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 REPLY BRIEF

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

HONORABLE CHARLES D. SHELDON

MICHAEL J. HERSEK
State Public Defender

MARIANNE D. BACHERS
State Bar No. 94743
Senior Deputy State Public Defender

221 Main Street, 10th Floor
San Francisco, CA 94105
Tel: 415/904-5600

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATE CASES

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

TABLE OF AUTHORITIES

Pages

STATUTES

TABLE OF AUTHORITIES

Pages

JURY INSTRUCTIONS

TEXT AND OTHER AUTHORITIES

No. S076175

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Appellee,	)
v.	)
ELOY LOY,	)
Defendant and Appellant.	)

APPELLANT'S REPLY BRIEF

I

RESPONDENT'S INCOMPLETE AND MISLEADING STATEMENT OF FACTS UNDERMINES ITS LEGAL ANALYSIS OF ALL THE ISSUES RAISED BY APPELLANT

The Statement of Facts in Respondent's Brief, and Respondent's discussion of the trial facts throughout its brief, tells only a part of what happened at trial. Important factual information has been left out and evidence has been misstated, providing the reader with a skewed version of the trial record and the issues raised by that record. As a result, it is necessary for appellant to set the record straight before addressing Respondent's legal arguments.

The physical and testimonial evidence presented by the prosecution at the guilt trial about the underlying capital case was contradictory, inconsistent, insubstantial and of dubious scientific reliability. The jury

deliberated over four days before convicting appellant. During its guilt phase deliberations, the jury submitted questions about the scientific evidence which was hotly disputed and impeached by the defense. The remaining evidence was exculpatory, innocuous or ambiguous. The summary of the evidence that follows overwhelmingly demonstrates that the trial court's errors were prejudicial, both individually and in combination.

A. Appellant's Living Situation in 1995-1996

Appellant apparently became an immediate suspect in this case because he had lived at the Arroyo home and because he had been imprisoned for sexual offenses on two prior occasions. Respondent makes many factual assertions about Appellant's living situation both before and after Monique disappeared and fails to include significant factual information in its brief.

There are two reasons why the evidence of appellant's access to the Arroyo home is important. A central theory that runs throughout Respondent's Brief is that Appellant lived at the Arroyo house for only a few weeks many months before Monique disappeared, and that Appellant was never permitted upstairs in the house without an escort. (Respondent's Brief at p. 11: "Appellant lived with Monique's family for two or three weeks in March or April. 5 RT 1095, 1105, 1176-1177; 6 RT 1215; 7 RT 1505-1506.") Respondent relies on this assertion in an attempt to prove that the only way Appellant's palm print could have been found on the door jamb outside Monique's room was because he was the perpetrator of this crime.

Actually, the testimony on this matter was contradictory. Joey, Monique's brother, denied that Appellant lived at their house, and said he

had stayed there for a week when his mother needed help pulling out grass. (5 RT 1107.) Joey said Appellant used to visit after he first "got out" [of prison]. (5 RT 1095.)[1] Josette, Monique's sister, testified that Appellant lived with them for "about a month". (5 RT 1176.) Gabriel, another brother, testified that Appellant lived there for "three to four months". (6 RT 1214.) Rosalina Arroyo, Appellant's sister and Monique's mother, testified that Appellant lived with them until two months before May, 1996, and had been there for two to three weeks. (7 RT 1506.) Joey testified that Appellant had not been in the house for a month to a month and a half before these events. (5 RT 1107.)

The evidence about Appellant's access to the upstairs of the house was also contradictory. Joey testified that there were two occasions he could recall when Appellant was upstairs. One was the night of May 8 when he'd been out drinking with Appellant and was helped upstairs by him. The other was when he brought him upstairs to use the bathroom. (5 RT 1104.) Joey testified that he could "only *remember* one other time" that Appellant was upstairs - and that was to use the shower. Joey testified Appellant "had to have a reason to go upstairs." (5 RT 1105.) Rosalina testified she never saw Eloy on the second floor but she also testified that she never told her brother that he could not go upstairs. (7 RT 1506, 1532.)

In sum, there is agreement among the witnesses that Appellant was upstairs on the night that he helped Joey go to his bedroom. Joey testified that he accompanied Appellant upstairs for a shower on another occasion. They also agree that Appellant had lived in the house for weeks at least.

---

[1] According to his brother Leonard, Appellant was released from prison in July, 1995. (7 RT 1555.)

These facts are important for several reasons. Obviously, the palm print, which the prosecution argued was evidence that Appellant was the perpetrator, could have been left on the other occasions. Secondly, a palm print outside the room proves that Appellant was *outside* the room, not in it. Significantly, although the room was throughly processed for fingerprints, no prints of Appellant's were found inside the room. (7 RT 1655.)

Evidence about appellant's access to the Arroyo home was important for another reason. The trial judge admitted testimony from Sara Minor, Monique's friend, about an alleged "excited utterance" Monique made in the days preceding her disappearance, in which she claimed Appellant had been touching her improperly. The only way in which admission of this evidence can be justified is to establish that it was made in the moments following the "exciting" incident, before an opportunity for fabrication arose. Respondent has argued at trial and on appeal that Appellant was not in the Arroyo home for at least a month before Monique disappeared. Most of the family members testified that Appellant had not been living in the house for at least a month before Monique disappeared, and no one testified that he had been in the house in the days preceding Monique's disappearance. If that is so, then it eliminates the possibility that Appellant had contact with Monique in the days before her death, and completely undermines the admissibility of the Sara Minor testimony. (See Argument IV, infra.

Similarly, Respondent attempts to create a cloud of suspicion around Appellant's activities after he helped Joey up to his room on May 8, 1996. Five days later, on May 13, Gabriel told the police that Appellant had walked down the stairs in front of him and out of the house the night Monique disappeared. Gabriel stated he checked the back door to make

sure it was locked. (8 RT 1909-1911.) Gabriel signed and initialed the police report containing his statement in order to show his agreement with its contents. (6 RT 1389.) It was only after the police focused on Appellant and charged him in this case that Gabriel changed his story, and denied at trial that he had seen Appellant walk down the stairs and out of the house. (6 RT 1212.)

Additionally, Appellant and Respondent agree that Appellant had been staying with his brother and sister-in-law, Leonard and Maria Loy, in May, 1996. But Respondent's Brief omits important facts about that living situation. (Respondent's Brief, at pp. 6-7.) Appellant had started living with his brother about two months before Monique disappeared. Appellant usually slept on a couch in the front room. (7 RT 1556.) The night that Monique disappeared, Leonard had twice gotten out of bed, and noticed his brother was not asleep on the couch. (7 RT 1559.) The next morning, Leonard noticed that his brother's car was parked out on the street in a different location than usual. It was visible on the street, but Leonard's view of it was blocked by a tree in his front yard. (7 RT 1565-1566.) Leonard also testified that on three different occasions, he found Appellant sleeping in his car after he had been out "partying" the night before. Leonard also testified that his wife did not permit smoking in the house, and Appellant would have to go outside to smoke. (7 RT 1565-1567.) Maria Loy also testified that Appellant was not asleep on the couch in his usual spot in the early morning hours of May 8. She then saw him there around 6:50 A.M. (7 RT 1569-1571.)

Howard Wilson was a neighbor of Leonard and Maria Loy. Wilson was outside smoking around 2:30 A.M. He saw Appellant drive by his house slowly three times on the night Monique disappeared. Appellant

eventually parked his car on the street, and got out and walked down the street. The car was still in the same place in the morning. (7 RT 1638-1643.).

Respondent's Statement of Facts (Respondent's Brief, at p. 6) omits any discussion of Leonard Loy's testimony mentioned above.

These facts are important and material as well. Appellant parked his car on a public street. He did not hide it. He sometimes slept in his car if he had been drinking - as he had the night in question. He was a smoker and he was not permitted to smoke inside the home of his brother and sister-in-law. All of these facts provide a much less nefarious explanation for Appellant's absence from the front room couch - information Respondent has left out of its Statement of Facts. (See pp. 6-7.) It is just as likely that Appellant simply stayed outside and slept in his car that night because he had been drinking. Circling the block in his car multiple times could also be chalked up to looking for a better parking spot - something an inebriated driver with a big car might desire.[2]

These alternative, and innocuous, explanations for Appellant's behavior are just as reasonable as the guilty inferences drawn by Respondent, especially in the absence of any proof whatsoever concerning how Monique got from her bedroom to the vacant lot.

B. The Forensic Investigation and Evidence

The forensic investigation - indeed, the entire guilt phase prosecution - hinges on two virtually microscopic pieces of evidence which are of dubious scientific value: the stain found on the trunk lid of Appellant's car (the trunk lid stain) and the stain found on the comforter which covered

---

[2] Appellant's car was a 1978 Cadillac Coupe de Ville. (8 RT 1884.)

Monique at the crime scene (the comforter stain).

1. The Physical Evidence Searches and Seizures

Searches took place at a number of locations beginning the morning of May 9 - and Appellant was taken into custody sometime before 1 pm. (8 RT 1917.)

As Respondent notes (Respondent's Brief, at p. 7), the family looked around the house in order to determine if there was any sign of forced entry and found none. (5 RT 1181.) This evidence just as equally supports the inference that Monique left the house on her own, not by other means.

Family members searched Monique's room on several occasions. Josette searched the room on the morning of May 9th, but could not find the shirt Monique had been wearing nor did she notice any shoes missing. (5 RT 1183, 1187.) Josette admitted that the room she shared with Monique was not tidy, nor was the closet where they kept their clothes. (5 RT 1193.) Additionally, Joey testified that Monique and Josette sometimes slept in each others' beds, "they switched off and on." (5 RT 1102.)

Joey searched Monique's room a day and a half or two days after Monique disappeared. For some reason, he was able to find the shirt/sweater that Monique had been wearing in the sisters' closet, which Josette had not been able to locate earlier. (5 RT 1132-1133.) In other words, the messy condition of the room made it impossible for the family to be sure what clothing was in the room at the time Monique disappeared, and in the days afterwards.

Officer Christine Sanders searched Monique's room on May 10 and collected trace evidence. She seized a sheet, blanket, clothing, and bedding. She vacuumed the room for the trace evidence. All presumptive tests for semen which she conducted were negative. (8 RT 1886-1889.) The trace

evidence seized from Monique's room was tested and was not connected in any way to Appellant. (8 RT 1750.)

Appellant's car, which was sitting outside Leonard Loy's house, was also searched on May 9 and on multiple other occasions. (8 RT 1890.) The search conducted on May 9 turned up nothing of evidentiary value. (8 RT 1917.) On May 10, Officer Sanders searched the car for blood, trace and hair evidence. (8 RT 1883-1884.) The officers looked in Appellant's trunk, which was fairly full. (8 RT 1885.) Criminalist William Moore also searched it on a later date, and confirmed that it was cluttered with miscellaneous items, such as spark plugs, bags, cans, clothing, a spare tire, etc. (7 RT 1687-1693.)

Officer Sanders also searched Appellant's bedroom at Leonard Loy's house on May 10. (8 RT 1890.)

Monique's body was found in the early morning hours of May 13, 1996, at a weedy vacant lot less than a mile from her home. (6 RT 1235-1236). The lot was surrounded by a six foot tall chain link fence (6 RT 1438), which the police department "ripped through" to gain access. (8 RT 1852-1853.) No evidence was presented at trial to explain how Monique's body was placed in the vacant lot surrounded with such a tall chain link fence.

Criminalists did seize plant evidence from the vacant lot and from the comforter found on top of Monique's body. None of this material was found in Appellant's car. The prosecution appears to have intentionally decided not to test the clothing Appellant was wearing the night Monique disappeared, rendering Appellant's clothing exculpatory. So, *none* of the evidence seized from a very dirty, sticky crime scene (7 RT 1445, 1460) was linked to Appellant's car or clothing.

2. The DNA Testing

The state contends "solid scientific evidence" linked Appellant to Monique's murder. (Respondent's Brief, at p. 47.) It is the central contention of the prosecution in this case that a tiny stain 1/8th of an inch in diameter (7 RT 1696) found on the inside trunk lid of Appellant's car was blood that belonged to Monique Arroyo. Additionally, Respondent contends that "faint" DNA markers "consistent" with Appellant's DNA were found mixed with Monique's fluids on the comforter (the comforter stain) which covered her when she was found. (Respondent's Brief, at pp. 11 & 47-48.) These two tiny bits of biological evidence allegedly constitute the "solid scientific evidence" which proves Appellant guilty of the capital murder of his niece. Once again, Respondent has omitted any reference to critical evidence that undermines the reliability and strength of this forensic evidence.

Criminalist William Moore first saw Appellant's car on May 17. (7 RT 1685.) Moore testified that the stain was so small he did not notice it until one of the technicians pointed it out. (7 RT 1676, 1678.) The trunk lid stain was found after Appellant's car had been searched several times.[3]

Moore testified that the stain was bright red, like the color of a car. He testified that he took a cotton tip swab and took a small portion of it to test for blood. According to Moore, the test was positive. He then took another swab to collect as much of the stain as he could. (7 RT 1677-1678.) Moore admitted that there was no way to age the stain or to tell when it was placed in the trunk. (7 RT 1702.)

---

[3] As mentioned above, Christine Sanders previously searched the car.

Moore typically took notes about the evidentiary items upon which he conducted presumptive tests for blood. There are no notes showing that Moore ran a presumptive test for blood on the trunk lid stain. Moore was also in the habit of photographing items after they test positive for blood. Moore admitted he had no photograph which documented his supposed finding regarding the trunk lid stain. (8 RT 1921-1923.)

Criminalist Sanders testified that when evidence swabs are taken for presumptive blood testing, the swab will not change the red color of the stain which is being preserved. The swab might have a slightly different color, but it will look the same. (8 RT 1894-1895.) But, when LAPD DNA expert Erin Riley examined the Q-tip which Criminalist Moore supposedly used to preserve the trunk lid stain, it was grey in color. (7 RT 1599, 1608.) Erin Riley did not test the trunk stain Q-tip in order to determine what bodily fluid or what kind of cellular material it contained. (7 RT 1609.)

Riley testified that she did not use the most sensitive method available in order to detect the amount of DNA in the trunk lid stain. (7 RT 1608-1609.) Riley also explained that contamination concerns associated with extremely low levels of DNA such as found in this sample (an unknown amount less than 300 picograms) (7 RT 1612), lead some laboratories to process the reference sample and evidence samples separately. (7 RT 1618-1619.) Riley however, extracted a sample for Monique and also for the trunk lid stain on the same day. (7 RT 1616.)

Riley testified that the test kit manufacturer itself, Perkin Elmer, would not even guarantee test results when less than 2 nanograms of DNA was used. As Riley stated, the trunk lid stain contained much less than that quantity. (7 RT 1611-1613.) Riley did not detect any DNA in one of the tests she conducted on the trunk lid stain. (7 RT 1612.)

