jury instructions were discussed, the prosecutor announced that Sara Minor's testimony should be considered by the jury pursuant to Evidence Code section 1108. (9 RT 2167.) This legal theory had never been advanced before by the prosecutor. In fact, it was legally impermissible to consider Sara Minor's testimony as section 1108 testimony because the prosecutor did not comply with section 1108's notice requirements with respect to the Minor testimony. Section 1108, subdivision (b) states:

> In an action in which evidence is to be offered under this section, the people *shall disclose* [emphasis added] the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.

The prosecutor filed a Notice of Intent to Introduce Evidence Pursuant to Penal Code Section 1108, on February 25, 1998, nine months before trial started. (2 CT 314.) That notice listed only two witnesses: Lillian Segredo and Ramona Munoz. Sara Minor was not mentioned. The defense filed an objection to the section 1108 testimony. (2 CT 409-413.)

The prosecutor never mentioned section 1108 as one of the reasons Sara Minor's testimony should be admitted. When the prosecutor argued that the Minor testimony should be considered as predisposition evidence, defense counsel continued to object. (9 RT 2168.)

Sara Minor's testimony should not have been admitted in the first place, but it certainly should not have been made a part of the predisposition instruction,[23] because it's admission under this theory violated section the notice requirements of section 1108.

The prosecutor also argued that Sara Minor's testimony should be the subject of an "other crimes" instruction. The "other crimes" theory was not mentioned during the *in limine* proceedings during which the admission of this testimony was discussed.

This Court has recently re-affirmed that in order to use other crimes to prove identity of a perpetrator, that "admissibility depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity." [citation] "A somewhat lesser degree of similarity is required to show a common scheme or plan and still less similarity is required to show intent. (*People v. Ewoldt* (1994) 7 Cal. 4th 380, 402-403, 27 Cal.Rptr.2d 646, 867 P.2d 757); quoted in *People v. Abilez* (2007) 41 Cal.4th 472, 500.)

Because offered to prove intent in the charged crime, the distinctive marks would have to exist between Minor's testimony and the charged crime, not the prior offenses. As to the charged crime, there was no

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[23] The challenge to the unconstitutional predisposition instruction, in Argument II above, also applies in connection to Sara Minor's testimony, and is incorporated herein by reference.

independent evidence about any of the circumstances so there was no valid evidentiary comparison here. Even if one accepts the prosecution theory, the Minor testimony and prior offenses are dissimilar in the extreme. The prior offenses involved women who were close in age to Mr. Loy. Mr. Loy did not attempt to conceal his identity. As mentioned previously, the priors involved obvious force and violence during sexual activity, including sodomy. The circumstances surrounding Monique's death were in no way similar. Thus, there were no distinctive or common marks linking the prior and present incidents in a way that proved Mr. Loy was the author of them all. As a result, the Minor testimony should not have been admitted under Evidence Code section 1101 either.

E. The Admission Of Sara Minor's Testimony Also Violated Mr. Loy's Federal Constitutional Rights

The erroneous admission of critical hearsay evidence also violated Mr. Loy's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Although a state court's erroneous application of state law does not, standing alone, violate the federal Constitution, state law errors that render a trial fundamentally unfair violate the Due Process Clause of the Fourteenth Amendment. (*Estelle v. McGuire* (1991) 502 U.S. 62.) State court procedural or evidentiary rulings can violate federal constitutional law by "either infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." (*Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

Even evidence which a state court finds properly admitted under a state hearsay exception may violate the Confrontation Clause of the Sixth Amendment. *(Dutton v. Evans* (1970) 400 U.S. 74; *Winzer v. Hall* (9th Cir.

2007) ___ F.3d ___; 2007 WL 2080154.)[24]

In *Winzer v. Hall, supra,* Winzer was convicted for making terrorist threats to his girlfriend and her daughter when he allegedly told the girlfriend, "I'll smoke you and your daughter," while appearing to indicate that he had a gun in the waistband of his pants. The girlfriend called 911, and an officer later came to her house and took her statement. The officer testified at trial about the statements Winzer allegedly made. The girlfriend did not testify. The state trial court admitted her statements under the spontaneous statement exception to the hearsay rule. The Ninth Circuit vacated Winzer's convictions and found that the hearsay statements should not have been admitted against him. The Ninth Circuit stated, 2007 WL 2080154, at page 6:

> But when the prosecution seeks to offer a hearsay statement, courts must decide whether the statement is so reliable that the prosecution may safely "deny the accused his usual right to force the declarant to submit to cross-examination, the greatest legal engine every invented for the discovery of truth." *Lilly v. Virginia,* 527 U.S. 116, 124 (1999) (internal citation omitted) (quoting *California v. Green*, 399 U.S. 149, 158 (1970).

Winzer recognized that *Ohio v. Roberts* (1980) 448 U.S. 56, 66, held that the admission of hearsay evidence does not violate the Confrontation Clause if the evidence falls within a firmly rooted hearsay exception. The Supreme Court has held that excited utterances or spontaneous declarations are firmly rooted hearsay exceptions. (*Idaho v. Wright* (1990) 497 U.S. 805, 820; *White v. Illinois* (1992) 502 U.S. 346, 355-356.) *Winzer* noted that the

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[24] This opinion was published on the Ninth Circuit website on July 23, 2007. The title page of the case states that it is for publication. For some reason, Westlaw has published this case in its unreported cases section.

reasoning for the spontaneous statement exception to the hearsay rule is that the statements are "given under circumstances that eliminate the possibility of fabrication, coaching, or confabulation," so that "the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trust-worthy and that cross examination would be superfluous." (*Idaho v. Wright, supra,* 497 U.S. at p. 802, quoted in *Winzer v. Hall*, 2007 WL 2080154, at p.7.) Conversely then, a statement made after the declarant has had an opportunity to reflect or discuss the matter with others does not carry "the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out of court statements." (*Idaho v. Wright, supra,* 497 U.S. at p. 817; quoted in *Winzer, Id.*) Moreover, *Winzer* holds that the fact that the declarant was upset when she spoke does not make the statement reliable. The Court found:

> The mere fact that Parrish was upset as she spoke would not make her utterance reliable. As the Supreme Court has recognized, a spontaneous statement is reliable because it is offered "without the opportunity to reflect on the consequences of one's exclamation." *White,* 502 U.S. at 356. Just because a subject is or appears to be *upset* [emphasis in original] offers no guarantee that he has not taken time to consider the matter. The subject may be upset precisely because he's had time to reflect, or he may feign emotional distress in a calculated effort to appear more credible.

(*Winzer v. Hall, supra,* 2007 WL 2080154, at p. 8.)

The Ninth Circuit found that the introduction of the hearsay statements was error and that the error had a substantial and injurious influence on the jury's verdict, which required that Winzer's convictions be vacated. (*Winzer v. Hall, supra,* 2007 WL 2080154, at pp.9-11.)

Ms. Minor's testimony should not have been admitted for several reasons. First, the record of the 402 hearing did not establish that in fact Monique had been molested by Mr. Loy. There was no independent evidence of a prior act of molestation, but only testimony that Monique alleged something had happened. Secondly, the evidence at the 402 hearing did not establish that the alleged touching occurred a short time before the telephone call. Thus, there is no evidence that the statements were an immediate and unreflective response to an event that caused her physical or mental shock. In other words, the prosecutor's failure to prove that the touching had occurred that night undermined any assertion that Monique's statement was excited or spontaneous, and admissible as an exception to the hearsay rule.

Other evidence showed there was reason to doubt the veracity of Monique's statements. Monique's brother Jose testified that Monique had no respect for her Uncle Eloy, and she treated him with disrespect. (5 RT 1142, 1150.) Jose testified that Monique called Mr. Loy names, such as "dumb," "stupid," "pimp," "loser," "dead beat dad," among other slurs. (5 RT 1106, 1150-1151.) Jose also testified that Mr. Loy had not been in the house for a month to a month and a half before Monique disappeared. When he did visit, he came to see Jose's mother - Mr. Loy's sister - when she was alone. (5 RT 1106-1107.) In light of this evidence, Monique's statement to Ms. Minor that Eloy had been at her home on the day of the telephone call may have been based on what she was told by another family member. Monique's willingness to cast aspersions on her uncle, and the fact that no one testified that he had been in the Arroyo home in the month or so before Monique's disappearance, all undermine the evidentiary foundation necessary for admission of these statements. As her brother testified,

Monique was more than capable of berating her uncle and saying things she knew would upset him. It was simply not proven that an event had very recently happened which produced the necessary level of "excitement" or spontaneity. Certainly what can best be described as a sniffling telephone conversation does not meet the high standards of obvious distress discussed in the cases above.

Winzer and the cases cited therein support the contention that Sara Minor's testimony should not have been admitted - and that the admission of her testimony violated federal constitutional protections as well. There is no independent evidence showing that the event Sara Minor described actually happened. There is no showing that Monique's statements to Sara were made under circumstances that eliminate the possibility of fabrication or confabulation, nor that they were made in a manner that inspires trust. As a result, the admission of Sara Minor's hearsay testimony also violated Mr. Loy's federal constitutional rights to confrontation, due process and a reliable determination of guilt and penalty in his capital trial.

F. The Admission Of Sara Minor's Testimony Was So Prejudicial That Reversal Is Required

The testimony about Monique's fondling accusation played a central and critical role in the prosecution's case. It was the prosecution theory that Mr. Loy had fondled Monique, and that his fondling proved his intent to commit a lewd and lascivious act in connection with the capital case.[25] The prosecutor argued:

> The defendant's prior molestation of Monique. We have testimony from Sara Minor that one week prior to the murder, Sara Minor

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[25] No testimony was presented which showed that Mr. Loy was aware of the conversation Monique had with Sara Minor.

called her friend, and her friend Monique is crying and she's telling her, yes, Uncle Eloy just came up to my room and laid on me – she didn't want to say the word "crotch." I don't know if you remember, she said, "He touched my private parts, he touched me in the chest, and he touched me in the crotch."

What does that show you?

That shows you that this is the type of thing he does. That's his intent. When he went into Monique's room that night and assaulted her, he meant to molest her, he meant to rape her. He meant to have some kind of lewd, lascivious conduct with Monique. That goes to his intent.

That goes to I.D., who did this. Obviously, the defendant did it."

(10 RT 2200.)

You know that he has this kind of interest. He likes her sexually because he's tried to do this. So the fact that he is her uncle, the fact that he's old enough to be her father doesn't stop him from having these feelings, these sexual feelings for her. You know that. You know what he's done before.

(10 RT 2214.)

Her friend, Sara Minor, that was her best friend. That's who she was telling her private stories to. That's who she told about the defendant molesting her.

(10 RT 2287.)

The prosecutor also misstated the evidence provided by Sara Minor during the penalty phase closing.

The prosecutor asked Betty Montiel, Mr. Loy's sister and a mitigation witness, "..were you aware that your brother had threatened Monique, told her not to tell her mother about what he was doing to her?" The court overruled a defense objection that there was no foundation for the

question. (11 RT 2537.) Ms. Montiel then testified she had never heard about the allegation. (11 RT 2536.)

As this quote demonstrates, the prosecutor is again using evidence for a purpose beyond which it was originally admitted. She initially argued it should be admitted for purposes of intent, but here argues it also proves identity. This is impermissible because, as shown above, there is no independent evidence nor are there common marks linking it to the capital offense.

The prosecutor misstated this evidence during her penalty phase summation:

> "Recall the prior molestation by the defendant of Monique Arroyo. Think about that last week of her life that one day that she calls up her friend, Sara Minor, because she is disgusted." (12 RT 2693.)
>
> "So she lives with this disgust and this threat. If she goes to somebody, she's going to get hurt by Mr. Loy." (12 RT 2694.)

The problem here is two-fold. Sara Minor testified that she called Monique - not that Monique called her. (7 RT 1723.) More importantly, there was absolutely no evidence presented through Sara Minor's testimony, nor any other witness's testimony, that Mr. Loy threatened to hurt Monique.

A violation of the Confrontation Clause is subject to a harmless error test, because its effect can be assessed in the context of the other evidence presented to the jury. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684; *Arizona v. Fulminate* (1991) 499 U.S. 279, 308.) In order to avoid reversal, respondent must show that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 381 U.S. at p. 24.)

To the extent this error violated state law only, it requires reversal if it is reasonably probable that the result would have been more favorable in its absence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Under the state law test, "'in a close case . . . any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.' [Citation.]" (*People v. Von Villas* (1992) 11 Cal.App.4th 175, 249; see also *Kotteakos v. United States* (1946) 328 U.S. 750, 763 [under federal "harmless error statute," errors "that may be altogether harmless in the face of clear error" may nevertheless require reversal when they "might turn scales otherwise level"].

Sara Minor's testimony provided crucial motive evidence for the prosecution. Without it, the evidence showed that Monique and her uncle did not get along very well - nothing more. The prosecutor also used the Minor testimony to prove that Mr. Loy had a lewd and lascivious intent towards his niece. This could not have been proven in the absence of the hearsay evidence; the prosecution had no other evidence to tie Mr. Loy to sexual conduct with his niece. Without the inadmissible hearsay, proof of the sole special circumstance of lewd and lascivious behavior would have been lacking. And, according to the prosecution closing argument, the fondling evidence also demonstrated that Mr. Loy was Monique's killer, because it proved intent and identity. Without it, this part of the prosecution case would have been completely undermined. Therefore, under any of these tests, reversal is required.

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IV

THE INTRODUCTION OF TESTIMONIAL HEARSAY CONCERNING CRITICAL FORENSIC FACTS VIOLATED THE CONFRONTATION CLAUSE AND APPELLANT'S RIGHT TO DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT AND THE APPROPRIATE PENALTY

A. Factual Background

The prosecutor called David Faulkner as an expert entomology witness. Mr. Faulkner was called to establish when Monique's body was placed in the vacant lot where it was found. In order to make that determination, Faulkner needed to determine the age of maggots found on her body, which depended in turn on knowing exactly when the maggots were taken from the body. (8 RT 1774.)

Over a hearsay objection, Mr. Faulkner was permitted to testify about the time and date the maggots were collected and preserved. (8 RT 1774.) The objection was brought on by the following exchange between the prosecutor and Mr. Faulkner.

> Q: Did you do some calculation to determine, in terms of when they were collected, when would be the time they could first be deposited or the host would be available to the insect?
>
> A: What I did was to look at the time when the specimens were removed from the victim and actually preserved, which stops or terminates their development, and then went backwards to determine how long they would have been associated with the victim.
>
> Q: So the time that they were — their development was terminated because of collection and preservation would be what day?
>
> A: That I believe was on ----

Mr. Larkin: Objection. No foundation.

The Court: Do you have sufficient information from what you've told us to answer that question?

The Witness: Yeah.

The Court: I'll allow it.

The Witness: I would have to see my report, but I believe they were preserved on the 13th and another on the 14th of, I believe, May.

(8 RT 1774-1774.)

During cross examination, Mr. Faulkner testified that he learned when the maggots were collected from a letter sent from the medical examiner's office. (8 RT 1783.) The state never produced for cross-examination the person who actually collected and preserved the maggots at the crime scene.

B. Faulkner's Testimony Should Have Been Excluded Because It Was Based On Inadmissible Hearsay

Mr. Faulkner's testimony should not have been admitted because it suffered from a basic foundational defect: it was based on inadmissible hearsay, as described above.

A trial court may not admit expert opinion which is based on information furnished by others that is speculative, conjectural, or otherwise fails to meet a threshold requirement of reliability. (*People v. Morris* (1988) 46 Cal3d 1, 21, *disapproved on other grounds, In re Sassounian* (1995) 9 Cal.4th 535, 543-544.)

Expert opinion cannot reasonably be based upon nonspecific and conclusory hearsay that does not set forth any factual details of an act

necessary for the opinion. (*People v. Dodd* (2005) 13 Cal.App.4th 1564, 1570; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1462; *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 1003.)

In *People v. Dodd, supra,* 13 Cal.App. 4th at pp. 1568, 1570-1571, the court held that it was reversible error to permit the prosecution's psychiatric expert to rely on a hearsay report of a prior molestation in reaching his conclusions in a mentally disordered sex offender proceeding. The court found the mere recitation in a probation report that Dodd had previously been charged with such an offense provided insufficient information upon which an expert opinion could be based.

Likewise, notations on the evidence container, and the letter from the coroner's office, fail to provide a sufficient evidentiary basis upon which Mr. Faulkner could base his expert opinion about when and by whom the maggots were collected in this case. The trial court should have sustained defense counsel's objection to admission of the evidence.

C. The Admission of Faulkner's Testimony Violated Mr. Loy's Right To Confront And Cross -Examine The Witnesses Against Him

This Court has recognized that trial courts have a duty to ensure that improper evidence is not presented through the guise of expert opinion.

> A trial court "has considerable discretion to control the form in which the expert is questioned to prevent the jury from learning of incompetent hearsay." (*People v. Price* (1991) 1 Cal.4th 324, 416 [3 Cal.Rptr.2d 106, 821 P.2d 610].) A court also has discretion "to weigh the probative value of inadmissible evidence relied upon by an expert witness. . . against the risk that the jury might improperly consider it as independent proof of the facts recited therein." (*People v. Coleman* (1985) 38 Cal.3d 69, 91 [211 Cal.Rptr. 102, 695 P.2d 189].) This is because a witness's on-the-record recitation of

> sources relied upon for an expert opinion does not transform inadmissible matter into "independent proof" of any fact. (*Korsak v. Atlas Hotels, Inc.*, *supra,* 2 Cal.App.4th at pp. 1524-1525, citing *Whitfield v. Roth* (1974) 10 Cal.3d 874, 893-896 [112 Cal.Rptr 540, 519 P.2d 588; Graham, *Expert Witness Testimony and the Federal Rules of Evidence: Insuring Adequate Assurance of Trustworthiness* (1986) U. Ill. L.Rev. 43, 66 ["evidence admitted solely to form the basis of an expert's opinion under [Federal Rules of Evidence] Rule 703 will not support a prima facie case"]; 2 McCormick on Evidence, *supra,* § 324.3, p. 373 and fn.8 [same].)

(*People v. Gardeley* (1997) 14 Cal.4th 605, 619.)

In this case, Faulkner's testimony was based on testimonial hearsay which was inadmissible in the absence of an opportunity to cross-examine the person who collected and preserved the evidence. In *Crawford v. Washington* (2004) 541 U.S. 36 (hereafter *"Crawford"*), the United States Supreme Court recognized that the admission of testimonial hearsay violates a defendant's Sixth Amendment confrontation rights unless there was a prior opportunity to cross-examine the declarant and the declarant is shown to be unavailable at the time of trial. (In accord, *Davis v. Washington* (2006) ___ U.S. ___, 165 L.Ed.2d 224, 126 S.Ct. 2266; *Hammon v. Indiana* (2006) ___ U.S. ___, 165 L.Ed.2d 224, 126 S.Ct. 2266.)

In *People v. Geier* (2007) 41 Cal.4th 555, this Court recently addressed whether expert opinion testimony based on the forensic report of a non-testifying laboratory technician implicated *Crawford.* The Court held that Geier's confrontation rights were not violated when the trial court permitted a DNA expert to testify about the testing of genetic material taken from the murder victim. The expert did not conduct the testing herself, but relied on the testing done by an employee to support her opinion that the

genetic material matched a sample of Geier's DNA. In the specific context of the *Geier* case, this Court adopted a three-part test for determining whether the admission of scientific evidence like laboratory reports was "testimonial" within the meaning of *Crawford*:

> "A statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial."

(*Id.* at 620.) The DNA report in *Geier* was not testimonial because it did not meet the second prong, i.e., it did not "describe a past fact related to criminal activity," but rather was "a contemporaneous recordation of observable events." (*People v. Geier, supra,* 41 Cal.4th at p. 621.)

The hearsay evidence regarding the collection of the specimen analyzed by Faulkner satisfies the three criteria approved in *Geier*. The information conveyed to Faulkner apparently came from investigators at the coroner's office, an agency more closely aligned with law enforcement than the laboratory in *Geier*. The purpose of memorializing this information, like other facts regarding the investigation of a crime included in a police report, is to support its admissibility at a later trial.

With respect to the second prong of *Geier,* the hearsay in issue was a report describing forensic testing of evidence. There was no dispute or issue in *Geier* about the source or condition of the biological samples that were tested. (*People v. Geier, supra*, 41 Cal.4th at p. 622.) In contrast, the foundation for Faulkner's expert opinion in this case was that the maggots were taken from the victim's body at a specific time and were then properly preserved. Faulkner was not present when the maggots were collected, and the prosecutor did not call the person who gathered this evidence. Thus, Faulkner's opinion turned on his belief that the maggots were collected on

May 13, 1996 at 4:00 a.m., which was based in turn on hearsay evidence – a letter he received from the coroner's office and a notation on the specimen bottle.