Furthermore, Riley testified that Monique's reference sample only yielded results at six loci because the sample was degraded. (7 RT 1620.) Riley claimed, based upon those six loci, that the victim could have contributed the DNA deposited on the trunk lid. However, when she computed the frequency statistic, she calculated the random match probability using all seven loci that yielded results on the test of the trunk lid stain. The trunk lid stain contained an additional loci that was not found in Monique's DNA sample. (7 RT 1600-1602, 1620-1623.)

Riley stated: "I just want to make sure I get this exact. Yes. The number that was stated in that sample was 1 in 125,000, which means that if you look at 125,000 individuals totally at random and just test them, the chances are you will have one individual that has that same type." (7 RT 1602.)

Riley stated that the statistical frequency for individuals who have the profile found in the trunk lid stain and also have the same genetic marker types as Monique, without the additional marker Riley's testing could not find, would be found in 1 in 5,100 random people. (7 RT 1622-1623.) Riley admitted that those figures refer to random samples of non-related people being analyzed, and that the figures for related people would be lower. Family members are more likely to have a closer type than that. (7 RT 1623.) Riley conducted no DNA testing on any member of the Arroyo family. (7 RT 1620.) She did not test any reference samples from the Arroyo family in order to determine if they could be the source of the weak type detected on the comforter, because, "They were never provided." (7 RT 1603, 1631.)

When Monique's body was found at the vacant lot, it was covered with a comforter. (7 RT 1670.) Criminalist Moore and Detective Stephen

Watson coordinated the collection of evidence at the scene. (7 RT 1455.) Moore conducted testing on the comforter at the crime lab. Moore cut out selected stains from the comforter for testing. He did not find any semen on the comforter. (7 RT 1672.) Moore testified that due to heat at the time the body was found, that fluids seeped out of Monique's orifices and onto the comforter. (7 RT 1674-1675.) The sexual assault kit in this case was negative. (7 RT 1675-1676.) He also testified that due to the state of decomposition of the body, it might have been difficult to observe evidence deposited inside the body. (7 RT 1673.)

Erin Riley, the LAPD DNA expert, conducted the DNA testing on the comforter. She testified that the comforter stain samples contained a mixture of DNA. (7 RT 1601-1602, 1626.) She also testified that her tests showed Monique could have contributed the DNA deposited, and that there were "additional very faint markers or types" which Appellant could have contributed. (7 RT 1601.)

Riley also admitted that an essential control – a substrate control -- was not used, despite the fact that "the guidelines" recommend it. A substrate control would indicate whether the DNA detected was already on the comforter as opposed to in the stain that was deposited. Riley admitted that it was "common for sheets and things like that" to have DNA on them, and that the DNA types could have been on the comforter prior to the deposit of the stain. (7 RT 1629 - 1630). Riley claimed she did not do the substrate control because the entire comforter was stained, but she also admitted that she never looked at the entire comforter. (7 RT 1629-1630.)

In summary, there are multiple reasons why the DNA evidence and testimony presented in this case do not constitute "solid scientific evidence" of Appellant's guilt. In fact, the DNA evidence presented in this case may

have absolutely no connection with Monique's death.

William Moore testified that it was impossible to tell when the stain was placed on the trunk lid. (7 RT 1702.) Erin Riley testified that the trunk lid stain contained an additional loci, or marker, that was not found in Monique's DNA sample. (7 RT 1600, 1602, 1620-1623.) The car Appellant was driving had been owned by another family member before he began using it. (7 RT 1525-1526.) The trunk lid stain could just as easily have come from another family member - one whose DNA contained the additional marker missing from Monique's sample - and have ended up there *at any time*. The prosecution turned a blind eye to this potential exculpatory evidence and chose not to collect and test the DNA of any other family member. Indeed, under these circumstances, neither Moore's nor Riley's testimony proved that the trunk stain was connected to this case.

The testimony concerning the comforter stain presents the same evidentiary problems. Riley testified that the comforter stain contained a mixture of DNA.[4] Riley never conducted a substrate control which would have shown whether the DNA types were on the comforter before the tested stain occurred. (7 RT 1629-1630.) Riley also testified that the stain contained a marker that was not present in Appellant's DNA. No sample from the comforter showed a "24, 25" DS180 result, which is Appellant's

---

[4] "Mixed samples can be very difficult to interpret, because the components can be present in different quantities and states of degradation... Typically, it will be impossible to distinguish the individual genotypes of each contributor." (National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, 2009, at p. 59.) "Mixed samples are a reality of the forensic world that must be accommodated in interpretation and reconstruction. As a rule, mixed samples must be interpreted with great caution." (Id., at p. 66.)

DS180 type. (7 RT 1633-1634.) Thus, Riley's testimony fails to establish that the comforter stain was in any way related to this case: the stain could have existed before Monique died. And, the prosecution's own expert admitted the stain contained a marker that it not present in Appellant's DNA. Consequently, Respondent's description of the prosecution guilt phase scientific evidence as "solid" is nothing more than hyperbole.

3. Pathologist and Related Evidence

Deputy Medical Examiner Lisa Scheinin testified about the cause of death and about evidence of sexual trauma. David Faulkner was called by the prosecution as an expert entomologist in order to prove when Monique's body was left at the vacant lot. The testimony of both witnesses was hotly contested by the defense.

Dr. Scheinin did the autopsy on May 14, 1996. (6 RT 1302.) She was unable to reach a conclusion about the cause of death until August or September of 1996. (6 RT 1335.)

Dr. Scheinin testified that she could only determine the cause of death by a process of exclusion because Monique's body was so badly decomposed. 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 1235-1237, 1328, 1368-1370, 1381.)

Dr. Scheinin's testified that: (1) Monique had died from asphyxia due to compression of the face or body. (6 RT 1235-1237). She also testified that she observed perivaginal trauma which in her opinion proved that Monique had died during a sexual assault (6 RT 1255-1256.)

In contrast, 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.) Dr. Van Meter concluded that the cause of death was undetermined due to the advanced state of decomposition of the body. She was unable to find evidence of sexual assault for the same reason. (9 RT 2070-2072.)

David Faulkner testified about maggot activity on the body. His testimony was also severely impeached. Faulkner originally wrote a report which estimated the approximate date and time when Monique's body was placed in the vacant lot *at a time **after** Mr. Loy was taken into custody.* (8 RT 1801-1802.) After receiving a letter from the prosecutor detailing her theory of the case, and reports on the case, Dr. Faulkner changed his report on the morning he was set to testify. He changed his report to show that the body had been left in the lot at a time consistent with the prosecution's theory of the case. (8 RT 1803-1806, 1774-1776.)

A further problem with Dr. Faulkner's revised conclusion was that the prosecution never proved who gathered the maggots at the crime scene.[5] 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.) The accuracy of Faulkner's testimony depended upon the maggots having been collected from the body when it was first found in the vacant lot. (8 RT 1774.) The prosecution never called any witness to prove that critical fact, and instead relied on the container notations to establish this evidence.

---

[5] 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.)

C. The Exculpatory Evidence

The vast amount of physical evidence seized in this case exculpated Mr. Loy because it had no connection to him whatsoever. Mr. Loy's car and residence were searched the morning Monique disappeared, but turned up nothing to show that Monique had been in the car. (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.)

Other evidence affirmatively excluded appellant. 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.) Nor did tire prints found at the crime scene match Mr. Loy's car. (9 RT 2116-2117.) Pubic and other hairs found on crime scene comforter, bed sheet and blanket were not Mr. Loy's. (8 RT 1752-1759.) Some of the hairs had roots and could have been tested for DNA. (8 RT 1754.) 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.) No evidence was recovered in Monique's bedroom which proved that Mr. Loy had been in there, much less that he had sexually assaulted and murdered her that night.

Criminalist Susan Brockbank was never asked to examine any clothes for sweater fibers. She testified that a loosely knit sweater like the one Monique had been wearing when she went to bed could easily shed fibers. (5

RT 1109-1110; 8 RT 1761.) Brockbank also testified that fibers found on the crime scene comforter had fibers on it that were similar to those in Appellant's car. (7 RT 1588-1589.) Brockbank never testified that the fibers were an exact match - or "unique" to Appellant's car fibers - contrary to Respondent's assertion. (See Respondent's Brief, at p. 48.) In any event, Brockbank's entire testimony about the carpet fiber evidence is of dubious scientific reliability.[6] Lastly, Brockbank admitted that the fibers could have been secondarily transferred by anyone who had been in the car. (8 RT 1761-1763.) Monique was observed by her brother Gabriel in the front seat of Appellant's car on one occasion. (5 RT 1117.)

Thus, there is no "solid scientific" proof that the fibers found on the comforter came from Appellant's car. Nor does the evidence establish that even if the fibers came from Appellant's car, that they were transferred to the comforter in connection with this case, particularly in light of the fact that Monique herself had been in Appellant's car and could have transferred the material on that occasion.

Respondent also claims that the palm print found outside Monique's door supports the theory that he was the perpetrator. Respondent states that, "The palm print was positioned in a way that suggested appellant was leaning on the door frame in an attempt to ensure that the door to Monique's room opened quietly. (7 RT 1653-1654.)" There is nothing in the cited

---

[6] "The increased use of DNA analysis, which has undergone extensive validation, has thrown into relief the less firmly credentialed status of other forensic science identification techniques (fingerprints, fiber analysis, hair analysis, ballistics, bite marks, and tool marks). These have not undergone the type of extensive testing and verification that is the hallmark of science elsewhere." (Donald Kennedy & Richard A. Merrill, (Fall 2003) *Assessing Forensic Science*, 20 Issues in Sci. & Tech. 33, 34.)

testimony - the testimony of the latent print examiner - to support this factual assertion. Secondly, like the carpet fiber evidence mentioned above, the scientific reliability of this testimony can no longer be considered "solid". Lastly, this evidence does not prove any connection with criminal activity. Even if the testimony is accepted as valid and accurate - which Appellant disputes - the most it proves is that Appellant was outside Monique's room, not in it.

Thus, in light of the many weaknesses in the prosecution's case, any error was necessarily prejudicial.

II

THE ADMISSION OF EVIDENCE PURSUANT TO EVIDENCE CODE SECTION 1108 CONSTITUTED REVERSIBLE ERROR

Appellant was charged with murder while in the commission of a lewd act on a child under the age of 14. (2 CT 403-404.) The victim in this case was Appellant's twelve year old niece, and the crime is alleged to have occurred in Appellant's sister's home, at a time when four other family members were in the house. Appellant's defense at trial was that he was not the perpetrator and had nothing to do with this incident.

Pursuant to Evidence Code section 1108 (hereafter "1108"), the prosecution convinced the trial court to allow the testimony of two adult women who were the victims of prior rapes by Appellant. The first victim was 16 years old, and was just a few years younger than Appellant at the time. The second victim was over thirty years old, and was also close in age to the defendant at the time. Although Appellant entered guilty pleas to these offenses, the court permitted graphic testimony about the details of the prior offenses by these women.

In the Opening Brief, Appellant contended the prior sex offense testimony should not have been admitted because the prior offenses were factually dissimilar to the charged crime, the testimony distracted jurors from their main inquiry; and because the predisposition evidence was far more prejudicial than probative. Appellant also argued that this Court should reconsider its decision in *People v. Falsetta* (1999) 21 Cal.4th 903. (Appellant's Opening Brief, at pp. 59-81.)

In sum, Appellant argued that the graphic and inflammatory prior offense witnesses' testimony would destroy the jurors' ability to fairly weigh the weak and hotly disputed guilt phase evidence.

Respondent argues that the trial court properly admitted the 1108 evidence under Evidence Code sections 352 and 1108, and also pursuant to the *Falsetta* case, a decision Respondent contends need not be revisited by this Court. Respondent also argues that even if it was error to admit the evidence of Appellant's prior offenses, it was harmless in light of the overwhelming evidence of his guilt of the capital crime. (Respondent's Brief, at pp. 34-54.) For the reasons that follow, Respondent's arguments should be rejected.

A. The Prior Offense Testimony Should Not Have Been Admitted Because It Was Factually Dissimilar From the Underlying Criminal Charge

In arguing that the evidence was properly admitted, Respondent relies primarily on *People v. Falsetta, supra.* However, *Falsetta* does not address the question raised in this case. There, this Court rejected a facial challenge to Section 1108, holding that the introduction of the defendant's prior sex offenses for the purpose of proving his propensity to commit sex offenses is not a *per se* violation of due process. The Court explained that in enacting Section 1108, the Legislature "intended in sex offense cases to relax the

evidentiary restraints section 1101, subdivision (a) imposed, to assure that the trier of fact would be made aware of the victim's and defendant's credibility." (*Falsetta*, 21 Cal.4th at p. 911) See also *Review of Selected 1995 Cal.Legislation* 1996) 27 Pacific L.J. 761, 762 (the Legislature "declared that the willingness to commit a sexual offense is not common to most individuals; thus evidence of any prior sexual offenses is particularly probative and necessary for determining the credibility of the witness.")

Thus, *Falsetta* did not involve the use of propensity evidence to prove identity, and therefore did not address the relationship between Section 1108 and 1101(b), where, as here, the propensity evidence is used to prove identity.

Under well-established case law, evidence of prior offenses is only relevant to prove identity where there is a high degree of similarity between the prior offenses and the charged crime. This principle survives the enactment of Section 1108, both because the Legislature did not repeal Section 1101(b) when it enacted Section 1108, and because it remains pertinent to the weighing of probative value versus prejudicial effect under Evidence Code section 352, which requires the trial court to consider, *inter alia,* "the nature [and] relevance" of the prior offense. *(People v. Falsetta, supra,* at p. 917.) In other words, if the prior offense is not sufficiently similar to the charged offense to support the inference that both crimes were committed by the same person, then the probative value of the evidence is significantly diminished for purposes of the section 352 weighing analysis.

Respondent also cites *People v. Britt* (2002) 104 Cal.App.4th 500, 506, which summarily held that in light of section 1108, "the 'signature test' is no longer the yardstick for admission of uncharged sexual misconduct" because section 1108 "rendered moot" section 1101(b). Under *Britt's*

analysis evidence of a prior sex offense would always be admissible, a proposition rejected in *Falsetta, supra,* 21 Cal.4th at p. 917 ("[r]ather than admit or exclude every sex offense," the trial court "must engage in a careful weighing process under section 352.") For the reasons stated above, *Falsetta* does not support the *Britt* court's conclusion. A review of the cases cited by Appellant and Respondent shows that courts have admitted this evidence when it bears a similarity to the charged offense. No such similarities exist in this case.

In *People v. Balcom* (1994) 7 Cal.4th 414, the defendant was charged with the rape of an adult woman who was not known to the defendant. The 1108 evidence also involved the rape of an adult woman who was unknown to the defendant.

In *People v. Fitch* (1997) 55 Cal.App.4th 172, the defendant was charged with the violent date rape of an 18 year old who lived near the defendant. The 1108 evidence concerned an acquaintance rape of an adult.