Additional evidence raised significant questions about when the maggots were collected. Gary Kellerman, the only coroner's investigator who testified, said that he did not collect the maggots and that he did not know who did. (9 RT 2011, 2018-2019.)[26] The label on Exhibit 10B, which contained the maggots, is the type used by evidence technicians to label evidence jars, but is not the type he uses. (9 RT 2013.) Kellerman did not recognize the writing on the specimen bottle (Exhibit 10B), and had never seen the bottle before testifying at the trial. (9 RT 2012, 2018-2019.) Although it was standard procedure to label a specimen in the way Exhibit 10B was labeled, the label on the exhibit did not say that the specimen was collected at the specified time. (9 RT 2014.) Most importantly, Kellerman testified that the notation on the specimen bottle did not say that the evidence was collected at that time. (9 RT 2017.) Thus, in contrast to *Geier,* the demeanor of the person who collected the maggots was "a significant factor in evaluating the foundational testimony relating to the admission" of the evidence. (*People v. Geier*, *supra,* 41 Cal.4th at p. 616, quoting from *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1412.) In the context of this case, the label on the specimen jar and the letter from the coroner's office to Faulkner related historical facts that were inadmissible in the absence of an

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[26] Dr. Scheinin also collected samples of the maggots, but testified that she did so on a different date, May 14, 1996, between 9 a.m. and noon. (8 RT 1343)

opportunity to cross-examine the person who collected the evidence.[27]

Even if this evidence was not "testimonial" under *Geier* or *Crawford,* it should have been excluded because it was unreliable. (*See State v. Rivera* (Conn. 2004) 268 Conn. 351, 363, 844 A.2d. 191, 201 [nontestimonial hearsay must satisfy the reliability requirements of *Ohio v. Roberts* (1980) 448 U.S. 56, 66].) No one came forward to testify that they had collected the maggots at the crime scene and no testifying prosecution witness could even establish the identity of the person who did. Faulkner's entire opinion was based on his belief regarding the time when the maggots were collected at the crime scene, but no witness established this historical fact.

Gary Kellerman was the only investigator from the coroner's office present at the scene who testified at trial. He observed maggots on the body but did not collect any. (9 RT 2011, 2017.) He had never seen the specimen jar (10B) containing the maggots analyzed by Faulkner before testifying, did not recognize the writing on the jar and did not know who collected the maggots. (9 RT 2012, 2018-2019.) Although Faulkner said it was standard procedure to label a specimen jar in the way 10B was labeled, he acknowledged that nothing on the label indicated that the specimen was collected at the specified date and time. (9 RT 2017.) Thus, the hearsay evidence relied upon by Faulkner did not satisfy the reliability requirements of *Ohio v. Roberts* (1980) 448 U.S. 56, 66, and its admission violated Mr.

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[27] As this Court recognized in *Geier,* there is a split of authority on the issue, which the Supreme Court has not yet addressed. Appellant submits that even if the evidence was admissible under *Geier*, its introduction violated his Sixth Amendment rights under *Crawford.*

Loy's rights under the Sixth, Eighth and Fourteenth Amendments.

D. The Erroneous Admission Of Faulkner's Testimony about The Maggots Was Prejudicial

Any error in admitting this testimony was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Mr. Faulkner was the only witness called by the prosecution to establish when the body was placed at the vacant lot, and the time of death. Without his testimony, the gap in the prosecution's evidence would have widened to a gulf. Therefore, the improper admission of the Faulkner testimony in violation of Mr. Loy's right to confrontation and cross-examination violated the Sixth, Eighth and Fourteenth Amendments. Reversal is required.

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V

THE TRIAL COURT'S COMMENTS TO PROSPECTIVE JURORS ABOUT THE HISTORY OF THE DEATH PENALTY IN CALIFORNIA VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS

A. Factual Background

Two panels of prospective jurors were questioned during jury selection proceedings in this case. During his introductory remarks to both panels of prospective jurors, the trial judge made the following comments (2 RT 460-462):

"I am going to tell you a little bit about the death penalty history of it just so you understand. Because some of you probably read a lot about it, talked about it, some of you haven't at all, and some of you may be a little of this here and there.

"If and only if the defendant were found guilty of the charged crime of murder, and, also, the jury found that the special circumstance alleged was true would we get to a second phase of the trial. There is two phases if that happens.

"If that doesn't happen, there would be only one phase. That would be the jury either found the defendant not guilty, or the jury found the defendant guilty of murder but not that the special circumstance was true.

"So only if the jury finds the defendant guilty of murder, special circumstance true

do we get to the second phase of trial. That's another reason why sometimes it's a little hard to know exactly how much time will be needed for the trial.

"Keep that in mind. Even though I'm going to be talking about the death penalty, you only get to that issue if the other things occur.

"I want to give you a little background on it. Because some of you do

have a history, and maybe it's right, maybe it's wrong in your mind insofar as the death penalty, and you might come to certain conclusions about what you know about the history.

"That's why I want to take just a minute on that. The reason I'm giving you history is because of the possible confusion about what you believe is the history.

"In about 1970 the death penalty law in California and a number of other states was found to be unconstitutional the way it was written for various legal reasons. At that time then various states, including California, came up with new death penalty laws.

"Our laws now have to do with what I've just talked about, a special circumstance. There are various special circumstances that can be alleged when the People decided that they're going to seek the death penalty in a case if they get a conviction on the charge.

"So there are a lot of people at the time back in 1970 that were on death row because jurors have made that decision, and this is the one area where jurors make that decision on the sentence rather than the judge. Because the law was invalidated, a number of people then, including some people you probably remember, no longer had the death penalty.

"Well, things happened and it changed since that time. In 1978, California passed a new death penalty law. It was an initiative on the ballot, the people passed the law, and that's the law that had to with special circumstances in the case.

"That new law was tested, and it took a number of years for testing, to go up and down the appellate ladder, California Supreme Court, U.S. Supreme Court, and so forth, and found constitutional.

"So a number of people have been convicted under that new law, and

there are a number of people on death row in California right now, as well as other states in the United States.

"So in this case, what you need to know is that if the defendant were found guilty of the first degree murder charge and special circumstance true, then you'd get to the second phase of the trial. Only if. That's when you get to the second phase of the trial.

"If you got to the second phase of the trial, there are just two options for the jury to choose, death penalty or life without the possibility of parole. You are instructed now that those two sentences and just what I said are meaningful. And that's what they mean. That's what the person would get.

"The reason I said that is some people have different ideas of what happens and when it happens. It's true that sometimes people have their appeals going for a long period of time; but you also know that it's true that after those appeals, certain things have happened in California and around the United States on this issue as far as executions being carried out."

The judge made the same comments to the second panel of jurors. (2 RT 512-514.)

During the penalty phase, the jury received an instruction which stated: "You should assume in your deliberations and decision that life without possibility of parole means that the defendant will be imprisoned for the rest of his life, and a death sentence means the defendant will be executed." (3 CT 644.)

B. The Trial Court's Instructions To The Jury Venire Undermined The Jurors' Sense of Responsibility For Their Sentencing Decision

In *Caldwell v. Mississippi* (1985) 472 U.S. 320, the Supreme Court held it is constitutionally impermissible to rest a death sentence upon a determination by a sentencer who had been led to believe that the

responsibility for determining the appropriateness of the defendant's death sentence rests elsewhere. In *Caldwell,* during penalty phase argument, the prosecutor told the jury that any death sentence they imposed would be subject to appellate review. The Court stated:

> The problem is especially serious when the jury is told that the alternative decision-makers are the justices of the state supreme court. It is certainly plausible to believe that many jurors will be tempted to view these respected legal authorities as having more of a "right" to make such an important decision than has the jury. Given that the sentence will be subject to appellate review only if the jury returns a sentence of death, the chance that an invitation to rely on that review will generate a bias toward returning a death verdict is simply too great.

(*Caldwell v. Mississippi, supra,* 472 U.S. at p. 333.)

In *People v. Morris* (1991) 53 Cal.3d 152, 181, this Court considered a *Caldwell* challenge to remarks a trial judge made to members of the defendant's venire. In that case, the trial judge told the prospective jurors:

> You need not, and will not, have to worry about the death penalty in the event that you find, first of all, that there was not a murder or that the murder wasn't in the first degree. You may never get to that point, but we still have to talk about how you feel about the death penalty. The supreme court, for the last 56 cases that they have decided about the death penalty, and I'm sure you all read about the supreme court. There have been 56 cases, ladies and gentlemen, since 1972, I believe, that have talked about death penalty cases. Fifty three of them were reversed, three of them were affirmed. In those cases, we were given guidelines. I, as a trial judge, was given these guidelines as to how to talk to you about this matter. Those guidelines are still in effect. I'm bound by them and so are you.

Defense counsel objected to the comments made by the trial judge and asked that the court give an admonition to the jury, and argued that the

comments made the potential imposition of the death penalty an "academic exercise" rather than the serious and final determination it truly signified. The trial judge then gave an admonition, which once again mentioned the 56 reversals.

On appeal, this Court found that the trial court's remarks were irrelevant and improper, but not prejudicial. The statements were found not to be prejudicial because they were made at the beginning of jury selection, in the context of the questioning that would be done about the death penalty. The Court found that the reference the trial judge made was not necessarily critical to the jury's sense of responsibility for its verdict. Moreover, the trial court's corrective statement appeared to satisfy defense counsel, who did not request further remedial action be taken. (*People v. Morris, supra,* 53 Cal.3d at p. 182.)

When the *Morris* case reached the Ninth Circuit, a majority of the panel agreed with this Court's resolution of the *Caldwell* claim. (*Morris v. Woodford* (9th Cir. 2001) 273 F.3d 826, 830-831.) Judge Ferguson, however, filed a concurring opinion in which he found that trial counsel had been prejudicially ineffective for failing to move for a mistrial and demanding a new jury not prejudiced by the political statements the trial judge had made. In Judge Ferguson's opinion, both the guilt and penalty judgments should have been vacated as a result of the judge's comments and due to trial counsel's prejudicial ineffectiveness. (*Morris v. Woodford, supra,* 273 F.3d at p. 843.)

This Court should reverse Mr. Loy's guilt and penalty judgments due to the comments made by the trial judge to the jurors in this case. The trial judge mentioned that a prior death penalty law had been invalidated and that a number of people "no longer had the death penalty." Then the trial judge

emphasized the levels of appellate review. He also emphasized that "some people have their appeals going for a long period of time", but that "certain things have happened in California and around the United States on this issue as far as executions being carried out." (2 RT 512-514.)

The judge's comments did exactly what *Caldwell* prohibits: he told the jury that there were multiple levels of appellate review, that at least two different courts would review its decision, that it is possible the law could be invalidated and death sentences tossed out, and that "certain things have happened in California and around the United States on this issue as far as executions being carried out." This last sentence is especially troublesome. It is ambiguous, and invited the listener to speculate about which "certain things" the judge was referring. Was it that few executions happen in California? Was it that criminal defense lawyers or liberal judges interfere with juror imposed death sentences and get in the way of executions being carried out? The whole effect of this part of the judge's comments was to suggest that other factors and people could interfere with the sentence the jury imposed. Indeed, it suggested that an appellate court could invalidate any death sentence imposed upon Mr. Loy.

Unlike the *Morris* case, defense counsel made no objection,[28] and so no curative admonition was given. The court's penalty phase instructions did not direct the jurors to disregard the multiple levels of appellate review or the undefined "other things." Indeed, the instruction telling them to "assume" that the defendant will be executed if sentenced to death emphasized the possibility that the sentence would not be carried out. Under

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[28] The issue is preserved for appellate review because the court's comments amounted to an instruction that affected the substantial rights of Mr. Loy. (Pen. Code, § 1259.)

these circumstances, and because the trial judge's comments violated the rule of *Caldwell v. Mississippi*, and undermined the reliability requirements of the Eighth Amendment, as well as the Fourteenth Amendment's due process and fundamental fairness protections, Mr. Loy's guilt and penalty judgments should be set aside.

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VI

APPELLANT'S DEATH SENTENCE, IMPOSED FOR FELONY-MURDER SIMPLICITER, IS A DISPROPORTIONATE PENALTY UNDER THE EIGHTH AMENDMENT AND VIOLATES INTERNATIONAL LAW

Appellant was subject to the death penalty under a single theory of felony-murder: murder in the commission or attempted commission of a lewd and lascivious act upon a child. The felony-murder theory of liability was the only theory that made him death eligible. Under California law, a defendant convicted of a murder during the commission or attempted commission of a felony may be executed even if the killing was unintentional or accidental. As will be demonstrated below, the lack of any requirement that the prosecution prove that a perpetrator had a culpable state of mind with regard to the homicide before a death sentence may be imposed violates the proportionality requirement of the Eighth Amendment as well as international human rights law governing use of the death penalty.

A. California Authorizes The Imposition Of The Death Penalty Upon A Person If A Homicide Occurs During An Attempted Felony Without Regard To The Perpetrator's State Of Mind At The Time Of The Homicide

Appellant was found to be death eligible solely because he was convicted of committing murder during the course of a lewd and lascivious act with a child. (2 CT 528.) Normally, the prosecution must prove that the defendant had the subjective mental state of malice (either express or implied) in the case of a homicide that occurs during a burglary, rape, sodomy or during any attempted felony listed in section 189. However, no such mens rea with regard to the murder is required for a first degree felony-murder to occur.

> [F]irst degree felony murder encompasses a far wider range of individual culpability than deliberate and premeditated murder. It includes not only the latter, but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable.

(*People v. Dillon, supra*, 34 Cal.3d at p. 477.) This rule is reflected in the standard jury instruction for felony murder, which was given with these case specific modifications:

> Unlawful killing of a human being, *whether intentional, unintentional or accidental*, which occurs during the commission or attempted commission of the crime of lewd and lascivious act on a child under 14, is murder of the first degree when the perpetrator had the specific intent to commit that crime. The specific intent to commit lewd or lascivious act on a child under 14 and the commission or attempted commission of the crime must be proved beyond a reasonable doubt.

(10 RT 2320-2321; CALJIC No. 8.21, italics added.)

Except in one rarely-occurring situation,[29] under this Court's interpretation of section 190.2, subdivision (a)(17), if the defendant is the actual killer in an enumerated felony murder, the defendant also is death eligible under the felony-murder special circumstance.[30] (See *People v.*

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[29]See *People v. Green* (1980) 27 Cal.3d 1, 61-62 [felony-murder (robbery) special circumstance does not apply if the felony was only *incidental* to the murder].

[30]As a result of the erroneous decision in *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 154, which was reversed in *People v. Anderson* (1987) 43 Cal.3d 1104, this Court has required proof of the defendant's

(continued...)

Hayes (1990) 52 Cal.3d 577, 631-632 [the reach of the felony-murder special circumstances is as broad as the reach of felony murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction'"].) The key case on the issue is *People v. Anderson* (1987) 43 Cal.3d 1104, where the Court held that under section 190.2, "intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*Id.* at p. 1147.) The *Anderson* majority did not disagree with Justice Broussard's summary of the holding: "Now the majority . . . declare that in California a person can be executed for an accidental or negligent killing." (*Id.* at p. 1152 (dis. opn. of Broussard, J.).)

Since *Anderson*, in rejecting challenges to the various felony-murder special circumstances, this Court repeatedly has held that to seek the death penalty for a felony murder, the prosecution need not prove that the defendant had any mens rea as to the homicide. For example, in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264, this Court rejected the defendant's argument that, to prove a felony-murder special circumstance, the prosecution was required to prove malice. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant argued that the felony-murder special circumstance required proof that the defendant acted with "reckless disregard" and could not be applied to one who killed accidentally. This

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[30](...continued)
intent to kill as an element of the felony-murder special circumstance with regard to felony murders committed during the period December 12, 1983 to October 13, 1987. This Court has held that *Carlos* has no application to prosecutions for murders occurring either before or after the *Carlos* window period. (*People v. Johnson* (1993) 6 Cal.4th 1, 44-45.)

Court held that the defendant's argument was foreclosed by *Anderson*. (*Id.* at p. 905, fn. 15.) In *People v. Smithey* (1999) 20 Cal.4th 936, 1016, this Court rejected the defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life.[31]

In urging the jury to convict appellant of first degree murder under the felony-murder rule, the prosecutor in this case argued:

> So if you have a killing, whether it's accidental, whether it's intentional, whether it's unintentional, unforeseeable, that occurs while a lewd or lascivious act is being committed on a person under fourteen years of age, that is first-degree murder.
> . . .
>
> Also, the judge will give you an instruction as to what a lewd act with a child is which supplies the felony for first-degree murder. And that is a person touched the body of a child. So touching, simple touching, groping in, as Sara Minor called it, a private area, rape, sodomy, oral copulation, anything like that.

(10 RT 2195-2196.)

The jury was instructed pursuant to the standard felony-murder instruction CALJIC No. 8.21, set forth above. (3 CT 593; 10 RT 2320-2321.) The trial judge rejected a proposed defense instruction that would have permitted the jury to find that accidental death was insufficient to prove the special circumstance charged in the case. (2 CT 511; 10 RT 2181-2184.)

The jury was also instructed regarding the special circumstance alleged in this case:

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[31]Alternatively, this Court found that there was sufficient evidence that the defendant did act with reckless indifference to justify the death penalty. (*People v. Smithey*, *supra*, 20 Cal.4th at pp. 1016-1017.)

> If you find the defendant in this case guilty of murder of the first degree, then you must determine if the special circumstance is true or not true, which, as you know, is an allegation of in the commission of a lewd or lascivious act on a child under 14.
>
> The people have the burden of proving the truth of this special circumstance. If you had a reasonable doubt whether it's true, then you would find it not true.
>
> If you are satisfied beyond a reasonable doubt the defendant actually killed a human being, you need not find the defendant intended to kill in order to find the special circumstance to be true.
>
> So in order to find a special circumstance alleged in the case to be true or untrue, you must agree unanimously.

(10 RT 2322-2323.)

B. The Felony-Murder Special Circumstances Alleged In This Case Violate The Eighth Amendment's Proportionality Requirement And International Law Because They Permit Imposition Of The Death Penalty Without Proof That The Defendant Had A Culpable Mens Rea As To The Killing

In a series of cases beginning with *Gregg v. Georgia*, (1975) 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in a variety of circumstances. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty for getaway driver to a robbery felony murder]; *Roper v. Simmons* (2005) 543 U.S. 551, 568 [death penalty for murder committed by defendant under 16-years old]; *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty for mentally retarded

defendant].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Supreme Court has applied a two-part test, asking: (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 183.)

The Supreme Court has addressed the proportionality of the death penalty for unintended felony murders in *Enmund v. Florida*, 458 U.S. 782, and in *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred the imposition of the death penalty on the "getaway driver" to an armed robbery-murder because he did not take life, attempt to take life, or intend to take life. (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty. Justice O'Connor, writing for the majority, held that it was not, and that the Eighth Amendment would be satisfied by proof that the defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (*Tison v. Arizona*, *supra*, 481 U.S. at p. 158.) Justice O'Connor explained the rationale of the holding as follows:

> [S]ome nonintentional murderers may be among the most dangerous and inhumane or all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with

> intentional. . . . *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence – the taking of human life – the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.

(*Id.* at pp. 157-158.) In choosing actual killers as examples of "reckless indifference" murderers whose culpability would satisfy the Eighth Amendment standard, Justice O'Connor eschewed any distinction between actual killers and accomplices. In fact, it was Justice Brennan's dissent which argued that there should be a distinction for Eighth Amendment purposes between actual killers and accomplices and that the state should have to prove intent to kill in the case of accomplices (*id.* at pp. 168-179 (dis. opn. of Brennan, J.)), but that argument was rejected by the majority.

That *Tison* established a minimum mens rea for actual killers as well as accomplices was confirmed clearly in *Hopkins v. Reeves* (1998) 524 U.S. 88. In *Reeves*, a case involving an actual killer, the Court reversed the Eighth Circuit's ruling that the jury should have been instructed to determine whether the defendant satisfied the minimum mens rea required under *Enmund/Tison*, but held that such a finding had to be made at some point in the case:

> The Court of Appeals also erroneously relied upon our decisions in *Tison v. Arizona*, 481 U.S. 137 (1987) and *Enmund v. Florida*, 458 U.S. 782 (1982) to support its holding. It reasoned that because *those cases require proof of a culpable mental state with respect to the killing before the*

> *death penalty may be imposed for felony murder*, Nebraska could not refuse lesser included offense instructions on the ground that the only intent required for a felony-murder conviction is the intent to commit the underlying felony. In so doing, the Court of Appeals read *Tison* and *Enmund* as essentially requiring the States to alter their definitions of felony murder to include a *mens rea* requirement with respect to the killing. In *Cabana v. Bullock*, 474 U.S. 376 (1986), however, we rejected precisely such a reading and stated that "our ruling in *Enmund* does not concern the guilt or innocence of the defendant – it establishes no new elements of the crime of murder that must be found by the jury" and "does not affect the state's definition of any substantive offense." For this reason, we held that a State could comply with *Enmund*'s requirement at sentencing or even on appeal. Accordingly *Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, *so long as their requirement is satisfied at some point thereafter*.