In *United States v. LeMay* (9th Cir. 2001), 260 F.3d 1018, the defendant was charged with child sex offenses against two of his young, minor nephews. The prior sex offenses admitted against him were sex assaults on the defendant's minor nieces.[7]

In *People v. Britt* (2002) 104 Cal.App.4th 500, the defendant was charged with indecent exposure, annoying, and molesting children. Britt was charged with masturbating by the window of two minor girls where they

---

[7] *LeMay* of course, is a federal case. Respondent referred to this case in order to show that the federal courts have also admitted this type of evidence under a corollary section of the Federal Rules of Evidence. However, the facts of *LeMay* are consistent with appellant's analysis because the predisposition evidence admitted at his trial related to conduct that was very similar to that charged as the underlying crime.

could see him. The prior offense evidence admitted against him involved Britt masturbating in front of an adult female driver of a car. A second prior offense involved exposing himself to his 11 or 12 year old neighbor.

In *People v. Soto* (1998) 64 Cal.App.4th 966, 991, the defendant was charged with the molestation of his 12 year old niece. The prior offenses admitted against the defendant pursuant to section 1108 were molestations of other nieces and minor female relatives, who were all within the same age range.

In *People v. Ewoldt* (1994), the defendant was charged with committing a lewd act upon a child under 14 and with molesting a child under age 18. The victim of both offenses was his step-daughter. The prior offense admitted under 1108 was a sex offense against another step-daughter, as well as a second uncharged offense against the main complainant.

In *People v. Branch* (2001) 91 Cal.App.4th 274, Branch was charged with sex offenses against his minor step grand-daughter. The 1108 evidence concerned a prior sex offense against his step daughter.

In *People v. Frazier* (2001) 89 Cal.App.4th 30, Frazier was charged with committing a lewd act with a child under 14, i.e., with sexually touching his nine year old niece. The prior offense evidence showed that when the defendant was a teenager, he sexually touched his teenage cousin. Another cousin and niece also testified to similar incidents. Each of the sex offenses in this case involved Frazier's sexual misconduct with female relatives - all of whom appear to have been minors.

In *People v. Reliford* (2003) 29 Cal.4th 1007, the defendant was charged with the rape of woman he met at dance club. The 1108 evidence involved a rape of another woman the defendant had met at a dance club.

All of the cases discussed above approved admission of the prior sex offenses under section 1108 because of their similarity. Indeed, the facts of the cited cases show that the prior and charged offenses are very similar: the defendants committed sex offenses against family members, against acquaintances, against children, or committed the offense against strangers but in a similar manner to the charged offense.

In contrast, two of the cases cited by the parties found that it was improper to admit 1108 evidence because of its dissimilarity to the charged offense. In *People v. Harris* (1998) 60 Cal.App.4th 727, the defendant was charged with committing non-violent sexual touching offenses of women he knew in a mental health program where he worked. The 1108 evidence concerned the brutal rape of a stranger in an apartment complex. The court found the 1108 evidence should not have been admitted due to its dissimilarity to the offenses for which Harris was being prosecuted.

In *People v. Abilez* (2007) 41 Cal.4th 472, Abilez was charged with the capital murder and sodomy of his mother. Abilez sought to admit evidence of his co-defendant's prior juvenile conviction for attempted unlawful intercourse with a minor, in order to prove that the co-defendant was the guilty party, not Abilez. This Court held that the evidence of the co-defendant's prior offense was inadmissible because it was too dissimilar, and because it was too remote from the charged crime. *(Abliez,* 41 Cal.4th at pp. 498-502.)

> "In cases in which [a party] seeks to prove the defendant's identity as the perpetrator of the charged offense by evidence he had committed uncharged offenses, admissibility 'depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity."

(*Id*, at p. 500.) Applying this principle, the Court then explained why the trial court did not err in excluding the evidence.

> "Apart from the age of the prior adjudication, another more compelling reason exists to support the trial court's decision: Vieyra's prior juvenile offense appears completely different from those of the crime here, namely, the sodomizing and murder of an older woman. For identity to be established, the uncharged misconduct and the charged offense must share common features that are *sufficiently distinctive* [emphasis in original] so as to support the inference that the same person committed both acts. [Citation.] The pattern and characteristics of the crime must be so unusual and distinctive as to be like a signature. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403, 27 Cal. Rptr.2d 646, 867 P.2d 757.)"

(*Abilez,* 41 Cal.4th at p. 501.)

The Court also noted that the "highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offenses," quoting *People v. Balcom, supra,* 7 Cal.4th at p. 425, 27 Cal.Rptr.2d 666, 867 P.2d 777.

This Court went on to find that because "[t]he prior crime, though sexual in nature, was so different from the present crime, the inference that the person who attempted to have sex with a minor more than twenty years earlier was likely to be the person who sodomized and killed the 68 year old victim here was weak." (*Abilez,* 41 Cal. 4th at p. 501.) Although this discussion concerned admissibility under Evidence Code section 1101, the Court found that the same factual and legal concerns applied with respect to the inadmissibility of this evidence under section 1108. (*Id.* at p. 502.)

In this case, the prior offenses were quite similar, *but only to each other*. Testimony at trial showed that Appellant picked up two women in

public places and then took them to other locations where the offenses occurred. Regrettably, the trial testimony also showed that the victims were quite severely injured during these incidents and that the sexual misconduct was forceful, violent and required medical attention. Both women were close in age to Appellant when the crimes occurred.

The prior offenses, however, share no similarities with the charged offense. The prosecutor argued that the prior offenses were admissible because:

> "The crime charged is not fundamentally different from the other cases. The defendant disrobed Monique, raped and suffocated her, ultimately killing her. The 'other crimes' evidence explains his intent and modus operandi. The defense's pathology expert puts the cause and motive of death into question, thus underlining intent as an issue." (2 CT 460.)

The prosecutor also asserted that the evidence would show that Monique was raped (2 CT 460). Appellant was not charged with rape. He was charged with attempting to commit a lewd and lascivious act with a minor. Appellant's prior offenses involved women who were close in age to him. 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.

To the extent that the prosecution argued that intent was in issue, that is always so, whenever the defendant pleads not guilty. (*People v. Roldan* (2005) 35 Cal.4th 646, 705-706.) The prosecution would have to prove intent under any circumstances. Thus, the mere fact that intent was in issue does not open the floodgates to admissibility under sections 1108 and 1101(b).

In any event, the prosecutor's claim that intent was in issue was

legally and factually incorrect. Appellant denied that he was involved in any way with this incident. Therefore, his intent was not in issue for 1101 purposes. "[e]vidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.'[Citation.]" (*Ewoldt, supra,* 7 Cal.4th at p. 394; emphasis in original.) Where the act is contested, it is improper to admit uncharged acts on this basis because intent is irrelevant. (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 925-926 [finding reversible error based on improper admission of uncharged act evidence for purposes of proving intent, where acts were contested]. Thus, admission of the prior offenses could not be justified based on the theory of intent.

Moreover, the prior offenses both involved forcible sexual assaults, with repeated acts of force against the victims, both of whom were bitten on the breasts.[8] These are the types of factual similarities which courts have found supported admissibility under section 1108.

In contrast, there was no "highly unusual and distinctive" pattern or method proven in the charged crime which mirrored the prior offenses. Neither involved a pre-teen girl, as was Monique. There was no evidence that he was sexually interested in pre-adolescent girls, or that he had committed sexual offenses against family members. (1 RT 400-403, 404-405.)

Importantly, the trial judge recognized that age difference among

---

[8] The uncorroborated hearsay testimony of Sara Minor which should have been excluded (see Argument IV, *infra*) played no part in the court's ruling; it was not presented to the court until after it overruled Appellant's 1108 objection and after the victims of the prior offenses testified before the jury.

victims was a significant differentiating factor where sex offense pre-disposition was concerned, but this recognition came only at another, later juncture in the trial. The prosecutor wanted to admit evidence from Gabriel Arroyo, Monique's older brother, who was 17 at the time the crime occurred, that he had seen Mr. Loy flirt with teenage girls who came to the 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.) After an Evidence Code section 402 hearing (6 RT 1220-1228), the court excluded the evidence 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.

(6RT 1227.) The court 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.)

Moreover, there was no evidence of repeated trauma beyond what the prosecutor argued was evidence of strangulation/asphyxiation, which the prosecutor argued was the cause of death. Nor was there any evidence that Monique had been bitten in any area.

The Information (1 CT 140-142) in this case did not charge Appellant with the use of force in the commission of any crime. The special circumstance did not require a showing of forcible rape or forcible sexual

assault. Therefore, the prior offenses and the capital offense differed on this factual basis as well.

The facts of the charged crime, as compared with the prior offenses, did not "virtually eliminate[] the possibility that someone else committed the crime". (*People v. Balcom* (1994) 7 Cal.4th 414, 425.)

Contrary to the trial prosecutor's argument, the central issue was not intent. The central issue was the identity of the perpetrator. Appellant denied he had anything to do with Monique's disappearance and death. His intent was not in issue.

The prior crimes would only be admissible under identity and modus operandi theories if Appellant's actions were "highly unusual and distinctive," and "virtually eliminated the possibility that someone else was the perpetrator." (7 Cal.4th at p. 425.) While the priors bear striking similarities to each other, the same cannot be said for the facts of the underlying charged crime. The only way in which the charged and prior offenses were "not fundamentally different," as the prosecutor argued, was that the charged offense also appeared to be sexually motivated. This is not a sufficient basis to justify admission of the 1108 evidence.

B. The Admission of the Prior Offense Testimony Was Overwhelmingly Prejudicial and Constituted Reversible Error Because the Independent Evidence That Appellant Was the Perpetrator Was Weak

As shown in the factual summary at the beginning of this brief, there were significant weaknesses in the physical and testimonial evidence presented by the prosecution. The tiny spot of alleged blood found on the inside of Appellant's car trunk lid was not proven to be Monique's. Indeed, the probability that a non-related person randomly selected from the population would match the trunk lid stain DNA at the six loci at which it

matched those in Monique's sample was 1 in 5,100. Other allegedly incriminating evidence included "very faint" DNA "markers" found on Monique's bedroom comforter at the crime scene, of which it could only be said that Appellant could not be "excluded" as the contributor; carpet fibers found on the crime scene comforter that could have come from Appellant's car; and an alleged palm print of Appellant's on the outside of Monique's bedroom door in a house where Appellant had lived.

DNA evidence was the centerpiece of the prosecution's case, and it is nothing but smoke and mirrors. The trunk lid stain and the comforter stain evidence cannot be accepted at face value because no DNA samples were taken and no comparison testing was done of any other member of the Arroyo family. Furthermore, hairs with roots were recovered from Monique's bed, and these hairs could have been tested for DNA. (8 RT 1754.) The prosecution ignored this evidence and never had it tested.

Erin Riley testified that with respect to one of the stains on the bedspread, Monique could have contributed the DNA deposited, but that there were "additional very faint markers or types" which Appellant could have contributed. (7 RT 1601.) First, as this court and others have recognized, presenting evidence of a DNA match without presenting evidence of the statistical significance of that match is of little or no evidentiary value. (*People v. Barney* (1992) 8 Cal.App.4th 798, 817 ["The statistical calculation step is the pivotal element of DNA analysis, for the evidence means nothing without a determination of the statistical significance of a match of DNA patterns."]; *People v. Venegas* (1998) 18 Cal.4th 47, 82 ["A determination that the DNA profile of an evidentiary sample matches the profile of a suspect establishes that the two profiles are consistent, but the determination would be of little significance if the

evidentiary profile also matched that of many or most other human beings".])

As The National Research Council has said, "To say that two patterns match, without providing any scientifically valid estimate (or, as least, an upper bound) of the frequency with which such matches might occur by chance, is meaningless." (National Research Council, DNA Technology in Forensic Science (1992) at p. 74 (hereafter NRCI).)

In fact, as the court cautioned in *People v. Pizarro* (2003) 110 Cal.App.4th 530, 576, disapproved on other grounds in *People v. Wilson* (2006) 38 Cal.4th 1237, 1250-1251, "If the jury is told simply that the defendant's genetic profile matches the perpetrator's profile and thus the defendant could be the perpetrator, the jury-awed by the sophistication and incomprehensibility of the evidence-will naturally respond by assuming the match absolutely proves identity. For this reason, courts have insisted that the prosecution provide comprehensible evidence regarding the meaning or significance of the match. [Citations omitted.]."")

Additionally, "Mixed samples can be very difficult to interpret, because the components can be present in different quantities and states of degradation. ... Typically, it will be impossible to distinguish the individual genotypes of each contributor." (National Research Council, DNA Technology in Forensic Science (1992) at p. 59.) "Mixed samples are a reality of the forensic world that must be accommodated in interpretation and reconstruction. As a rule, mixed samples must be interpreted with great caution." (Id. at p. 66.) (See also National Research Council, The Evaluation of Forensic DNA Evidence (1996), p. 123 ["Recommendation 4.4: If the possible contributors of the evidence sample include relatives of the suspect, DNA profiles of those relatives should be obtained. If these

profiles cannot be obtained, the probability of finding the evidentiary profile in those relatives should be calculated with [one of two specified formulas].")

With respect to Riley's testing of the comforter stain, she admitted that an essential control – a substrate control – was not used, despite the fact that "the guidelines" recommend it. (7 RT 1630.) A substrate control would indicate whether the DNA detected was inherent in the substrate itself as opposed to in the stain that was deposited. (See generally, National Research Council, *Strengthening Forensic Science in the United States: a Path Forward*, 2009, Chapter 4, pp. 114-116 [discussing the importance of guidelines, protocols, and quality assurance].)

The weakness of this evidence is that it does not prove Appellant committed this crime. Although Appellant came from a large, extended family, no DNA testing was done of any other family member by the prosecution in order to determine if any one or more of them might been the source of the biological evidence. (See National Research Council, The Evaluation of Forensic DNA Evidence (1996), p. 123 ["Recommendation 4.4: If the possible contributors of the evidence sample include relatives of the suspect, DNA profiles of those relatives should be obtained. If these profiles cannot be obtained, the probability of finding the evidentiary profile in those relatives should be calculated with [one of two specified formulas].") The trunk lid stain could have been the result of a cut finger from myriad other family members. And the comforter stain - a mixture of fluids - could have come from any number of sources: family laundry being doing done together, use of the comforter by Monique's sister in their shared bedroom, another family member using the comforter, and so forth. Because the biological evidence was not conclusively connected to Appellant, and

because other family members' DNA was not tested so that they could be excluded, this biological material may not be evidence of a crime at all. It may simply be fluid left by another family member at some other time. Because Appellant was related to Monique and to other family members who had access to and contact with the car and the comforter, Riley's testimony about the random match probability and the "very faint markers" on the bedspread was misleading at best.