(*Hopkins v. Reeves*, *supra*, 524 U.S. at 99, citations and fns. omitted; italics added.)[32]

Every lower federal court to consider the issue – both before and after *Reeves* – has read *Tison* to establish a minimum mens rea applicable to all defendants. (See *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Pruett v. Norris* (8th Cir. 1998) 153 F.3d 579, 591; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-985, revd. on other grounds, *Hopkins v. Reeves* (1998) 524 U.S. 88; *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329, 335; *United States v. Cheely* (9th Cir.

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[32]See also *Graham v. Collins* (1993) 506 U.S. 461, 501 (conc. opn. of Stevens, J.) [stating that an accidental homicide, like the one in *Furman v. Georgia*, may no longer support a death sentence].)

1994) 36 F.3d 1439, 1443, fn. 9.)[33] The *Loving* court explained its thinking as follows:

> As highlighted by Justice Scalia in the *Loving* oral argument, the phrase "actually killed" could include an accused who accidentally killed someone during commission of a felony, unless the term is limited to situations where the accused intended to kill or acted with reckless indifference to human life. We note that Justice White, who wrote the majority opinion in *Enmund* and joined the majority opinion in *Tison*, had earlier written separately in *Lockett v. Ohio* (1978) 438 U.S. 586 [parallel citation omitted] (1978), expressing his view that "it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624 [parallel citation omitted]. Without speculating on the views of the current membership of the Supreme Court, we conclude that when *Enmund* and *Tison* were decided, a majority of the Supreme Court was unwilling to affirm a death sentence for felony murder unless it was supported by a finding of culpability based on an intentional killing or substantial participation in a felony combined with reckless indifference to human life. Thus, we conclude that the phrase, "actually killed," as used in *Enmund* and *Tison*, must be construed to mean a person who intentionally kills, or substantially participates in a felony and exhibits reckless indifference to human life.

(*Loving v. Hart, supra*, 47 M.J. at p. 443.)

Even were it not abundantly clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In *Atkins*, the Court emphasized that "the clearest and

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[33]See also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.

most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (*Atkins v. Virginia*, *supra*, 536 U.S. at p. 312.)

Roper v. Simmons, *supra*, 543 U.S. 551, supports appellant's Eighth Amendment proportionality argument. In declaring the death penalty for juvenile offenders unconstitutional, the United States Supreme Court reaffirmed that in determining whether a punishment is so disproportionate as to be cruel and unusual, the Court first considers "the evolving standards of decency" as reflected in laws and practices of the United States and then exercises its own independent judgment about whether the challenged penalty furthers the goals of retribution and deterrence. (*Roper v. Simmons*, *supra*, 543 U.S. at p. 561.) Applying this Eighth Amendment framework, the Court in *Simmons* found a national consensus against capital punishment for juveniles in large part from the fact that the majority of states prohibit the practice. By the Court's calculations, 30 states preclude the death penalty for juveniles (12 non-death penalty states and 18 death-penalty states that exclude juveniles from this ultimate punishment) and 20 permit the penalty. (*Id.* at p. 564.) Even though the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for juveniles was not as dramatic as the rate of abolition of the death penalty for the mentally retarded chronicled in *Atkins*, the Court found that "the consistency of the direction of the change" was constitutionally significant in terms of demonstrating a national consensus against executing people for murders they committed as juveniles. (*Roper v. Simmons*, *supra*, 543 U.S. at pp. 565-566.) The Court further held that because of the diminished culpability resulting from the adolescents' lack of maturity and underdeveloped sense of responsibility, their vulnerability to negative

influences and outside pressures, and their still developing characters, the penological justifications of retribution and deterrence are inadequate to sustain the death penalty for juvenile offenders. (*Id.* at pp. 568-575.)

Simmons, like *Atkins*, leaves no doubt that, at least with regard to capital punishment, the proportionality limitation of the Eighth Amendment is the law of the land and that the most compelling objective indicia of the nation's evolving standards of decency about the use of the death penalty are the laws of the various states. In this regard, appellant has made a far more compelling showing of national consensus against the death penalty for felony-murder *simpliciter* than either Simmons or Atkins made in their respective cases. There are now only five states, including California, that permit execution of a person who killed during a felony without any showing of a culpable mental state whatsoever as to the homicide.[34] Forty-five states – 90% of the nation – prohibit the penalty in this circumstance.

This Court should revisit its previous decisions upholding the felony-murder special circumstance and hold that the death penalty cannot be imposed unless the trier of fact finds that the defendant had an intent to kill or acted with reckless disregard to human life. Because the factual finding is a prerequisite to death eligibility, which increases the maximum statutory penalty, it must be found unanimously and beyond a reasonable doubt by a jury. (*Ring v. Arizona* (2002) 536 U.S. 584, 602-603; see also *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856; 860, 871]; *Blakely v. Washington* (2004) 542 U.S. 296, 304-305; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, 493-494.) There is no jury finding in this case that

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[34]Besides California, only Florida, Georgia, Maryland and Mississippi permit execution of a defendant even when there is no mens rea.

appellant intended to kill or acted with reckless indifference to human life.

In *McConnell v. State* (Nev., 2004) 102 P.3d 606, the Nevada Supreme Court, overruling its prior case law, unanimously held that Nevada's felony-murder statute violated the Eighth and Fourteenth Amendments, as well as the state constitution, because "it fails to genuinely narrow the death eligibility of felony murderers and reasonably justify imposing death on all defendants to whom it applies." (*Id.* at p. 624.) *McConnell* held that an aggravating circumstance – the basis for death eligibility in Nevada – could not be based "on the felony upon which a felony-murder is predicated." (*Ibid.*) Although *McConnell* is based on the Eighth Amendment's narrowing principle rather than on its proportionality principle, such as that asserted in this case, the decision is nonetheless instructive.

Notably, the Nevada Supreme Court in *McConnell* imposes the very constitutional requisite that appellant advocates – i.e., that there must be proof of a culpable mental state before a felony murder can be death eligible. The Nevada felony-murder aggravating circumstance, unlike the Nevada felony-murder statute, "requires that the defendant '[k]illed or attempted to kill' the victim or '[k]new or had reason to know that life would be taken or lethal force used." (*McConnell v. State*, *supra*, 102 P.3d at p. 623, emphasis omitted.) The Nevada Supreme Court found this requirement to be inadequate because it permits a jury to impose death on a defendant who killed the victim accidentally. (*Id.* at p. 623, fn. 67.) In *McConnell*, the Court held that the mens rea requirement statutorily provided for an accomplice also applies to the actual killer, and made clear that "even if the defendant killed the victim, they must still find that the defendant intended to kill or at least knew or should have known that a killing would take place or

lethal force would be applied." (*Ibid.*) Even with this new proportionality limitation, the Nevada Supreme Court held the felony-murder aggravating circumstance failed to genuinely narrow the death eligibility of felony murderers. (*Id.* at p. 624.) Like the Nevada Supreme Court, this Court should recognize the constitutional infirmity of its felony-murder special circumstance.

McConnell reduces the number of states that limit imposition of the death penalty on a felony murderer without regard to his mens rea. As noted above, before *McConnell*, felony-murder *simpliciter* was the basis for the death eligibility in only six states, including California: Florida, Georgia, Maryland, Mississippi and Nevada. Without Nevada, that number is now five.[35] This dwindling number underscores that capital punishment for felony- murderers without proof of a culpable mental state is inconsistent with contemporary standards of decency that inform the Eighth Amendment's proportionality principle. (See *Atkins v. Virginia*, *supra*, 536 U.S. at pp. 311-312; *Trop v. Dulles* (1958) 356 U.S. 86, 100-101 (plur. opn. of Warren, J.).)

That at least 45 states (32 death penalty states and 13 non-death

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[35]In Shatz & Rivkind, *The California Death Penalty: Requiem for Furman?* (1997) 72 N.Y.U. Law. Rev. 1283, 1319, fn. 201, the authors list seven states other than California as authorizing the death penalty for felony-murder *simpliciter*, but Montana, by statute (see Mont. Code Ann., §§ 45-5-102(1)(b), 46-18-303), North Carolina, by court decision (see *State v. Gregory* (N.C. 1995) 459 S.E.2d 638, 665) and Nevada, as noted above in *McConnell v. State*, *supra*, 102 P.3d at p. 624, now require a showing of some mens rea in addition to the felony murder in order to make a defendant death eligible.

penalty states) and the federal government[36] reject felony-murder *simpliciter* as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in *Enmund* (41 states and the federal government) and *Atkins* (30 states and the federal government). Although such legislative judgments constitute "the clearest and most reliable objective evidence of contemporary values" (*Atkins v. Virginia, supra*, 536 U.S. at p. 312), professional opinion as reflected in the Report of the Governor's Commission on Capital Punishment (Illinois)[37] and international opinion[38] also weigh against finding felony-murder *simpliciter* a sufficient basis for death eligibility. The most comprehensive recent study of a state's death penalty was conducted by the Governor's Commission on Capital Punishment in Illinois, and its conclusions reflect the current professional opinion about the administration of the death penalty.

Even though Illinois's "course of a felony" eligibility factor is far narrower than California's special circumstance, requiring actual participation in the killing and intent to kill on the part of the defendant or knowledge that his acts created a strong probability of death or great bodily harm (720 ILCS 5/9-1(b)(6)(b)), the Commission recommended eliminating this factor. (*Report of the Former Governor Ryan's Commission on Capital*

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[36]See 18 U.S.C. § 3591, subdivision (a)(2).

[37]The Court has recognized that professional opinion should be considered in determining contemporary values. (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21.)

[38]The Court has regularly looked to the views of the world community to assist in determining contemporary values. (See *Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21; *Enmund v. Florida*, 458 U.S. at pp. 796-797, fn. 22; *Coker v. Georgia, supra*, 433 U.S. at p. 596.)