Additionally, Mr. Loy's car had been purchased from another family member about two months before Monique died. (7 RT 1525-1526.) Mr. Loy drove it for about two months. (7 RT 1526.) Evidence at trial established that the Loy/Arroyo family was large and extended. Monique had three siblings and two parents with whom she lived - all testified at the guilt phase. There were a total of ten siblings in the Loy family - eight siblings were living at the time of trial. (11 RT 2491-2492, 2506.) And there were the members of the Arroyo family as well. Thus, there were many other people to whom the trunk lid stain might have been traced - had the prosecution chosen to do such testing. Erin Riley was not given any blood to test from any other family member. (7 RT 1630-1631.) Additionally, William Moore, the LAPD criminalist who took the trunk stain sample, testified that it was impossible to tell how long the stain had been in the trunk. (7 RT 1702.) Consequently, this stain does not prove that Monique's blood was found in Mr. Loy's trunk.

In *People v. Wilson* (2006) 38 Cal.4th 1237, this Court addressed issues regarding the use of DNA evidence in criminal cases. In *Wilson*, this Court stated that: "...a match is less significant if the blood could have come from many persons rather than from only a few." (*Id.* at p. 1239.) The prosecution expert in *Wilson* testified that the defendant's genetic profile

"would be expected to occur in one of 96 billion Caucasians, one in 180 billion Hispanics, and one of 340 billion African Americans." The expert gave similar statistics concerning the genetic profile for the victim. (*Id.* at p. 1241.)

Wilson highlights that the genetic evidence in this case was insufficient to connect Mr. Loy with Monique's death. The forensic evidence and testimony did not establish that Monique's "blood" was in Mr. Loy's car. A red stain was found on Mr. Loy's trunk lid - a car that had previously been owned by another family member. The stain could have been placed there any time - including before Mr. Loy owned the car. Secondly, the stain was not proven to be from Monique. Most importantly, there was an additional genetic marker found in this case which made the frequency statistic among those who could have been contributors to be 1 in 5,100. The probability that a non-related person randomly selected from the population would match the trunk lid stain at those six loci was 1 in 5,100. This is not enough to prove that she was the donor, particularly where there were many other family members who could have been the sources of the stain.

Likewise, the fluid on the comforter could have been deposited at any time. No prosecution expert conducted a substrate test in order to determine whether the fluids they recovered on the comforter could have been deposited previously. And, as Deputy District Attorney Anne Ingalls so aptly observed in her closing argument, "everybody used everything" in the Arroyo family household. This would be particularly true with respect to the matching sheets and comforters shared by Josette and Monique.

The maggot evidence is also unreliable. Over objection, Mr. Faulkner was allowed to testify about the time and date that the maggots

were collected and preserved, simply based on a notation on the container in which the maggots were sent to him, and on a letter sent to him from the coroner's office. (8 RT 1774, 1783.) The state never produced a witness who established when the maggots were collected and preserved. In fact, the prosecutor objected when trial counsel tried to inquire into this issue. Mr. Faulkner relied on the date and time the maggots were collected in order to reach his conclusions in this case. (8 RT 1774.) Faulkner first wrote a report that supported the defense case: his estimate of the time when the body was left at the lot was 60 to 65 hours before it was found. (8 RT 1789.) This would have been on May 10 - after Mr. Loy was in custody.

C. The Admission of the 1108 Evidence Was More Prejudicial Than Probative and Therefore Was An Abuse of Discretion

"The prejudice referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. In applying section 352, prejudicial is not synonymous with damaging." (*People v. Branch* (2001) 91 Cal.App.4th 274, 286.)

> "In other words, evidence should be excluded as unduly prejudicial when it is of such a nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose. (*Vorse v. Sarasy* (1997) 53 Cal.Ap.4th 998, 1008-1009.)"

(*Ibid.*)

The problem here is that the predisposition evidence was so graphic and its details so disturbing, that this jury could not fairly evaluate the

prosecution's other evidence, which was contradictory, insubstantial, of dubious scientific validity and subject to impeachment. The prior offense testimony became the main event here, and this allowed the jury to ignore the weaknesses in the prosecution case. In other words, the jury was permitted to use the prior offense testimony for an improper and illegitimate purpose.

Since the admission of the evidence was so inflammatory, and its admission was so prejudicial, reversal is required because it is reasonably probable that the result would have differed in the absence of this error. (*People v. Harris* (1998) 60 Cal.App.4th 727, 741; *People v. Watson* (1956) 46 Cal2d 818.)

III

THE PREDISPOSITION INSTRUCTIONS WERE CONSTITUTIONALLY FLAWED AND REQUIRE REVERSAL OF THE GUILT PHASE CONVICTIONS

In the Opening Brief, Appellant argued that the jury instructions the trial court gave during the prosecution's case-in-chief and at the end of the guilt phase concerning the prior sex offense evidence were constitutionally infirm because they: (1) permitted Appellant's conviction to be based solely on predisposition evidence; and, (2) allowed Appellant to be convicted based on the preponderance of the evidence standard applicable to the predisposition evidence, rather than on the proof beyond a reasonable doubt standard. Additionally, the jury was never given an instruction which defined preponderance of the evidence, further exacerbating the unconstitutional misdirection the jury received. (Appellant's Opening Brief, at pp. 82-101.)

It is Respondent's main contention that no error was committed when Appellant's jury was given the 1996 version of the predisposition instruction because the instructions as a whole provided proper guidance to the jury.

Respondent acknowledges that some lower courts have found the version of the CALJIC instructions given to Appellant's jury to be improper (Respondent's Brief, at p. 62), there is no "reasonable likelihood" that the jury was misled. (RB at pp. 54-65.) This is Respondent's standard argument when jury instructions are attacked as unconstitutional.

But the "reasonable likelihood" standard invoked by Respondent is not applicable to the instructional error in this case. That standard applies to determine whether an *ambiguous* instruction is erroneous. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 72.) It has no application where, as here, the instruction is facially incorrect. (*Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592.) By authorizing the jury to convict based on an inference of propensity, the instruction was erroneous on its face, and in conflict with the more general reasonable doubt instruction. Respondent's generic argument that the sum of the instructions cures any error thus fails in this context.

A. Federal Authority Establishes That the 1996 Version of CALJIC 2.50.01 Is Constitutionally Infirm

The Ninth Circuit has decisively rejected Respondent's contention with respect to exactly the same version of CALJIC 2.50.01 given in Appellant's case.

In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, 822, that Court found that the 1996 version of CALJIC 2.50.01 was unconstitutional because it permitted jurors to reach a determination of guilt based on a preponderance of the evidence standard, rather than a proof beyond a reasonable doubt standard.[9]

---

[9] In *Byrd v. Lewis* (9th Cir. 2009) 566 F.3d 855, 866, a panel of the Ninth Circuit overruled *Gibson* "to the extent it applie[d] structural error review to an instructional error that affects only an element of the offense, a

(continued...)

Since that time, in published and unpublished opinions[10], California federal courts have found that this version of 2.50.01violates defendants' due process rights. (*Roettgen v. Ryan* (C.D. Cal. 2009) 639 F.Supp.2d 1053; *McKinstry v. Ayers* (E.D. Cal. 2007) 2007 WL 1113531 [domestic violence predisposition instruction case, habeas relief granted based on *Gibson v. Ortiz; Dixon v. LaMarque* (N.D. Cal. 2007) 2007 WL 2316254 [habeas relief granted for erroneous predisposition instruction, in reliance on *Gibson*].)

More importantly, in some of the predisposition instruction cases which have followed in *Gibson's* wake, Respondent has conceded reversible error. (*Mejia v. Garcia* (9th Cir. 2008) 534 F.3d 1036, 1044 [state did not contest Mejia's argument with respect to rape conviction and conceded that *Gibson v. Ortiz* was materially indistinguishable and mandated relief on that charge; *Moreno v. Kernan* (E.D.Cal. 2008) 2008 WL 161991 [state concedes that *Gibson* is controlling authority which dictates reversal].)

Respondent's assertion here that the version of 2.50.01 given in Appellant's case was constitutional is therefore belied by its concessions of reversible error in federal district court and the Ninth Circuit where the same

---

[9](...continued)
permissible evidentiary inference or a potential theory of conviction, as opposed to an instructional error that affects the overarching reasonable doubt standard of proof." The *Byrd* case did not concern the predisposition instruction at issue here, and therefore, it is not relevant to this aspect of Appellant's case.

[10] It is permissible to cite unpublished decisions of the federal courts. (Fed.R.App.P. 32.1(a) [permitting citation to federal opinions, judgments, orders or written dispositions which have been issued on or after January 1, 2007]. These cases are not cited for judicial authority but to show that the state has previously conceded this issue.

version of the instruction was in issue. (*Mejia v. Garcia, supra,* 534 F.3d at p. 1044; *Moreno v. Kernan, supra,* 2008 WL 161991.) Moreover, Respondent offers no legitimate factual or legal reason in its brief to ignore the reasoning of Ninth Circuit's opinion in *Gibson*, or its legal concessions in other cases. In fact, Respondent attempts to de-emphasize this important, persuasive decision, and its line of authority, by relegating it to footnote status. (See RB, at pp. 62-63, fn.11.)

Instead of discussing the facts or legal conclusions reached by the Ninth Circuit, Respondent merely observes that, "This Court is not bound by *Gibson.*" (Respondent's Brief, at p. 62, fn. 11.) Respondent cites *People v. Seaton* (2001) 26 Cal.4th 598, 653, for this legal precedent. *Seaton* could not be farther off the mark. The cited section of the *Seaton* opinion involved the issue of defendant's shackling during trial. Seaton offered an Eleventh Circuit case as authority for the legal proposition he was advocating. This Court dismissed Seaton's argument, explaining:

> There, by a narrow two-to-one majority, a federal appellate court rejected a case by case evaluation of prejudice and apparently adopted reversal per se rule when a defendant's shackles, unjustifiably ordered by the trial court, are visible to the jury at the penalty phase of a capital trial. Decisions of the federal courts of appeal are not binding on this court.

(*Id.* at p. 653.) The comment in *Seaton* has more to do with the nature of the issue raised by Appellant than it does with dismissing the persuasive mandate to which the *Gibson* decision is entitled.

Next, Respondent cites *People v. Williams* (1997) 16 Cal.4th 153, 190, as authority that this Court is not bound by *Gibson.* But that is not what *Williams* says. The precise section cited by Respondent makes the inapposite observation that, "Decisions of lower federal courts interpreting

federal law are not binding on state courts." The *Gibson* decision dealt directly with the constitutionality of a California jury instruction. *Williams* does not support the contention for which Respondent has cited it.

Finally, Respondent cites *People v. Bradford* (1997) 15 Cal.4th 1229, 1305, for the same proposition. But there are two aspects to this issue, as the cited section of *Bradford* points out, one of which Respondent omits. Federal court decisions may not be binding, but they constitute persuasive authority - all the more so where the state has previously conceded constitutional error on the very issue at the center of the dispute.

Thus, Respondent's casual dismissal of the *Gibson* line of authority only serves to underscore the significance of those decisions. The Ninth Circuit, and multiple federal district courts, have vacated California convictions in cases in which jurors were given the 1996 version of 2.50.01. Respondent provides no legal reason why this case differs from those in which relief was granted. There is none.

This Court should therefore credit the Ninth Circuit's decision invalidating the 1996 version of the same predisposition instruction on constitutional grounds. (*In re Tyrell J.* (1994) 8 Cal.4th 68, 79 [lower federal courts persuasive but not controlling]; *People v. Bradley* (1969) 1 Cal.3d 80, 86 [lower federal court decisions "persuasive and entitled to great weight"] The reasoning of that case is compelling. Appellant is entitled to a guilt phase reversal on the basis of the *Gibson* decision alone.

B. The Most Persuasive and Analogous State Cases Establish that Reversible Error Occurred

As explained in the Opening Brief, Appellant's case was tried soon after the enactment of section 1108 and the soon after the disputed CALJIC instruction came into use. The original, 1996 version of the predisposition

instruction was quickly and strongly criticized in the appellate courts. This Court considered a subsequent formulation of the 2.50.01 instruction in *People v. Reliford* (2003) 29 Cal.4th 1007, and found it passed constitutional muster. Respondent argues that this Court should follow *Reliford*, even though that instruction differed in a material way from the one Appellant's jury received. The courts of appeal which have considered the 1996 version of the instruction, however, have uniformly criticized it, and recognized the danger that a jury might base its decision solely on the predisposition evidence. There is a reasonable possibility that the jury in this case did exactly the same thing.

Respondent argues that the predisposition instruction Appellant's jury received was not constitutionally deficient, particularly when all the jury instructions were considered together. In making this argument, Respondent apparently overlooks the fact that when the erroneous instruction was read the first time at the beginning of the prosecution's case, immediately before the prior victims testified, it was the only instruction given to them at that time. The jury viewed this evidence and all the rest of the witness testimony that followed through the lens of the faulty instruction. There was no reminder about proof beyond a reasonable doubt. The jury was told they could rest their ultimate decision on the predisposition evidence - period. Respondent's discussion of the case law is also incomplete. Like its discussion of the *Gibson* case, Respondent sweeps the authorities which support Appellant under the footnote rug. (See Respondent's Brief, at p. 63, fn. 12.) Although Respondent trivializes these authorities, they too require reversal of Appellant's guilt phase convictions.

Respondent suggests that the cases upon which Appellant relies - *Vichroy, Orellano* and *Frazier* - are flawed because they examined CALJIC

2.50.01 in isolation, without reference to any of the other instructions given. (Respondent's Brief, at p. 63, fn. 12.) Not so. Each of these court considered the other instructions, but then applied the well-established rule that specific instructions control over general instructions.[11] (*People v. Vichroy* (1999) 76 Cal. App.4th 92, 98-101; *People v. Orellano* (2000) 79 Cal.App.4th 179, 185-187; *People v. Frazier* (2001) 89 Cal.App.4th 30, 35-40.)

In *Vichroy*, the defendant was convicted of committing lewd and lascivious acts on his thirteen year old step daughter. The jury was instructed with CALJIC 2.50.01 (6th Ed. 1996). The court reversed, stating:

> "We do not believe proof beyond a reasonable doubt of a basic fact, that appellant committed prior sexual offenses, may act as proxy or substitute for proof of the ultimate fact, i.e., appellant's guilt of 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 No. 2.50.01, as given, required no proof at all of the current charges."

(*Vichroy*, 76 Cal.App.4th at p. 99.)

The *Vichroy* jury also received another instruction - one not given to

---

[11] The Supreme Court, the Ninth Circuit and this Court all hold that specific instructions control over general instructions. (See *Francis v. Franklin* (1985) 471 U.S. 307, 320 [holding that a contrary general instruction does not automatically cure a deficient specific instruction]; *Flores-Chavez v. Ashcroft* (9th Cir. 2004) 362 F.3d 1150, 1158 [specific instruction controls the general instruction]; *LeMons v. Regents of the University of California* (1978) 21 Cal.3d 869, 878, n.8 ["..the more specific charge controls over the general charge."]; *Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395 ["It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general."]

Appellant's jury which was much more favorable to the defense - which the court found conflicted with CALJIC 2.50.01.

> "Finally, the jury was instructed that if they decided beyond a reasonable doubt, that proof of the prior offense proved a character trait of appellant, and that the proved character trait was relevant to the question whether he committed the charged offense, '*then you may consider this evidence together with other evidence to decide whether he committed the charged offense. You may not convict him merely because you believe he committed .... another offense or because you believe he has a character trait that tends to predispose him to committing the charged offense. The question before you is whether the defendant is guilty of the crime charged in the case, not whether he is guilty of any other offense.*"

(*Vichroy*, at pp. 99-100.)

These instructions were in conflict with each other, according to the *Vichroy* court, because 2.50.01 told the jury that they only had to find that appellant committed prior sexual offenses in order to find him guilty of the current charges. There was nothing to explain how to reconcile these competing instructions. The court found the instruction suffered from a fatal constitutional infirmity because it permitted the jury to find appellant guilty of the charges solely because he had committed prior sex offenses. Under these circumstances, the conviction had to be reversed.

Thus, *Vichroy* explicitly rejects Respondent's argument that other instructions can cure the infirmity of 2.50.01.

Following on the heels of *Vichroy*, *People v. Orellano*, *supra*, 79 Cal.App.4th 179, 181, was decided. *Orellano* reversed convictions for lewd and lascivious acts with a child based on 2.50.01, and specifically found that, "...these [predisposition] instructions are prejudicially erroneous, even in light of other standard instructions on reasonable doubt."

Like Appellant's jury, the *Orellano* jury was given CALJIC 2.50.01 and 2.50.1 (the preponderance of the evidence instruction). Unlike Appellant's jury, the jury was also given CALJIC 2.50.2: "The jury was instructed under CALJIC 2.50.2 that preponderance of the evidence means evidence with more convincing force than that opposed to it, and that the jurors should find against the party with the burden of proof if the evidence is so evenly balanced that they are unable to find the evidence on either side preponderates." (*Id.* at at p. 183.) The court also noted that the jury received other standard instructions, including CALJIC 1.01 [consider instructions as a whole]; CALJIC 2.61 [defendant may rely on state of the evidence]; and CALJIC 2.90 [the prosecution's burden of proof and the usual reasonable doubt instruction].

Reversing the judgment, the *Orellano* court explained:

> "Because Evidence Code section 1108 permits admission of disposition evidence in this unprecedented manner, we believe it is *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), 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."

(*Id.* at pp. 185-186; emphasis in original.)

The *Orellano* court rejected the reasoning of *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147-149; *People v. O'Neal* (2000) 78 Cal.App.4th 1065, and *People v. Regalado* (2000) 78 Cal.App.4th 1056, (cases cited by Respondent, Respondent's Brief, at pp. 59-64) "which hypothesized the process by which rational and reasonably intelligent jurors might harmonize the instructions as a whole" *Orellano*, 79 Cal.App.4th at p. 186.)

First, the court explained that until the enactment of section 1108, disposition evidence was universally excluded due to the danger that juries would be unfairly influenced by it. Therefore, an essential safeguard to prevent the lessening of the prosecutorial "burden of proof is proper instruction to the jury that evidence of prior offenses is not sufficient to prove the guilt of the charged crime beyond a reasonable doubt." (*Id.* at p.186.) Second, the jury was specifically told that they could infer appellant's disposition, and his guilt of the current charges, from his commission of the prior crimes, while the other instructions were general in comparison. (*Ibid.)* In conclusion, the court stated:

> "The danger that the jury leaped to a verdict of guilty is too great for us to confidently assume the jurors arrived at a verdict beyond a reasonable doubt by the careful reasoning process involving all the other instructions. In the context of disposition evidence under Evidence Code section 1108, we conclude there is a reasonable likelihood that jurors were misled by the incomplete instruction. Since we have no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281; *People v. Vichroy, supra,* 76 Cal.App.4th at p. 101.)

(79 Cal.App.4th at p. 186.)

C. The Erroneous Instruction was Prejudicial under Any Test of Harmless Error

The only reference to the standard for evaluating prejudice in Respondent's Brief appears at page 66. There Respondent states: "Thus, it is not reasonably likely the jury convicted appellant on 'a lowered standard of proof.' (*People v. Reliford, supra,* 29 Cal.4th at p. 1016.)" Respondent has not replied to the standard of prejudice arguments contained in Appellant's Opening Brief, at pages 94-100.

Gibson v. Ortiz, supra, 387 F.3d at pp. 824-825, found that the predisposition instruction amounted to structural error because it violated numerous constitutional guarantees. The court stated:

> "CALJIC 2.50.01 permitted the jury to find Gibson guilty of the charged sexual offenses by merely a preponderance of the evidence, and therefore constituted structural error within the meaning of *Sullivan*. See *Sullivan [v. Louisiana* (1993)] 508 U.S.[275] at 281-82. In *Sullivan*, the trial court gave the jury a definition of reasonable doubt that had previously been held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990). In invalidating Sullivan's conviction because of an unconstitutional standard of proof, the Supreme Court tied the Fifth Amendment requirement of proof beyond a reasonable doubt to the Sixth Amendment right to a jury trial, holding that 'the jury verdict required by the Sixth Amendment is a jury verdict of *guilty beyond a reasonable doubt. Id.,* at 278. (emphasis added). A *Sullivan* error precludes harmless error review because no verdict within the meaning of the Sixth Amendment has been rendered." [12]

Similarly, *People v. Orellano, supra,* 79 Cal.App.4th at pp. 186-187,

---

[12] To the extent that *Gibson* applied structural error review because it found that CALJIC 2.50.01was tantamount to an erroneous definition of reasonable doubt (*Gibson, supra,* 387 F.3d at p. 825), it remains good law. See footnote 10, *supra.*

applied the *Sullivan per se* standard of reversal, as did *People v. Vichroy, supra,* 76 Cal.App.4th at p. 101.

Other California cases have relied on *Yates v. Evatt* (1991) 500 U.S. 391, and *Chapman v. California* (1967) 386 U.S. 18, to find reversible error. In *People v. Younger* (2000) 84 Cal.App.4th at pp. 1383-1384, the court stated:

> "We must ask whether the evidence was so overwhelming, or otherwise so inconsistent with the possibility that the jury based its decision merely on Younger's propensity, as to leave it beyond a reasonable doubt that the same verdict would have been reached in the absence of the faulty instruction. (*James, supra,* 81 Cal.App.4th at pp. 1362-1363; *Yates v. Evatt, supra,* 500 U.S. 391, 404-405.) Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments."

Similarly, in *People v. Frazier, supra,* 89 Cal.App.4th at pp. 38-39, the court explained:

> "Under *Chapman's* reasonable doubt standard, however, it is not enough to show the jury considered evidence from which it *could have* come to its verdict without reliance on the presumption that because the defendant did it in the past he did it this time. [citation omitted]. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing beyond a reasonable doubt the presumed fact (defendant did it) independently of the presumption (defendant did it in the past therefore he did it this time.) [footnote omitted.] We approach this inquiry by asking whether the force of the evidence considered by the jury in accordance with its instructions 'is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption.'"

Plainly and irrefutably, Appellant's case meets all of these standards and must be reversed. Whether the instructional error amounts to structural

error - and a *per se* reversal - or whether the instruction is trial error, the result is the same: reversal is required. The evidence presented against Appellant was entirely circumstantial - except for the prior offense testimony. That testimony was lurid and damning. The instruction was not only delivered at the conclusion of the evidence, both orally and again in written form (10 RT 2305-2306; 3 CT 552) but was also prominently presented on the second day of trial - along with the isolated predisposition instruction, unaccompanied by any other instruction to counter its unconstitutional dilution of reasonable doubt. (6 RT 1411-1412.) This undoubtedly highlighted both the evidence and the instruction. Standing alone, the fact that the trial court gave this instruction immediately before the 1108 testimony distinguishes Appellant's case from those in which the 1996 instruction has been found harmless.

1. The Weakness of the Underlying Case Supports a Finding of Prejudice

Courts considering the predisposition instruction have pointed to the relative weakness of the evidence of the underlying criminal case, and the strength of the prior crimes evidence, as one of the reasons why reversal was required[13]. *People v. Younger, supra,* 84 Cal.App.4th 1360, was a murder and domestic violence case, in which the jury was instructed pursuant to CALJIC 2.50.02, the mirror instruction to 2.50.01. The instructions are the same, except one addresses the predisposition to commit domestic violence; the other, the predisposition to commit sexual offenses. The court of appeal

---

[13] See also *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 777, *reversed on other grounds, Woodford v. Garceau* (2002) 538 U.S. 202 [finding reversible error in the use of a predisposition instruction pursuant to Evidence Code section 1101, due to relatively weak circumstantial evidence case, and strong prior crimes evidence].

reversed Younger's convictions, stating:

> "When the evidence of the charged offense is so ambiguous as it is here, inviting the jury to infer guilt from prior offenses raises a serious question whether the verdict was affected by a faulty inference of guilt by propensity. We cannot say beyond a reasonable doubt that the error was unimportant in relation to everything else."

(84 Cal.App.4th at p. 1362.)

The defendant in *Younger* had a long history of domestic violence with his girlfriend, Heather. She was a teenager when they first met. Heather left high school, and her family and friends, and moved in with Younger. There were numerous incidents of violence which were reported to local authorities. Friends, co-workers and family of Heather saw bruises on her body on a number of occasions. Family members witnessed Younger and Heather fighting. Yet, they continued to live together and had two children. Younger eventually went to jail for one of the domestic violence incidents. Younger returned to live with Heather after he got out of jail. (84 Cal.App.4th at pp.1362-1368.)

In the days before Christmas, 1995, Younger and Heather had a fight. Younger took his children and went to spend the holidays with his family. (84 Cal.App.4th at pp.1368-1369.)

When Heather failed to make her usual rent payment, on January 4, the manager and assistant manager of her apartment building went to her unit. They found a strong odor inside and called police. Heather was found in the bathroom, the door of which was locked from inside. Heather's body was found sitting up in the bathtub, with a rope around her neck, tied to the shower above her. Heather's artificial fingernails were all found intact. Strands of her hair were found in the rope around her neck and between her

fingers. Nothing significant was found beneath the fingernails. None of Younger's hair was found on the corpse or in the rope. The shower rod and curtain were in place and not damaged. Heather was wearing underwear, but outer clothing was in the bathroom with her, as was her purse. There were no signs of struggle in the apartment. A letter to Heather written by Younger was on the dining room table. Younger's fingerprints were found in a number of locations, including the bathroom door. (84 Cal.App.4th at pp.1371-1372.)

Evidence was presented of multiple acts of domestic violence against numerous former paramours of Younger. (84 Cal.App.4th at pp.1373-1375.)

Pathologists testified for both the prosecution and the defense. The autopsy was performed by Dr. A. Jay Chapman, an experienced forensic pathologist who had performed several thousand autopsies, including over 500 suicides. Dr. Chapman noted that Heather's body was in an advanced state of decomposition. He stated that minor injuries would be obscured by the process of decomposition, but significant injuries, including bruising, would be visible. Dr. Chapman was unable to identify a cause of death with certainty. His report stated that death was consistent with hanging, but he could not rule out drowning or other asphyxial death. Dr. Chapman testified he could not rule out suicide either. (84 Cal.App.4th at p. 1376.)

The defense pathologist was Dr. Robert Lawrence, a pathologist for the San Joaquin County Coroner's office. Dr. Lawrence had performed around 7,000 autopsies, including at least 500 suicides and 100 suicides by hanging. It was Dr. Lawrence's conclusion that this was a suicide, and he would have so concluded had this case been assigned to him. (84 Cal.App.4th at pp. 1376-1377.)

The jury in the *Younger* case received the CALJIC instruction which stated:

> "If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type 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 of which he is accused."
>
> The court found: "We conclude that reversal is required; we believe there is reasonable doubt that the jury avoided resting its verdict on an improper inference of guilt from propensity." (84 Cal.App.4th at pp. 1379-1380.)

As in this case, the Attorney General argued that the usual, general instructions given at trial were sufficient to inform the jury. The court rejected that argument and found there was nothing ambiguous about the predisposition instruction.

> "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 a*nd 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."

(84 Cal.App.4th at pp. 1381-1382.)

None of the other instructions given "restrain[ed] the jury from accepting the court's invitation to conclude that because the defendant did it before, he did it again." (84 Cal.App.4th at p. 1382.)

Most importantly, the court finds: "In a close case, the instruction poses a significant danger that the jury will decide it would be irrational to find a defendant who committed prior offenses not guilty, regardless of the weakness of the direct evidence or of other circumstantial evidence

presented by the prosecution." (84 Cal.App.4th at p. 1382.)

Moreover,

> ". . . 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.)

(84 Cal.App.4th at p. 1383.)

The parallels between *Younger* and Appellant's case are many and decisive. Like *Younger*, the prosecution case rested on circumstantial evidence. Like *Younger*, Appellant has a documented history concerning the predisposition offenses. Also like *Younger*, the evidence of the prior offenses was stronger than the evidence of the underlying offense. And, in both cases, experienced pathologists from both the prosecution and defense reached differing conclusions as to how the victims met their deaths. Additionally, the jury in Appellant's case deliberated over four different days, and asked a number of questions about the disputed evidence during their deliberations. (10 RT 2339, 2344-2345, 2353, 2361-2365.) And

finally, like *Younger,* Appellant's case must be reversed based on these virtually identical facts.

People v. Frazier (2001) 89 Cal.App.4th 30, is another predisposition instruction case in which the court found that the weakness of the prosecution case was one reason reversal was required. In *Frazier*, two juries heard evidence against the defendant. In one case, the jury deliberated for two days and hung. In another trial, the jury deliberated for three days, and reheard testimony, then hung. At a third trial, Frazier was convicted after the jury deliberated for 80 minutes. The only difference between the trials: in the third and last trial, the jury was given the predispostion instruction. In the first two, it was not given. (89 Cal.App.4th at p. 37.)

The Attorney General argued that other instructions filled in the elements omitted from the predisposition instruction. The *Frazier* court rejected these arguments, precisely because a jury might be tempted to take the short cut to conviction permitted by the predisposition instruction. 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.]

(89 Cal.App.4th at p. 37.)

In this case, the underlying offense evidence was weak and hotly disputed, as discussed earlier in this brief. Appellant incorporates those discussions of the evidence, as well as that included in the Opening Brief, by reference.

2. The Prosecutor's Argument Exacerbated the Effect of the Instructional Error

Yet another factor which contributes to reversal in predisposition cases is prosecutorial argument which exacerbates the effect of the instruction. The prosecutor's argument in Appellant's case took great advantage of the predisposition instruction and emphasized that the jurors could decide Appellant was guilty based solely on that evidence. 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, 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.)