Punishment, April 15, 2002, at pp. 72-73, <http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_04.pdf>.) The Commission stated, in words which certainly apply to the California statute:

> Since so many first degree murders are potentially death eligible under this factor, it lends itself to disparate application throughout the state. This eligibility factor is the one most likely subject to interpretation and discretionary decision-making. On balance, it was the view of Commission members supporting this recommendation that this eligibility factor swept too broadly and included too many different types of murders within its scope to serve the interests capital punishment is thought best to serve.
>
> A second reason for excluding the "course of a felony" eligibility factor is that it is the eligibility factor which has the greatest potential for disparities in sentencing dispositions. If the goal of the death penalty system is to reserve the most serious punishment for the most heinous of murders, this eligibility factor does not advance that goal.

(*Id.* at p. 72.)

With regard to international opinion, the Court observed in *Enmund*:

> "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." (*Coker v. Georgia*, 433 U.S. 584, 596, n. 10 [parallel citations omitted]). It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe.

(*Enmund v. Florida*, *supra*, 458 U.S. at p. 796, fn. 22.) International opinion has become even clearer since *Enmund*. Article 6 (2) of the International Covenant on Civil and Political Rights ("ICCPR"), to which the United States is a party, provides that the death penalty may only be imposed for the "most serious crimes." (ICCPR, G.A. Res. 2200A (XXI), 21 U.N. GAOR

Supp. (No. 16) at p. 52, U.N. Doc, A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976 and ratified by the United States on June 8, 1992.) The Human Rights Committee, the expert body created to interpret and apply the ICCPR, has observed that this phrase must be "read restrictively" because death is a "quite exceptional measure." (Human Rights Committee, General Comment 6(16), ¶ 7; see also American Convention on Human Rights, art. 4(2), Nov. 22, 1969, OAS/Ser.L.V/11.92, doc. 31 rev. 3 (May 3, 1996) ["In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes . . . ."].) In 1984, the Economic and Social Council of the United Nations further defined the "most serious crime" restriction in its Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. (E.S.C. res. 1984/50; GA Res. 39/118.) The Safeguards, which were endorsed by the General Assembly, instruct that the death penalty may only be imposed for intentional crimes. (*Ibid.*)[39] The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions considers that the term "intentional" should be "equated to premeditation and should be understood as deliberate intention to kill." (*Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions*, U.N. Doc. CCPR/C/79/Add.85, November 19, 1997, ¶ 13.)

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[39]The Safeguards are a set of norms meant to guide the behavior of nations that continue to impose the death penalty. While the safeguards are not binding treaty obligations, they provide strong evidence of an international consensus on this point. "[D]eclaratory pronouncements [by international organizations] provide some evidence of what the states voting for it regard the law to be . . . and if adopted by consensus or virtual unanimity, are given substantial weight." (*Restatement (Third) of the Foreign Relations Law of the United States*, § 103 cmt. c.)

The imposition of the death penalty on a person who has killed negligently or accidentally is not only contrary to evolving standards of decency, but it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty ... measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-799, quoting *Coker v. Georgia*, *supra*, 433 U.S. at p. 592). With respect to retribution, the Supreme Court has made clear that retribution must be calibrated to the defendant's culpability which, in turn, depends on his mental state with regard to the crime. In *Enmund*, the Court said: "It is fundamental 'that causing harm intentionally must be punished more severely than causing the same harm unintentionally.'" (*Enmund v. Florida*, *supra*, 458 U.S. at p. 798, quoting Hart, *Punishment and Responsibility* (1968) p. 162.) In *Tison*, the Court further explained:

> A critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime. Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished. The ancient concept of malice aforethought was an early attempt to focus on mental state in order to distinguish those who deserved death from those who through "Benefit of . . . Clergy" would be spared.

(*Tison v. Arizona*, *supra*, 481 U.S. at p. 156.) Plainly, treating negligent and accidental killers on a par with intentional and reckless-indifference killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve

any deterrent purpose. As the Court said in *Enmund*:

> [I]t seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg v. Georgia*, *supra*, 428 U.S., at 186, 96 S.Ct., at 2931 (fn. omitted).

(*Enmund v. Florida*, *supra*, 458 U.S. at pp. 798-99; accord, *Atkins v. Virginia*, *supra*, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never foresaw.

Since imposition of the death penalty for each instance of felony-murder *simpliciter* in this case (burglary, rape, sodomy felony-murder special circumstances) clearly is contrary to the judgment of the overwhelming majority of the states, recent professional opinion and international norms, it does not comport with contemporary values. Moreover, because imposition of the death penalty for felony-murder *simpliciter* serves no penological purpose, it "is nothing more than the purposeless and needless imposition of pain and suffering." As interpreted and applied by this Court, the felony-murder special circumstances are unconstitutional under the Eighth Amendment, and appellant's death sentence must be set aside.

Finally, California law making a defendant death eligible for felony-murder *simpliciter* violates international law. Article 6(2) of the ICCPR restricts the death penalty to only the "most serious crimes," and the Safeguards, adopted by the United Nations General Assembly, restrict the death penalty to intentional crimes. This international law limitation applies

domestically under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) In light of the international law principles discussed previously, appellant's death sentence, predicated on his act of killing the victim without any proof that the murder was intentional, violates both the ICCPR and customary international law and, therefore, must be reversed.

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VII

CUMULATIVE ERRORS AT THE GUILT PHASE REQUIRE REVERSAL

A. Legal Standards

Appellant contends that the trial court committed multiple errors at the guilt phase. These include the improper admission of Mr. Loy's prior offenses under Evidence Code section 1108; providing the jury with a constitutionally flawed instruction concerning Mr. Loy's alleged predisposition to commit sex offenses; the improper admission of hearsay testimony about an alleged act of improper touching of Monique Arroyo by Mr. Loy; and the improper admission of the Faulkner testimony. As discussed in the arguments above, each error on its own constitutes reversible error. In combination, these errors violated the Sixth, Eighth and Fourteenth Amendments, and violated Mr. Loy's rights to a fair and reliable result in the guilt phase of his capital case, to due process of law, and to a fundamentally fair trial. These combined errors require that Mr. Loy's guilt phase convictions and penalty judgment be reversed.

The problem here is that if the trial court had not admitted the Section 1108 evidence, or had the jury not been given the improper predisposition instruction, the prosecutor would have been unable to argue and manipulate the evidence as she did at several different junctures in the case. The prosecutor's discussion of the evidence exacerbated the harm caused by the erroneous trial court rulings.[40] Had the Section 1108 evidence not been admitted, and had the erroneous instruction not been given, the jury would

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[40] Defense counsel pointed out how the prosecutor was able to exploit the trial court's rulings with respect to the Section 1108 evidence in his Motion for New Trial. (3 CT 686-690.)

have been more likely to reject the prosecutor's unsubstantiated arguments about the hotly disputed evidence in this case.

California courts have long recognized the concept of cumulative error. (*People v. Underwood* (1964) 61 Cal.2d 113, 126) [reversing guilt phase of death penalty case for several evidentiary errors.] The cumulative error doctrine is a litmus test that always applies in a criminal case, because it is used to determine whether the defendant received due process and a fair trial. (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349.)

In *People v. Holt* (1984) 37 Cal.3d 436, 458-459, an automatic appeal, this Court held that the combination of multiple errors, including improper impeachment, erroneous admission of evidence, and improper prosecutorial argument, amounted to prejudicial error, requiring reversal. Federal courts also recognize the concept of cumulative error. Even if no single error is sufficiently prejudicial, where there are several substantial errors, their cumulative impact may be so prejudicial as to require reversal. (*Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893) [vacating guilt judgment in capital case for multiple errors in the admission and exclusion of evidence].)

In evaluating the cumulative effect of errors, the Court must take into account the whole record, including the strength of the prosecution's case and the arguments of counsel. Where jury deliberations are lengthy, this indicates that the prosecution case was not open and shut, and strongly indicates that errors in the admission of evidence are prejudicial. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.)

B. The State's Case Was Weak

The physical evidence in this case fell into several categories. There were several items of forensic evidence which the prosecution contended

proved that Mr. Loy murdered Monique. The evidence was: (1) the minute red stain on the inside of Mr. Loy's car trunk; (2) the tiny patch of bodily fluid on the comforter found at the crime scene; and (3) carpet fibers similar (but not identical) to those in Mr. Loy's car found on the crime scene comforter.

Additionally, the coroner testified (1) that Monique must have died during a sexual assault because the coroner found a tiny speck of hemorrhage in the perivaginal area; (2) that the injury could have occurred during consensual sexual activity; and (3) that given the absence of internal penetrating injury or blunt force trauma, the probable cause of death was asphyxia to face, neck or body compression or all of the above. (6 RT 1369-1370.)

It was the defense contention at trial that Monique had left her bedroom on her own on the night she disappeared. The defense contended that she may have left with some older boys who had been coming to her window late at night, and had been trying to get her to go out with them. According to the original report of the prosecution maggot expert, the body was placed at the lot where it was found at a time when Mr. Loy had already been placed in custody. (10 RT 2217, 2238, 2258-2265.)

The vast amount of physical evidence seized in this case either exculpated Mr. Loy or was found to have no connection to him whatsoever. Mr. Loy's car and residence were searched the morning Monique disappeared. The search of the car done that morning turned up nothing to suggest that Monique had been in it. (8 RT 1912-1917.) The search of Mr. Loy's residence - his brother's house - also did not result in the seizure of any evidence linking Mr. Loy with Monique's disappearance. (8 RT 1912-1917.) The dirty clothing Mr. Loy had been wearing the night Monique

disappeared - when the prosecution claimed he assaulted and murdered her - was seized, but the prosecution never bothered to test it for the presence of any trace evidence. (8 RT 1927-1929, 1751, 1761.) Three pairs of Mr. Loy's shoes were seized, including the work boots he had been wearing the night Monique disappeared. None of the shoes matched shoe prints found at the crime scene. (9 RT 2104-2114.) Tire prints found at the vacant lot did not match Mr. Loy's car. (9 RT 2116-2117.) Pubic and other hairs found on the crime scene comforter, bed sheet and blanket were not Mr. Loy's. (8 RT 1752-1759.) Pubic hairs on the comforter did not belong to Monique. (8 RT 1760.) No attempt was made to compare the hair with any other person. (8 RT 1753.) No hairs of Mr. Loy were found in Monique's bedroom. (8 RT 1754.) Nor was any other evidence recovered in Monique's bedroom which proved that Mr. Loy had been in her room, much less that he had sexually assaulted and murdered her that night.

Additionally, the evidence the prosecution relied upon in order to prove when Monique's body was placed in the vacant lot where it was found was unreliable. The prosecution entomologist, Dr. Faulkner, originally wrote a report which estimated the approximate date and time when Monique's body was placed in the vacant lot as a time after Mr. Loy had been taken into custody. (8 RT 1801-1802.) After receiving additional reports from the prosecutor and a letter detailing her theory of the case, Dr. Faulkner changed his opinion about when the body was left in the vacant lot on the morning he was set to testify. (8 RT 1803-1806, 1774-1776.)