In *People v. James, supra,* 81 Cal.App.4th at p. 1346, the court stated:

> "We hold the instructions violated due process by increasing the likelihood the jury would misuse evidence of prior offenses, opening the door to conviction based merely on

> propensity. Propensity evidence tends to be highly persuasive. By itself, however, it can never prove guilt. Suggesting that the jury can base its verdict directly on an inference from propensity undermines the state's obligation to prove every element of the charged offense. The error is compounded, and the state's burden of proving guilt beyond a reasonable doubt is further obscured, when the jury is told the prior offenses may be established by a preponderance of the evidence."

In *People v. Younger, supra,* 84 Cal.App.4th at pp. 1383-1384, the court discussed the prosecutor's argument, which was very similar to the argument given in Appellant's case:

> "There was certainly other evidence in the record supporting a finding of guilt. However, we cannot assume the jury rested its verdict on that evidence. We must ask whether the evidence was so overwhelming, or otherwise so inconsistent with the possibility that the jury based its decision merely on Younger's propensity, as to leave it beyond a reasonable doubt that the same verdict would have been reached in the absence of the faulty instruction. (*People v. James, supra,* 81 Cal.App.4th at pp. 1362-1363; *Yates v. Evatt, supra,* 500 U.S. 391, 404-405.) Our conclusion that there is such reasonable doubt is reinforced by the prosecutor's use of the instruction in her closing arguments. (See *People v. James, supra,* 81 Cal.App,4th at pp. 1364-1365, fn. 10) [closing argument cannot cure error in instruction but may exacerbate it].)
>
> "The prosecutor characterized the testimony on Younger's domestic violence as a category of evidence that would tell the jury 'why he murdered Heather Moore, how he murdered Heather Moore, that in fact it was murder.' She reiterated the terms of the instruction permitting the jury to infer from Younger's abuse of Sutton, Taylor, and Heather that he was likely to commit and did commit murder, which the prosecutor described as "the ultimate act of domestic violence.' She suggested that 'even though we don't know exactly how Mr. Younger accomplished murdering Heather Moore,' the nature of his prior assaults indicated he could have smothered Heather on the bed, or surprised her from behind and strangled

her. The prosecutor discussed the domestic violence at length, especially the prior assaults against Heather. She reminded the jury again that "you can infer from these assaults, just as the instruction says, you can infer that Mr. Younger has a disposition to commit violence, domestic violence. And you can then infer that he was likely and did commit the crime [with] which he's charged; that is, murder.' The prosecutor also told the jury that she did not have to answer the question how Younger actually killed Heather, '[b]ut certainly his past behavior and his past assaults tell you that he certainly knew how to do this, and was very capable of violence."

The court went on to find that the prosecutorial argument contributed to an improper finding of guilt.

"The jury was invited *as a matter of law* to find Younger guilty based on his past offenses. The prosecutor cannot be blamed for taking advantage of the instruction, but her arguments did tend to encourage the jury to substitute proof of the prior offenses for crucial missing elements in the proof specific to the charged offense. The method of killing is not an element of murder, but when the physical evidence supports a finding of suicide as strongly as it did in this case, method is obviously a significant consideration in resolving whether there was an unlawful killing. If the jury concluded it need not decide how Younger murdered Heather, because the ultimate question was resolved by the prior offense evidence, Younger was improperly convicted."

(84 Cal.App.4th at p.1385.)

People v. Frazier, supra, 89 Cal.App.4th at 39, also relied on the prosecutor's closing argument in finding reversible error in connection with the predisposition instruction:

"For example, the prosecutor told the jury: 'And then, for the disposition to commit sex acts, that's another thing that you're going to be instructed on... What that's referring to is basically that he's done this before, he had touched somebody or molested somebody or violated somebody in a sexual way, *so*

> *he did it this time*. And the law says that's something that you can look at and you can use to for that direct purpose. For the direct purpose to say *because he's done it before, he's done it this time*. And ladies and gentlemen, where there's smoke, there's fire. It's true. It's happened over and over again because the defendant is the type of person that doesn't draw that line... He crosses that line. And it's time for it to stop."

These arguments are very similar to those made by the prosecutor in Appellant's case, and like *Frazier*, constitute yet another reason that reversal is required in this case.

Even the cases Respondent has relied upon to support affirmance recognize that prosecutorial argument with respect to the predisposition instruction could exacerbate the error. See *People v. O'Neal* (2000) 78 Cal.App.4th 1065, 1079 [finding that prosecutor did not make any argument that the prior sex offense could constitute proof beyond a reasonable doubt of the present offense; therefore, no error shown]; *People v. James, supra,* 81 Cal.App.4th at p. 1364-1365 [prosecutor did not argue the improper inference to the jury.]

Respondent's argument that the additional general instructions cured all ills must be rejected by this Court. Under the *per se* standard of review, Appellant need not prove the error was harmless to obtain a reversal. It is enough that the unconstitutional instruction was given. Under this standard, reversal is mandatory.

Under the *Yates/Chapman* standard, the issue is whether the force of the evidence considered by the jury in accordance with its instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. That cannot be said here. Appellant would likely never have been charged in this case in the absence of his prior convictions. The

remainder of the prosecution case was built on weak, circumstantial evidence. It proved that Monique was a victim of a homicide, but it did not prove Appellant was the perpetrator. The evidence was underwhelming. The jury deliberated over four diffent days and specifically asked about significant, disputed evidence: testimony about whether Monique had been in the front of Appellant's car; about the forensic testimony concerning the fluid found on the trunk lid of Appellant's car; and about the expert testimony concerning maggots.[14] The jury struggled with the evidence of the underlying crime over several days. Under these circumstances, this Court must find that the same result would not have been reached in the absence of the predisposition instruction, and reverse Appellant's conviction.

IV

THE INTRODUCTION OF INADMISSIBLE, ACCUSATORY HEARSAY CONSTITUTED PREJUDICIAL, REVERSIBLE ERROR

In the Opening Brief, Appellant argued that the trial court improperly admitted the testimony of Sara Minor, a friend of Monique Arroyo, regarding a hearsay allegation by Monique that Appellant had improperly touched her. Appellant argued that there was no proof Monique was "excited" or made the statement spontaneously while still under the influence of a startling incident. Appellant also argued the hearsay statements were not admissible under the fresh complaint doctrine, or pursuant to Evidence Code sections 1101 or 1108. Finally, Appellant argued the admission of the testimony violated the Sixth, Eighth and Fourteenth Amendments, and that its admission was so prejudicial as to require reversal. (Appellant's Opening Brief, at pp. 102-119.)

Respondent contends that the testimony was properly admitted either

---

[14] See Argument IV, below, which is incorporated by reference.

under the spontaneous statement or fresh complaint exceptions to the hearsay rule. (Respondent's Brief, at pp. 66-79.) Respondent also asserts the testimony was admissible pursuant to Evidence Code sections 1108 and 1101(b). In any event, Respondent asserts, even if improperly admitted, any error was harmless. (Respondent's Brief, at pp. 102-119.)

A. Hearsay Testimony Was Improperly Admitted Because There Was No Evidence That The Statement Was Spontaneous, Nor That It Was Made Immediately After Any Alleged Incident

A hearing was held pursuant to Evidence Code section 402 to determine the admissibility of Minor's testimony. The prosecutor's main argument for admissibility was that Monique's statements qualified for admission because they were spontaneous statements or excited utterances. Although his ruling is not entirely clear, it appears the trial court admitted the statements as excited utterances. (7 RT 1721.)

At the 402 hearing, the prosecutor told the trial judge that Sara Minor would testify that she spoke to Monique about a week before she disappeared, that Monique was crying and told her that Appellant "had basically molested her and that she was scared of him, that he had touched her private parts, breasts and basically, grabbed her." (7 RT 1705.) In response to appellant's objection to its admission as a spontaneous utterance, the prosecutor represented to the court that Minor would testify that Monique said that the conduct occurred on the same day as the telephone call she had with Monique, about a week before Monique disappeared. Respondent echoes this representation, asserting in its Statement of Facts that Monique told Sara that her uncle had been up to her room and touched her chest and grabbed her crotch *earlier that day.*" (Respondent's Brief, at p. 12.)

The court stated that under section 352, that the probative value of the evidence would "certainly not" be outweighed by undue consumption of time, nor would the evidence confuse or mislead the jury. The court appeared to find there would be no undue prejudice, and therefore the evidence would be admitted based on what he had heard. (7 RT 1713.) But what the judge heard at the402 hearing and what was presented to the jury was not what the prosecutor represented.

The testimony the prosecutor elicited from Minor at the 402 hearing did not support her offer of proof on when, if at all, Monique said that the conduct occurred. The prosecutor's direct examination established that Sara Minor spoke to Monique "almost every day," and that they had a conversation about a week before Monique disappeared. During that conversation, Ms. Minor testified that Monique, "[t]old me that she felt uncomfortable around her uncle because he would, like, touch her." She described Monique as "holding back tears" while they were talking. (7 RT 1717-1718.) Ms. Minor testified that Monique said it was her uncle Eloy.

Significantly, during the 402 hearing, Minor was not asked and did not testify about when Monique said the alleged touching occurred. In the absence of that evidence, there was no basis on which the court could conclude that Monique was "still 'under the stress of excitement caused by' the exciting event" when she spoke to Minor (*In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1130) and the trial court erred in admitting it on that basis.

Moreover, Respondent's assertion about when this event might have occurred is at odds with testimony of Monique's brother, Joey. This testimony was presented by the prosecution prior to the 402 hearing. Joey testified that Appellant had not been at the house for a month and a half

before he came to help with the sprinkler system. (5 RT 1107.) This testimony was presented well in advance of the Sara Minor 402 hearing and conflicted with the prosecution's main assertion: that Appellant was molesting Monique in the days just before she disappeared.

Nothing in Minor's subsequent testimony in front of the jury provided the factual foundation necessary to satisfy Evidence Code section 1240. Minor testified 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.[15] Monique was "crying, but not heavily". She testified that, "You could just hear her trying to hold back tears." (7 RT 1725.)

When she testified in front of the jury, Sara Minor stated Monique told her she was afraid of her uncle because of this behavior. Monique also asked Ms. Minor not to tell anyone about what she had confided. (7 RT 1723-1726.) She told Monique her uncle had touched her the week before their phone conversation. (7 RT 1729-30.)

Sara Minor never testified that Monique said that Appellant had touched her the day of their conversation, as Respondent has asserted.[16]

---

[15] There was no mention in Minor's statement to the police describing the telephone conversation regarding Appellant "sneaking up to" Monique's room. (7 RT 1726-1727.)

[16] See Respondent's Brief, at p. 12: "A week before Monique disappeared, Monique told her friend Sara M. That she was afraid of appellant because he had "sneak[ed]" up to her room and touched her chest

(continued...)

Her testimony was:

Q (by defense counsel): Did she tell you that had happened a week before or that it happened sometime previous to that?

A: What are you talking about?

Q: When she said that he would touch her?

A: It was the week before.

Q: Did she tell you he had been there that day?

A: Yeah. (7 RT 1729)

On re-direct examination, she was asked:

Q (by prosecutor): 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.)

Sara Minor's "feeling" that the conduct happened that day does not prove anything. She never testified that Monique said she had been touched that day. In fact, she testified that Monique told her she had been touched a week earlier.

A recent decision of this Court demonstrates that the trial court erred when it admitted Sara Minor's testimony, in the absence of any evidence that the statement described an event immediately preceding it. In *People v. Gutierrez* (2009) 45 Cal.4th 789, 808-814, a capital murder case, this Court found that an out-of-court statement of the victim's son to family members was inadmissible as a spontaneous declaration. In *Gutierrez*, the defendant's former girlfriend was the victim of a homicide. The defendant

---

[16](...continued)
and "grab[bed] her crotch" earlier in the day." Respondent has plainly overstated the testimony at trial.

was charged with her first degree murder, as well as another first degree murder, and other charges not relevant to this discussion. At trial, evidence showed that the former girlfriend's homicide was the result of a dispute between her and the defendant concerning their three year old son.

About two months after his mother's death, the three year old son made statements to a family member that, "I am going to untie my mommy." He also said, "[h]is daddy and his mean friend tied up his mommy." The child cried when he made this statement and made other angry gestures. The family member reported this information to an investigating officer two days later. (45 Cal.4th at p. 808.)

Defense counsel objected to the admission of these statements as hearsay. The court overruled the objection and found it admissible under the spontaneous statement exception to the hearsay rule. (45 Cal.4th at p. 809.)[17]

This Court held the statements inadmissible. The Court stated, at 45 Cal.4th at pp. 810-811:

> Here, defendant argues that the child's statement did not satisfy the requirements of a spontaneous declaration because the child's ability to reflect and fabricate had returned by the time he made the statement, and the statement failed to

---

[17] In *Gutierrez*, this Court reached the merits of federal constitutional objections to the admission of the hearsay evidence on appeal even though trial counsel only made a general hearsay objection. The Court found that Appellant's claims that the admission of the hearsay evidence violated his right to a fair trial, right to confront witnesses under the Sixth Amendment and his right to due process under the Fourteenth Amendment were not forfeited. (45 Cal.4th at p. 809.) Respondent has raised the same bar to Appellant's claim of federal constitutional error here. (Respondent's Brief, at pp. 76-77.) Based on *Gutierrez*, this Court should also reach the merits of Appellant's federal constitutional objections to the admission of this evidence.

> describe the event immediately preceding it. We agree. The word "spontaneous" as used in Evidence Code section 1240 means " actions undertaken without deliberation or reflection.... [T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*People v. Farmer* (1989) 47 Cal.3d 888, 903, 254 Cal.Rptr.2d. 508, 765 P.2d 940, overruled on another point in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6, 94 Cal Rptr.2d 396, 966 P.2d 46.)

This Court emphasized that the crucial element in determining whether an out-of-court statement is admissible as a spontaneous statement is the mental state of the speaker.

> "The nature of the utterance-how long it was made after the startling incident and whether the speaker blurted it out, for example-may be important, but solely as an indicator of the mental state of the declarant." (*People v. Farmer, supra,* 47 Cal.3d at pp. 903-904.)

(45 Cal.4th at p. 811.)

In *Gutierrez*, physical evidence of the event about which the declarant complained was discovered, and there was demonstrable, visual proof of the declarant's emotional excitement or distress, all of which are lacking in Appellant's case. In holding that the statement was nonetheless inadmissible, the Court cited with approval *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1130, in which the Court of Appeal held that the out-of-court statement of a three-year-old girl stating that her father had sexually abused her one- to- two months earlier was not admissible as a spontaneous statement because the victim was not "still 'under the stress of excitement caused by' the exciting event, in this case the acts of sexual abuse." (Fn. omitted, disapproved on other

grounds by *People v. Brown* (2003) 31 Cal.4th 518, 3 Cal.Rptr.3d 145, 73 P.3d 1137.)

The court observed:

> "Frequently, statements are ruled inadmissible under this exception even though uttered only a few minutes after the exciting event. [Citations.] Substantially longer delays have been tolerated when the declarant was unconscious. [Citation.] *Nonetheless, nothing in the cases or underlying theory of the 'spontaneous exclamation' exception would suggesst the necessary level of psychological stress could be sustained for even a few hours* to say nothing of the weeks and months involved in this case."(In *In re Cheryl H., supra*, 153 Cal.App.3d at p.1130, 200 Cal.Rptr. 789, fn. omitted.)

(*People v. Gutierrez, supra,* 45 Cal.4th at p. 811; emphasis added.)

Gutierrez confirms that spontaneity is the linchpin of admissibility under Section 1240.

Additionally, in *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1290-1291, reversible error was found where, in admitting a spontaneous statement, the trial court speculated about the event that had been described; when the event occurred; and whether the declarant was still under the effects of the alleged event at the time the statements were made. The trial judge here made the same errors, and those errors should have the same result in this case.

In *People v. Ramirez* (2007) 143 Cal.App.4th 1512, 1522-1526, a case decided since the Opening Brief was filed, the court held that the trial court improperly admitted testimony under the spontaneous statement exception to the hearsay rule. In *Ramirez,* the teenage victim was sexually assaulted at a hotel one night. She ultimately blacked out and awoke in an unfamiliar house. The victim told several women at the house that she had been assaulted. She then walked to the hotel where the incident occurred

and made similar statements to a clerk there. She was bleeding and had obviously recently been injured. The appellate court found the trial court erred in admitting the victim's statements under the spontaneous statements hearsay exception, because the narrative style and content of the victim's statements suggested they were made after deliberation and reflection. Additionally, the victim told her friends that she was worried about what her brother would do if he found out about what had happened.

Similarly, Monique refused to answer Sara Minor's initial questions about what was bothering her. She also insisted that Minor not tell anyone about their conversation. These comments demonstrate Monique's reflection and consideration about the remarks she made and how they would be perceived by others, just as in *Ramirez*. And like *Ramirez*, this Court should find the hearsay evidence improperly admitted.

Gutierrez discussed and rejected the applicability of a number of authorities upon which Respondent has relied in finding the hearsay inadmissible. The main cases Respondent relies upon with respect to this aspect of admissibility are: *People v. Morrison* (2004) 34 Cal.4th 698, 718; *People v. Poggi* (1988) 45 Cal.3d 306, 318; *People v. Farmer* (1989) 47 Cal.3d 888, 903, disapproved on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724); *People v. Trimble* (1992) 5 Cal.App.4th 1225; *People v. Raley* (1992) 2 Cal.4th 870, 893, quoting *People v. Washington* (1969) 71 Cal.2d 1170, 1176.) (Respondent's Brief, at pp. 66-71.) The cases cited by Respondent in support of admissibility and rejected as inapposite by *Gutierrez* should also be found inapplicable to Appellant's case.

Respondent claims that Monique's statements were admissible because they were "made under the immediate influence of stress caused by the event." Respondent also asserts that, "Monique cried as she told Sara

that appellant had touched her chest and grabbed her crotch before Sara called." (Respondent's Brief, at p. 69.) This factual assertion allegedly proves that Monique was "unquestionably under the stress of the event when she made the statement," and that the statement was made "without deliberation or reflection." (quoting *People v. Morrison, supra,* 34 Cal.4th at p. 718; and *People v. Farmer, supra,* 47 Cal.3d at p. 903.) (Respondent's Brief, at p. 69.)

First of all, there is absolutely no proof other than Minor's hearsay testimony that there was "an event".[1818] Secondly, even assuming there was "an event", there is no absolutely no evidence that it happened right "before Sara called". Thirdly, there is no evidence that Monique was sufficiently "excited" nor that her statement was truly spontaneous.[1919] Consequently, there is no proof that Monique was then "under the stress of the event", and "made the statement without deliberation or reflection."

The facts of the cases cited by Respondent (Respondent's Brief, at pp. 66-71) differ in dispositive ways from the situation presented in

---

[18] Indeed, a number of jurisdictions preclude admissibility of spontaneous statements in absence of any evidence that the underlying event which caused the excitement actually occurred. (See *Commonwealth v. Barnes* (1983) 310 Pa.Super. 480, 456 A.2d 1037; *People v. Leonard* (1980) 83 Ill.2d 411, Ill.Dec. 353, 415 N.E.2d 358, aff'g 80 Ill.App.3d 741, 36 Ill.Dec. 148, 400 N.E.2d 568; *Brown v. United States* (1945) 80 U.S. App.D.C. 270, 152 F.2d 138; *State v. Terry* (1974) 10 Wash.App.874, 520 P.2d 1397.

[19] Trial testimony that witness sounded "kind of nervous, scared like", was insufficient to show that her statement was "the instinctive and uninhibited expression of the speaker's actual impressions and belief." (*People v. Farmer, supra*, 47 Cal.3d at p. 903; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1290-1291; quoted in *People v. Hines* (1997) 15 Cal.4th 997, at p. 1034 n. 4.)

Gutierrez and the facts of Appellant's case. In all of these cases, there was proof that the startling event had in fact occurred, in addition to and independent of the substance of the hearsay statement.

For example, in *People v. Trimble* (1992) 5 Cal.App.4th 1225 , the young child who uttered the spontaneous statement had in fact observed an event that was later verified to be true: the homicide of her mother. It was proven that she had been alone with the perpetrator for an extended period of time. As soon as she had access to a trusted family member and adult, she made a "completely hysterical" statement, while in a "state of extreme agitation" (5 Cal.App.4th at p. 1235), about the circumstances of her mother's death. The declarant daughter had personally observed these events, which were later confirmed by the recovery of her mother's body. As the court described, "The appearance of Corinne and Mrs. Lods, followed by the departure of appellant, was a triggering event, startling enough to provoke an immediate, unsolicited, emotional outpouring of previously withheld emotions and utterances." [citation omitted.] (*Trimble, supra,* 5 Cal.App.4th at p. 1235.

The *Trimble* court noted several foundational requirements which must be met before a spontaneous statement may be admitted, none of which were met with respect to the Minor hearsay testimony:

> "Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance."* [emphasis in original.] (*People v. Poggi, supra,* 45 Cal.3d 306, 319; quoting from *People v. Washington* (1969) 71 Cal2d 1170, 1176 [footnote omitted]." .

(*Trimble*, 5 Cal.App.4th at p. 1234.)

The *Trimble* court also quoted *People v. Farmer, supra,* one of the other cases upon which Respondent relies:

> "A spontaneous utterance within the meaning of section 1240 is one which is undertaken without deliberation or reflection." (*People v. Farmer* (1989) 47 Cal.3d 888, 903 [additional citation omitted].)
>
> "The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is thus not the nature of the statement but the mental state of the speaker. The nature of the utterance - how long it was made after the startling incident and whether the speaker blurted it out, for example, - may be important, but solely as an indicator of the mental state of the declarant. (*People v. Farmer, supra,* at pp. 903-904.)

(*Trimble, supra,* at pp. 1234-1235.)

Thus, the testimony in *Trimble* met the necessary requirements to overcome a hearsay objection: it was an agitated, hysterical statement, about a later proved homicide, made to the first trusted adult with whom a particularly youthful declarant came into contact. Nothing of the sort occurred in this case.

Respondent's reliance on *People v. Morrison* (2004) 34 Cal.4th 698, does not buttress his argument. The spontaneous statements found admissible in *Morrison* were given by the declarant to a police officer who arrived on the crime scene where the declarant had just been shot and appeared to be on the verge of death. The statements identified the assailants. This Court recognized that statements "purporting to name or otherwise identify the perpetrator of a crime may be admissible where the declarant was the victim of the crime and made the remarks while under the stress of excitement caused by experiencing the crime." (*Id.,* at p. 700.)

Morrison cites additional cases which found statements admissible

as spontaneous because they were made just moments after a startling event, the occurrence of which was obvious. (See, e.g., *People v. Farmer* (1989) 47 Cal.3d 888, 904-905 [statements of shooting victim in response to questioning of police dispatcher and officer at the scene helped describe the crime by identifying the perpetrator]; *People v. Anthony O.* (1992) 5 Cal.App.4th 428, 433 [seconds after shooting, victim stated to police officer, " 'I just been shot. You got the wrong car. It was Sharky from El Sereno.' "]; *In re Damon H.* (1985) 165 Cal.App.3d 471, 474, 476 [in response to his mother's question why his buttocks hurt, crying minor stated, " '[b]ecause Damon put his weenie in my butt' "]; *People v. Jones* (1984) 155 Cal.App.3d 653, 659-662 [when a treating physician asked a burn victim, 30-40 minutes after his injury, what had happened, victim responded that the person " 'I live with threw gasoline on me' "].) (*Morrison, supra,* 34 Cal.4th at p. 700.)

Similarly, in *People v. Poggi* (1988) 45 Cal3d 306, 315-320, this Court upheld the admission of a spontaneous statement made by a crime victim to a police officer who arrived the victim's house and found her bloodied and severely wounded. The victim was worried the assailant might still be in the house. This Court found the statements were made while the victim was still under the influence of the attack, and were therefore made before there was time to contrive or misrepresent.

In *People v. Raley* (1992) 2 Cal.4th 870, 891-894, this Court found that the trial court properly admitted statements made by a sexual assault victim found in a ravine by a passing motorist. This Court found that although the statements were made nearly 20 hours after the victim was attacked, the were still spontaneous because the victim had been unconscious and bleeding, and was near death. This Court found that the

victim's physical condition was such that it would inhibit deliberation. This Court also noted that the victim was quite distraught when she made the statements.

A similar fact situation was presented in *People v. Washington* (1969) 71 Cal.2d 1170, 1176-1177. This Court ruled that statements made by a crime victim to a hospital nurse were properly admitted as spontaneous statements. The victim had been robbed and brutally beaten, and was taken to a hospital. The victim was unconscious when he was admitted. When he did regain consciousness, a nurse asked what happened to him. His responses to the nurse's questions were found to be admissible.

Finally, Respondent also relies upon *People v. Brown* (2003) 31 Cal.4th 518, 541-542, in support of the argument that these statements were admissible due to their spontaneity. (Respondent's Brief, at p. 70.) *Brown,* however, falls into the same category as Respondent's other inapposite cases. There, the declarant was observed while making the disputed statements. He was crying and shaking, and was so visibly upset by the events he perceived, that "he could not stop his body from shaking nor stem the flow of tears." (*Brown, supra,* 31 Cal.4th at p. 541.) This declarant's visible behavior is a long, decisive way from what Sara Minor was able to discern during her phone call with Monique.

In each of these cases, proof of the startling event was evident. The spontaneous statements were made immediately after the event, or just after a period of unconsciousness, before there was time for the speaker to misrepresent or contrive. The facts of these cases demonstrate a clear connection between a demonstrable startling event and corresponding excited statement. Neither exist with respect to Monique's statements in this case. There is no independent evidence that Appellant did touch Monique.

There is no evidence that Appellant had just been or was in Monique's house at the time she made these comments.

The fact that Monique might have been crying while speaking to Sara Minor does not prove that her "reflective powers were in abeyance." If that were true, any comment made by someone who was crying would qualify for admission. But as this Court has found, testimony that witnesses sounded "kind of nervous, scared like," is insufficient to show that a statement is "the instinctive and uninhibited expression of the speaker's actual impressions and belief."[20] (*People v. Farmer, supra*, 47 Cal.3d at p. 90; see also *People v. Perch, supra,* 229 Cal.App.3d at pp. 1290-1291, quoted in *People v.* Hines (1997) 15 Cal.4th 997, 1034 n. 4.) Monique's telephonic comments simply did not prove that an "exciting" event had just occurred nor did they reflect the level of excitement or hysteria present in any of the cases in which admission was deemed proper.

The evidence before the court in the 402 hearing did not support admissibility. The facts presented at trial did not provide any additional support for admitted Monique's accusation. Under these circumstances, this testimony should not have been admitted under Evidence Code section 1240.

B. Monique's Statements Were Not Admissible Under the Fresh Complaint Doctrine

Respondent argues that the Minor testimony was properly admitted under the fresh complaint doctrine for two reasons. First, Respondent argues, it was properly admitted "on the issue of whether the murder was

---

[20] Respondent's further attempt to support admissibility by characterizing Minor's call as "unexpected" is contradicted by Minor's testimony that she and Monique spoke "almost every day." (7 RT 1717.)

committed during the commission of a lewd and lascivious act on a child under the age of 14 years." (Respondent's Brief, at p. 72.) No authority or explanation is provided for this proposition, which is clearly wrong.

As this court explained in *People v. Brown, supra,*

> "[P]roof of an extrajudicial complaint, made by the victim of a sexual assault disclosing the alleged assault, may be admissible for a *limited nonhearsay purpose* – namely, to establish the fact of, and the circumstances surrounding, the victim's disclosure of the assault to others – whenever the fact that the disclosure was made and the circumstances under which it was made are relevant to the trier of fact's determination as to whether the offense occurred."

(*People v. Brown, supra,* 8 Cal.4th at 749-750.) Evidence of a fresh complaint is relevant to negate the inference that a failure to complain means the charged crime did not occur, "as long as the evidence is admi[tted] for a nonhearsay purpose" (*id.* at p. 759), not to prove the truth of the matter asserted. Because the "fresh complaint" was about an alleged prior act, it could not assist the jury in determining whether the charged acts occurred.[2121] Therefore, under Respondent's theory, Monique's hearsay statements would have to be admitted for their truth to be relevant to the issue whether the murder was committed during a lewd and lascivious act.

Secondly, Respondent argues that the evidence was properly admitted as a fresh complaint because it was "limited to the fact that Monique complained that appellant sexually touched her a week before the

---

[21] The trial court recognized that this case was different from the ones cited by the prosecutor "[b]ecause most of the cited cases have to do with fresh complaint leading to charges of a victim being subjected to lewd and lascivious acts and/or sexual molestations, et cetera, and those leading to charges, as opposed to this case, something leading to a more serious charge. (7 RT 1708.)

incident." (Respondent's Brief, at p. 72.)

This is simply untrue. Sara Minor testified about the graphic details concerning Appellant's alleged grabbing of Monique's private parts. Another "detail" was that Appellant had "sneaked up" to Monique's room in the past, a detail which was not included in Minor's statement to the police concerning the call (7 RT 1726-1727), and of which there was no other evidence. Respondent's argument fails because the testimony went beyond the existence of a complaint.

A final problem is the use to which this evidence was put. Fresh complaint evidence is only admissible to how that a complaint was made, not to prove the matter stated. (*In re Daniel Z., supra,* 10 Cal.App. 4th at p. 1022.) In this case, Sara Minor's testimony was used to establish the substantive fact that Appellant had previously committed a lewd and lascivious act against Monique, and as circumstantial proof of the special circumstance in this case. (10 RT 2196, 2200, 2214.]) No proper limiting instruction was given.[22] Indeed, the instructions explicitly authorized the jury to consider the substance of Monique's hearsay statement as proof of the charged offense:

> Evidence has been introduced for the purpose of showing lewd or lascivious acts between the defendant and the alleged victim on one or more occasions other than that charged in this case.
>
> If you believe the evidence, you may use it only for the limited purpose of tending to show defendant's lewd dispositions or intent

---

[22]As this Court has recognized, if the details of an extrajudicial complaint are admitted, 'even with a proper limiting instruction, a jury may well find it difficult not to view those details as tending to prove the truth of the underlying charge of sexual assault, thereby converting the victim's statement into a hearsay assertion." (*People v. Brown, supra*, 8 Cal.4th at p. 763.)

toward the child.