A further problem with Dr. Faulkner's conclusions was that the

prosecution never proved who gathered the maggots at the crime scene.[41] Gary Kellerman, a coroner's investigator who was called to the crime scene, saw maggots on the body. He denied collecting any of the maggots. He looked at the container (Exhibit 10B) in which the maggots were stored, and could not say who had collected them. (9 RT 2009-2012, 2017-2018.) When defense counsel attempted to question Mr. Kellerman further about the collection of the maggots, the prosecutor thwarted this inquiry by objecting to it. (9 RT 2015-2017.)

The prosecution's evidence about the cause of death and sexual assault was also unreliable and flawed. Monique's body was badly decomposed. (6 RT 1235-1237.) Dr. Scheinin, the state's coroner, testified that she could only determine the cause of death by a process of exclusion. She testified that because she could find no evidence of blunt force trauma, or internal penetrating trauma, the probable cause of death was asphyxia to the face, neck or body. (6 RT 1328, 1368-1370, 1381.) The defense expert, Dr. Van Meter, testified that the body was so badly decomposed that it was impossible to tell how Monique died and whether she had been sexually assaulted. (9 RT 2070-2072.)

There was no direct evidence about how Monique got out of her bedroom the night she disappeared. The prosecution theory was that Mr. Loy - after having drunk a number of beers with his nephew - hid inside his sister's house that night and then went to Monique's room, where he touched her improperly, suffocated or strangled her to death, and then carried her lifeless body out her bedroom door, down two flights of creaky wooden

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[41] Defense counsel objected when Dr. Faulkner was asked by the prosecutor when the maggots were collected and preserved. The objection was overruled. (8 RT 1774.)

stairs, through part of the house, and outside to his car, where he deposited the body in the front passenger side of Mr. Loy's car. (10 RT 2203-2010.) This "theory" was pure speculation however. There was absolutely no physical evidence that this happened. No one saw or heard anything of the sort. A bedroom sheet was found in the driveway of the Arroyo house, but how it got there is unknown. The sheet did not have any trace evidence on it connected to Mr. Loy. (8 RT 1752.)

C. The Prosecutor Misinformed the Jury

The prosecutor exacerbated the prejudice that flowed from the improper admission of evidence at the guilt phase by manipulating the evidence during her closing argument. In some cases, the prosecutor was flat wrong about the state of the evidence at trial. Given the weakness of the state's case, the prosecutor attempted to convince the jury that the guilt case was stronger than it actually was by overstatement, manipulation of the evidence.

1. The genetic evidence

The prosecutor's description of the genetic evidence did not match the testimony given during trial.

The prosecutor stated:

> "When you think of it in terms of all of the factors, all of them pointing to the same thing, Eloy Loy is the person who committed the murder. So when we start talking about it, we'll start at the top, the defendant's DNA on Monique's comforter." (10 RT 2198.)

A few lines later, the prosecutor took the facts of the case and twisted them to her advantage. She said:

> "But the one particular spot, 13, 13-A, she found mixed results, a mixture, meaning two peoples' DNA mixing together, a mixture. That had faint results from the defendant." (10 RT 2199.)

The prosecutor went on to conflate the meaning of the evidence:

"Hence, you have the mixture of the defendant's bodily fluids during the course of rape, and Monique's own DNA, her own vaginal secretions. So we have the defendant's DNA on Monique's comforter." (10 RT 2199.)

Later, the prosecutor misstated the evidence about the trunk lid stain:

"Finally, you have Monique's blood in the defendant's trunk...It is.. The blood is not because Monique was in the trunk. The blood is there because - whatever place that Monique bled, whether it was from her mouth, from her braces, whether it was because she is 12 years old and the defendant hurt her, ripped something as he was raping her, she bled.

"She stayed in the front part of the car, but she bled. And in carrying Monique to the dump site and then going to his trunk to clean up, the defendant got some blood from his finger or whatever part of his body that was on it and put it on the trunk.

"There is no other reasonable explanation for her blood being in a car that she was hardly ever in, nobody liked her to be in it[42], and especially the trunk. All these factors show that the defendant is guilty of first degree murder." (10 RT 2207-2208.)

The prosecutor returned to the genetic evidence:

"You have physical evidence on the comforter from the DNA, you have the fibers, and you have her blood in the trunk, all pointing to the reasonable, inescapable conclusion that the defendant is guilty of first degree murder." (10 RT 2214-2215.)

This argument continued in the prosecutor's guilt phase rebuttal:

"Again, I'll start at the top of the chart. The DNA. Not the

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[42] Also, no witness testified that "nobody liked her to be in" Mr. Loy's car.

defendant's blood. DNA. Not the defendant's blood. The victim's blood. Defendant's bodily juices.

"When we are talking about numbers 1 in 125,000 with a missing test, well, if you recall, that testimony had to do with the victim's sample. Because it was so degraded, one of the results dropped out, and they couldn't get a result.

"Was that a problem? No. Most of the blood on the blanket you're going to assume is the victim's blood. So we know what the D1S80 is. We know what the victim's blood is. We don't need to really necessarily have all seven tests from the victim to figure out what her blood type is.

"The important part is that it's the victim's blood, but some of it had the defendant's bodily juices in it." (10 RT 2274-2275.)

At the conclusion of her rebuttal, the prosecutor once again misstated the evidence:

"The fact her blood was in the trunk. The fact his DNA is on her comforter." (10 RT 2294.)

These comments went far beyond the actual serology and DNA evidence. No witness testified that Monique's blood was on the trunk lid. And no witness testified that Mr. Loy's bodily fluids were on the comforter. Erin Riley testified that the trunk stain was "associated" with Monique, and she couldn't be excluded as a source. (7 RT 1600.) Riley also stated she was only able to get results for six of the seven markers from the sample taken from Monique's body because of the degradation of the sample. (7 RT 1620.) This meant that the sample from the trunk had an extra marker, the D1S80 marker, that was not present in the sample from Monique. (7 RT 1620.) Riley conceded that if Monique had a different D1S80 type than what was found in the trunk lid sample, she would be excluded as a source.

(7 RT 1625.)

Although Riley did testify, as the prosecutor asserted, that there was a 1 in 125,000 chance of a random match between the trunk lid sample and Monique (7 RT 1602), Riley also said this statistic depended upon matching test results for all seven markers, which Riley did not have from Monique's body sample. (7 RT 1621-1622.) Riley agreed that if there was only a match between six markers, the chances of a random match increased significantly, i.e., only 1 in 5,100. Additionally, she stated that the statistics she gave referred to random samples of non-related people. The statistical frequency would be much lower if the pool the sample was compared to included family members. (7 RT 1623.) However, Riley did not test the DNA of any other Arroyo family member. (7 RT 1620.)

Similarly although Riley testified that she got very faint markers for Mr. Loy on the comforter (7 RT 1600), she admitted that no sample on the comforter showed "24, 25," which she knew was Loy's DS180 type. (7 RT 1633.)

The prosecutor's argument was an overstatement of the testimonial record in this case. There was no definitive proof that the trunk stain was in fact Monique's blood or that the fluid on the comforter was a mixture of Monique's and Mr. Loy's bodily fluids. Riley's testimony was inconclusive on these matters, and left open the very real possibility that the neither Monique nor Mr. Loy were the sources of this genetic evidence.

2. Mr. Loy's Clothing

Later in the rebuttal argument, the prosecutor argued:

> "We have no idea what the defendant was wearing that night, do we? There is no testimony on that. You have no idea if he was wearing a white t-shirt, beige t-shirt, any shirt, a shirt shirt. Who knows? We don't know if he changed his clothes, do

we?" (10 RT 2281.)

This statement was incorrect. Joey Arroyo testified that his uncle was wearing jeans, work boots and a 49ers jersey, which had gotten dirty from working on the sprinklers. (6 RT 1131.) Additionally, Detective Richard Simmons testified that he searched Mr. Loy's residence (at his brother's house) and car trunk for clothing Mr. Loy had been wearing. He seized a 49ers jersey as well as other clothing from the house and car trunk. (8 RT 1929-1930.) Criminalist Susan Brockbank, who was responsible for examining the trace evidence in the case, testified that she never examined any of Mr. Loy's clothing, nor was she asked to examine his clothing for sweater fibers. (8 RT 1761.)

3. Trying to Rationalize the Lack of Evidence

Had the trial court not committed the errors related to the prior offense evidence, this trial would have looked very different to the jury. The evidence of the underlying crime was disputed and inconclusive. Had the jury been presented with just that evidence, the prosecutor likely would not have had the same success arguing that the jury should ignore the absence of critical evidence in the case.

In connection with the prosecutor's speculation that Mr. Loy killed Monique in her bedroom, the prosecutor argued:

> She struggled, and in her struggle, she bumped her head against the wall or against this iron rod, getting that occipital hemorrhage back here. He attempted to control her, as he tries to control all of his victims, and she was dead by the time she left that bedroom. The defendant killed her. He put a pillow over her head to suffocate her.
>
> Did he actually do some kind of choke hold that we can't seen anymore because of decomposition? It doesn't really matter.

He killed her before she even left the room. (10 RT 2208-2209.)

No evidence was presented to establish where and in what manner Monique died. This was all speculation.

In her rebuttal argument, the prosecutor discussed why the jury should ignore the gaps in the prosecution evidence:

> The fact that Gabriel didn't hear any noise, what does that mean?
>
> Whether Monique left on her own accord, whether she left because the killer - another killer rapist came into the house and stole her, whether the defendant was the one that carried her out, that's irrelevant. Because nobody heard. That's irrelevant. That's a red herring. That's a so what. Who cares?

(10 RT 2279.)

The prosecutor went on to discuss the sheet found in the driveway:

> Josette. He attacks Josette because she sees a sheet. She doesn't think anything of it. That's a big ah-haaa. So what?
> .....
> Why would anybody attach some significance except somebody was sloppy and left it behind? (10 RT 2279-2280.)

The prosecutor also urged the jury to ignore the lack of trace evidence in the case:

> We don't know what he was wearing. So it's irrelevant if we don't find anything of her on him. (10 RT 2281.)

The prosecutor continued:

> The fact that there is [sic] no fingerprints of the defendant in the room, you heard the testimony of Ruben Sanchez. We don't leave fingerprints everywhere we touch. That doesn't happen.

> The same with hair. Just because the guy has raped Monique doesn't mean he is going to leave all his pubic hair behind. There is no testimony – like I'm leaving hair right here.
>
> .....
>
> Footprints. Talk about the footprints at the scene of the crime. What relevance does that have? It would be relevant if it was there, and it was the defendant's footprint. That would be meaningful because it would show at one point he was there, whether it was May 9 or some other day. Who knows? The fact that he was there would be meaningful.
>
> The fact that there are no footprints does not mean he was never there. Because again, we don't leave our footprints wherever we go in the dirt.
>
> We don't leave tire tracks everywhere we go in the dirt either. That would be meaningless, the fact that they are not there.

(10 RT 2282-2283.)

The prosecutor continued to explain away the evidentiary problems in her case:

> The footprint on the blanket. We had testimony that the LA Fire Department and the cops both went out to the crime scene in the dark. The footprint is in the dirt. It's not in blood. It's in the dirt. It's meaningless. No significance at all.
>
> Pubic hairs. Again, we've got a household of people. We've got Monique. It's not her pubic hair. We have Josette. She's got a boyfriend. She's got brothers. She's got a mom.
>
> What? You go pull pubic hairs from everybody in the house? And if they are there, is that relevant?
>
> Of course they might be there. They live there. Everybody uses everybody else's stuff. It doesn't make any sense. It would be

irrelevant. That's a red herring.

(10 RT 2284.)

The prosecutor also told the jurors that it was irrelevant that Jose Arroyo found the lights on and the doors open when he left for work in the morning. (10 RT 2286). She also argued that the lack of semen on the blanket and sheet was meaningless. (10 RT 2292.)

D. Reversal Is Required

The guilt phase jury was unconstitutionally misdirected in its task in this case. It was permitted to consider deeply inflammatory evidence about Mr. Loy's prior offenses, and then was allowed to reach its determination about whether Mr. Loy was guilty or innocent of capital murder based on whether he was predisposed to commit sex offenses. Improperly admitted hearsay evidence provided an important link in the chain for conviction. The prosecutor exacerbated the prejudice to Appellant when she misstated the record in her closing argument. The prosecutor's guilt phase case was weak, as has been discussed in detail throughout this brief. The jury deliberated over three days during the guilt phase. Under these circumstances, it is reasonably probable that a result more favorable to Mr. Loy would have been reached at the guilt phase in the absence of the errors that were committed at his trial. Due to the violations of Mr. Loy's right to a fair trial, to due process of law and his right to a reliable guilt phase judgment, the guilt phase convictions must be reversed.

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VIII

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

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the

pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 30 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3 Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; 12 RT 2680.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the impact of the victim's death, the method of the homicide, the motive for the homicide, the time of the homicide, and the location of the homicide. In the instant case, the prosecutor repeatedly argued that the circumstances of the crime (12 RT 2693-2698), as well as the impact of the victim's death on her family and the

community (12 RT 2698-2701), were aggravating factors.

This Court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than that the particular set of circumstances surrounding the instant murder were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

This Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (CALJIC Nos. 8.86, 8.87). (*People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 12 RT 2685-2687.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 863-864], now require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 12 RT 2685-2687.) Because these additional findings were required before the jury could

impose the death sentence, *Ring*, *Apprendi, Blakely* and *Cunningham* require that each of these findings be made by the jury beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court has previously rejected the claim that either the Due Process Clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural sentencing protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (12 RT 2680-2682, 2685-2687), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even assuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf.

People v. Williams (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 290, 305.) Nonetheless, this Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona*, *supra*. (See *People v. Prieto*, *supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal

Constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code, § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the Fourteenth Amendment and by its irrationality violate both the due process clause of the Fourteenth Amendment and the cruel and unusual punishment clause of the Eighth Amendment to the federal constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 12 RT 2683.)

Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Sixth, Eighth, and Fourteenth Amendments to the federal constitution, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.)

The United States Supreme Court's recent decisions in *Cunningham v. California, supra,* ___ U.S. ___ [127 S.Ct. 856], *Blakely v. Washington, supra*, 542 U.S. 296, *Ring v. Arizona, supra*, 536 U.S. 584, and *Apprendi v. New Jersey, supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury and the jury should have been so instructed.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88,12 RT 2685-2687.) The phrase "so substantial" is an

impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. (20 RT 2844-2846.) These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307; the punishment must fit the offense and the offender, i.e., it must be appropriate (see *Zant v. Stephens, supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

This Court previously has rejected this claim (*People v. Arias*, *supra*, 13 Cal.4th at p. 171), but appellant urges this Court to reconsider those

rulings.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California, supra,* 494 U.S. at p. 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the pattern instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in

favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Failed To Inform The Jurors That Even If They Determined That Aggravation Outweighed Mitigation, They Still Could Return A Sentence Of Life Without The Possibility Of Parole

Pursuant to CALJIC No. 8.88, the jury was directed that a death judgment cannot be returned unless the jury unanimously finds "that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (12 RT 2685-2687.) Although this finding is a prerequisite for a death sentence, it does not preclude a sentence of life without possibility of parole. Under *People v. Brown* (1985) 40 Cal.3d 512, 541, the jury retains the discretion to return a sentence of life without the possibility of parole even when it concludes that the aggravating circumstances are "so substantial" in comparison with the mitigating circumstances. Indeed, under California law, a jury may return a sentence of life without the possibility of parole even in the complete absence of mitigation. (*People v. Duncan* (1991) 53 Cal.3d 955, 979 ["The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial to warrant death."]; CALCRIM No. 766 ["Even without mitigating circumstances, you may decide that the aggravating circumstances, are not substantial enough to warrant death"].) The pattern instructions given in this case, however, failed to inform the jury of this option and thereby arbitrarily deprived appellant of a state-created liberty and life interest in violation of the due process clause of the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346).

The decisions in *Boyde v. California*, *supra,* 494 U.S. at pp. 376-377 and *Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307 do not foreclose this claim. In those cases, the High Court upheld, over Eighth Amendment challenges, capital-sentencing schemes that mandate death upon a finding that the aggravating circumstances outweigh the mitigating circumstances. That, however, is *not* the 1978 California capital-sentencing standard under which appellant was condemned. Rather, this Court in *People v. Brown*, *supra*, 40 Cal.3d at p. 541, held that the ultimate standard in California is the appropriateness of the penalty. After *Boyde*, this Court has continued to apply, and has refused to revisit, the *Brown* capital-sentencing standard. (See, e.g., *People v. Champion* (1995) 9 Cal.4th 879, 949, fn. 33; *People v. Hardy* (1992) 2 Cal.4th 86, 203; *People v. Sanders* (1990) 51 Cal.3d 471, 524, fn. 21.)

This Court has repeatedly rejected this claim. (See *People v. Smith* (2005) 35 Cal.4th 334, 370; *People v. Arias*, *supra*, 13 Cal.4th at p. 170.) Appellant urges the Court to reconsider these rulings.

8. The Instructions Failed To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. [127 S.Ct. 1706, 1712-1714]; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California*,

supra, 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution

9. The Penalty Jury Should Be Instructed On The Presumption Of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a

capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14th), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th & 14th), and his right to the equal protection of the laws. (U.S. Const., Amend. 14th.)

In *People v. Arias*, *supra*, 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

D. Failing To Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth,

and Fourteenth Amendments to the federal constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the Court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); 20 RT 2797-2800) acted as barriers to the consideration of mitigation in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal constitution. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.) The Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but appellant urges reconsideration.

2. The Failure to Delete Inapplicable Sentencing Factors

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. (20 RT 2821-2824 [prosecutor argued evidence under factors d, e, f, g, h, i and j was "nonexistent" in this case].) The trial court failed to omit those factors from the jury instructions (CALJIC No. 8.85, 20 RT 2797-2800), thus likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights.

(*Monge v. California, supra,* 524 U.S. at p. 732, citing *Lockett v. Ohio, supra*, 438 U.S. 586, 604; CALCRIM No. 763 ["If you find there is no evidence of a factor, then you should disregard that factor," "Do not consider the absence of a mitigating factor as an aggravating factor" and "You may not consider as an aggravating factor anything other than the factors contained in this list that you conclude are aggravating in this case. You may not take into account any other facts or circumstances as a basis for imposing the death penalty."].)

Appellant asks the Court to reconsider its decision in *People v. Cook* (2006) 36 Cal.4th 566, 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. (20 RT 2797-2800.) The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.) As a matter of state law, however, several of the factors set forth in CALJIC No. 8.85 – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289).

Appellant's jury was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance. Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors

precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Clemons v. Mississippi* (1990) 494 U.S. 738, 752; *Stringer v. Black* (1992) 503 U.S. 222, 230-232, 235-236.) As such, appellant asks the Court to reconsider its holding that the trial court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary And Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. (See *Solem v. Helm* (1983) 463 U.S. 277, 290-292.) For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. The California Capital Sentencing Scheme Violates The Equal Protection Clause

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the equal protection clause of the Fourteenth Amendment to the federal constitution. To the extent that there may be differences between capital defendants and

non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants. (See *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Griffin v. Illinois* (1956) 351 U.S. 12, 28-29.)

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. This Court has previously rejected these equal protection arguments. (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but appellant asks the Court to reconsider that ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court numerous times has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments to the federal constitution, or "evolving standards of decency" (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment (see Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" at

<http://web.amnesty.org> [as of 5/23/2007]) and the United States Supreme Court's recent decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554).

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CONCLUSION

For all of the reasons stated above, this Court should reverse Mr. Loy's guilt phase convictions and sentence of death.

DATED: Aug. 24, 2007

Respectfully submitted,

MICHAEL R. HERSEK
State Public Defender

Marianne D. Bachers

MARIANNE D. BACHERS
Senior Deputy State Public Defender

CERTIFICATE OF COUNSEL

(CAL. RULES OF COURT, RULE 8.630(b)(2)

I, Marianne Bachers, am the Senior Deputy State Public Defender assigned to represent appellant Eloy Loy in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count I certify that this brief is 54,715 words in length.

MARIANNE BACHERS
Attorney for Appellant

DECLARATION OF SERVICE

Re: *People v. Eloy Loy* No. S076175

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

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed respectively as follows:

Office of the Attorney General
Attn: Susan Sullivan-Pithey, D.A.G.
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Los Angeles County Superior Court
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Mr. Eloy Loy
(Appellant)

Each said envelope was then, on August 27, 2007 , sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on August 27, 2007, at San Francisco, California.

DECLARANT