You must not consider that evidence for any other purpose." (3 CT 601.) Other instructions reinforced the prosecutor's argument that the victim's hearsay statement should be considered as proof of a prior lewd act by Appellant. In fact, the prosecutor told the trial court, during the instructions' conference, that this was so. (9 RT 2167-2168.) The prosecutor also relied on this evidence during closing argument to prove that Appellant had previously committed a lewd and lascivious act upon Monique. (10 RT 2200).

As Respondent's own brief establishes, Sara Minor's testimony went well beyond that permitted under the fresh complaint doctrine. Because the details of Monique's statements were inadmissible under that theory, Sara Minor's testimony could not have properly been put before the jury on that legal basis. (*People v. Brown*, *supra,* 8 Cal.4th at pp. 749-750.)

Respondent contends that Minor's testimony was admissible under both Evidence Code sections 1101 and 1108. In making these arguments, Respondent has conflated relevance and admissibility under the rules of evidence. Sections 1101 and 1108 do not provide a separate basis for admission if Monique's hearsay statement did not meet the criteria for an excited utterance under Section 1240. Appellant does not agree that Minor's testimony was relevant under either section, but even if it was, relevance does not trump the fact that it was inadmissible hearsay.

//

//

D. Sara Minor's Testimony Was Inadmissible Under Both Evidence Code Sections 1108 and 1101

1. The People's Failure to Seek Admission Under 1108 At Trial Prevents Respondent From Doing So on Appeal

The trial prosecutor never mentioned section 1108 as a basis for admitting Sara Minor's testimony. The prosecutor stated, "So based on the fresh complaint, as well as the separate doctrine of 1240, excited utterance, I think that the evidence should come in." (7 RT 1712.) The only legal theories of admissibility mentioned were the fresh complaint and spontaneous statement exceptions to the hearsay rule. (7 RT 1704-1713.)

Respondent is precluded from arguing a theory of admissibility on appeal that was not presented to the trial court below. (*People v. Hines* (1997) 15 Cal.4th 997.) In *Hines,* the Court stated:

> "The Attorney General challenges the propriety of the trial court's ruling that the statement was inadmissible. He contends that the statement was admissible either as a spontaneous declaration (Evidence Code section 1240) or as a contemporaneous statement to explain the conduct of Donna Roberts. (Evidence Code section 1241). Because the prosecutor did not attempt to justify admission of the statement on either of these grounds, the Attorney General may not now assert them as a basis for challenging the trial court's ruling excluding the statement. (*People v. Fauber* (1992) 2 Cal.4th 792, 854, 9 Cal.Rptr.2d 24, 831 P.2d 249; *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640, 108 Cal.Rptr. 585, 511 P.2d 33.)

Hines, supra, 15 Cal.4th at p. 1034, fn. 4.)

The People's failure to seek admissibility below based on section 1108 bars them from arguing that admission was proper on that basis on appeal.

2. Appellant's 1108 Objections Were Preserved

Contrary to Respondent's assertion that there was no objection below to 1108 evidence (Respondent's Brief, at p. 74), trial counsel in fact objected to the admissibility of 1108 evidence throughout the proceedings below. (2 CT 409-413; 1 RT 400-405; 6 RT 1406-1407; 7 RT 1467-1468; 3 CT 686-690 [Motion for New Trial].) Respondent does not contest the fact that the prosecution failed to give the statutorily required pre-trial notice of its intent to admit Sara Minor's testimony as 1108 evidence.[23] Obviously, the defense could not object to Sara Minor's testimony pretrial because he had no notice that the prosecutor was going to seek its admission as 1108 evidence. Under these circumstances, trial counsel's failure to include Minor's testimony in his objections to the admissibility of the 1108 evidence cannot reasonably be deemed a forfeiture of the issue.

When the prosecutor sought to introduce Sara Minor's testimony, she made a distinction between admissibility based on excited utterance and fresh complaint and the section 1108 evidence. She said, "So this – even without the vaginal trauma, this would come – this type of evidence, if we simply had a nude body of a young female found in a vacant lot with her comforter wrapped around her, it would come in for that reason, to show how that came about, *along with the 1108 evidence*." [emphasis added.] (7

---

[23] The prosecutor's Notice of Intent to Introduce Evidence of Another Sexual Offense by Defendant pursuant to Evidence Code Section 1108 was limited to evidence of the November 10, 1980, sexual assault against Lillian Ber, and the March 24, 1975, sexual assault of Ramona Munoz. The notice said nothing about Sara Minor's testimony. (1 CT 314.) Nor did the prosecutor mention that testimony at the hearing on the admissibility of 1108 evidence held just before the trial began. (1 RT 400-407.)

RT 1711.)

When the 1108 instructions were discussed, the prosecutor finally came up with the 1108 theory of admissibility for the Minor testimony. (9 RT 2165.) Defense counsel plainly objected to the all proposed 1108 instructions, including those referring to Sara Minor. (9 RT 2164-2165, 2168.)[24]

Defense counsel plainly preserved all objections, including a 352 objection (7 RT 1710), to the admission of Sara Minor's testimony under these circumstances[25]. Respondent's suggestion otherwise should be rejected.

Moreover, in the Opening Brief, Appellant specifically noted that arguments made concerning section 1108 instructional error were included by reference in the section of the brief which addressed the Minor testimony. (Appellant's Opening Brief, at p. 111, fn. 23.)

3. The Evidence Was Inadmissible Under Section 1101

The prosecutor also failed to mention Evidence Code section 1101when she argued in favor of admitting Sara Minor's testimony. As a

---

[24] In referring to the predisposition instructions, defense counsel stated, "Again, for the record, I would object to either one of them, especially 2.50.01, based on 1108 evidence." (9 RT 2165.)

[25] In *People v. Reliford, supra,* 29 Cal.4th at p. 1013, fn. 1, this Court stated: "We are not presented with and do not decide whether the uncharged sex acts must be similar to the charged offense in order to support the inference." The inference referred to is that of predisposition. Appellant contends that his prior offenses differ greatly from those charged here, as he has stated throughout this brief. In any event, this issue need not be resolved in this case, as there are other more compelling and dispositive legal and factual reasons for not admitting the Minor testimony.

result, Respondent has forfeited this argument in the same manner as the 1108 argument in section 2, above, which is incorporated by reference.

Respondent again argues that Appellant forfeited the claim that this evidence was inadmissible under section 1101 because he failed to object on that ground below. (Respondent's Brief, at p. 75.) Once again, not so. Defense counsel filed a pre-trial Opposition to §1108 Evidence. (2 CT 409-413.) In that pleading, defense counsel cited *People v. Ewoldt* (1994) 7 Cal.4th 380, a seminal 1101(b) decision from this Court, in arguing against admissibility of prior sex offenses. Defense counsel plainly intended these arguments to apply to all prior sex offenses that the prosecution sought to admit against him at trial. Therefore, this argument has been preserved.

In any event, should this Court reach the 1101 argument, Respondent's arguments should still be rejected.

Both Appellant and Respondent agree that the *Ewoldt* decision is relevant to admissibility of this testimony.

In *Ewoldt,* the defendant was charged with having committed lewd acts with his step daughter, when she was under 14 years old and under 18 years old. Pursuant to section 1101(b), the trial court admitted testimony from the victim's older sister about uncharged sex acts the defendant had previously perpetrated upon her.

Ewoldt contains a lengthy discussion of admissibility of uncharged crimes under section 1101. As that decision notes, at p. 770: "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. (See *People v. Robbins*, *supra*, 45 Cal.3d 867, 880.)"[26] However, *Ewoldt* also notes that the trial court should

---

[26] The defense in this case was that Appellant was not the

(continued...)

consider the probative value of uncharged evidence testimony which is based solely on the uncorroborated testimony of the complaining witness in assessing admissibility under section 352. (*Ewoldt, supra,* at pp. 407-408, citing *People v. Stanley* (1967) 67 Cal.2d 812.)

"The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts." (*People v. Miller* (1990) 50 Cal.3d 954, 987.)

Although Respondent does not urge common scheme or plan as a basis for admissibility (Respondent's Brief, at 74), the evidence would not be admissible under that theory either. Early in the trial, the court found that Appellant's prior offenses were dissimilar to the fact situation presented in this case. The prosecutor wanted Monique's brother Garbiel to testify that he had seen Mr. Loy flirt with teenage girls who came to the house to visit Gabriel. She wanted to show that Appellant 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

---

[26](...continued)
perpetrator. Intent was an "issue" only in the sense that mens rea is an issue in every case.

> 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.)

The trial court ruled that any evidence of sexual interest in teenage girls was more prejudicial than probative under the facts of this case. The judge also implied that Appellant's alleged flirtations were simply not relevant to proving that he had a sexual interest in girls who were "30 years or so younger", as the prosecutor claimed. By analogy, the trial judge found the facts concerning Appellant's alleged involvement in Monique's death to be dissimilar from the other sexual offenses admitted at the guilt phase of the trial.

Sara Minor's second hand testimony of Monique's uncorroborated claims did not amount to to proof of signature type behavior by Appellant. There was no independent evidence that these events happened in the first place. There was no evidence about when these events were alleged to occur. Neither the trial testimony nor the 402 hearing testimony establish when these events supposedly occurred. Monique's allegations bore no factual similarity to the prior incidents about which Ramona Munoz and Lillian Segredo Ber testified. Indeed, their testimony undermines any claim of admissibility under signature theories.

For all of these reasons, Sara Minor's testimony was inadmissible

pursuant to section 1101(b).

4. The Admission of Sara Minor's Testimony Violated The Federal Constitution

In the Opening Brief, Appellant argued that the admission of Sara Minor's testimony also violated numerous federal constitutional rights. Appellant cited numerous cases in support of this argument. (AOB, at pp. 112-116.)

Respondent argues that Appellant's citations only address Sixth Amendment violations, and urges this Court to ignore any other purported constitutional violations as a result. (Respondent's Brief, at p. 76.)

Once again, not so. The cases cited by Appellant address not only the Sixth Amendment[27], but also discuss reliability concerns[28] implicated by the admission of improper hearsay. Since reliability is a key Eight Amendment consideration, that objection has also been preserved. Several of Appellant's cited cases also discuss due process and fundamental fairness protections provided by the Fourteenth Amendment[29]. An objection on this basis has also been preserved. Any claim otherwise amounts to factual and legal misdirection by Respondent.

Respondent also argues that Appellant's Sixth Amendment claim has been forfeited because trial counsel failed to raise it below. Not so, as Appellant has explained above. (*People v. Gutierrez, supra,* 50 Cal.4th at 809.)

In response to arguments in the Opening Brief, Respondent argues

---

[27] *Winzer v. Hall* (2007) 494 F.3d 1192.

[28] *Ohio v. Roberts* (1980) 448 U.S. 56.

[29] *Estelle v. McGuire* (1991) 502 U.S. 62; *Walters v. Maas* (9th Cir. 1995) 45 F.3d 1355, 1357.

that this Court may ignore *Winzer v. Hall, supra,* 494 F.3d 1192, because it does not constitute controlling authority. In *Winzer,* the Ninth Circuit held that the Confrontation Clause was violated when a California trial court admitted a hearsay testimony as a spontaneous statement during Winzer's trial for making terrorist threats to his girlfriend and her daughter. (494 F.3d at p.1200-1201.) As explained in the Opening Brief, the Ninth Circuit found prejudicial constitutional error in the admission of this evidence which tipped the scales against the defendant. Like the arguments Appellant has repeatedly advanced herein, the court found that significant time had elapsed between the alleged threats and the time when they were reported to police. The court found that bad feelings between the defendant and the declarant could well have motivated her claims about his alleged statements, thereby undermining admissibility pursuant to the spontaneous statement exception.

Respondent repeats the same litany of justifications that have appeared throughout the Respondent's Brief in support of admissibility. *Winzer* demonstrates that the admission of this evidence not only violated state law, but Appellant's Sixth Amendment confrontation rights as well. No argument of Respondent undermines the holding of *Winzer.* It is directly on point, and it demonstrates that both the facts and law require that this Court find this evidence to have been admitted in violation of the U.S. Constitution.

For all of these reasons, and those in the Opening Brief, this Court should find that Sara Minor's testimony was improperly admitted and find that the prosecutor's improper use of the evidence and the trial court's instructions sanctioning the prosecutor's arguments preclude a finding that the error was harmless.

IV

THE ADMISSION OF THE FAULKNER TESTIMONY VIOLATED THE CONFRONTATION CLAUSE BECAUSE IT WAS BASED UPON PHYSICAL EVIDENCE THE SOURCE OF WHICH WAS NEVER PROVEN

In the Opening Brief, Appellant argued that the trial court erred reversibly and prejudicially when it admitted the prosecution expert testimony of David Faulkner, an entomologist who was called to establish the date and time when Monique's body was left at the abandoned lot where it was recovered about a week after she disappeared. (Appellant's Opening Brief, at pp. 120-127.) Trial counsel objected to Faulkner's testimony on foundational grounds, and was overruled by the trial court. (8 RT 1774.)

This was a crucial issue in the case because Appellant was detained by law enforcement officials before 1:00 P.M. on May 9, the day Monique was reported missing. (8 RT 1913-1914.) If the body was placed in the lot after Appellant was detained, he could not have been the perpetrator. As a result, Faulkner's testimony was absolutely critical to the prosecution case against Appellant.

Respondent contends that Appellant's arguments amount to nothing more than evidentiary quibbling, and are easily resolved by reference to state authorities, citing *People v. Geier* (2007) 41 Cal.4th 555. Respondent also contends that Appellant forfeited his federal constitutional objections.[30]

---

[30] Respondent argues that Appellant has forfeited this argument by failing to object on this legal basis at trial. (Respondent's Brief, at pp. 84-85.) Respondent is wrong. An objection on these grounds would have been futile, because trial counsel could not have anticipated the sea change in the law presented by *Melendez-Diaz*. (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4.) [finding trial counsel's failure to object to object on Sixth

(continued...)

But *Geier* pre-dates the Supreme Court's decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527[31]. There, the Supreme Court held there that the Confrontation Clause of the Sixth Amendment was violated where certificates of laboratory analysis of drug evidence were admitted without requiring the in-court testimony of the analyst. The High Court's analysis in *Melendez-Diaz* undermines this Court's reasoning in *Geier* in several significant ways.[32]

In *Geier*, this Court exempted the authors of laboratory reports from cross-examination on the theory that scientific test results are intrinsically neutral and reliable, not accusatory. (*People v. Geier, supra,* 41 Cal.4th at p. 607.) But in *Melendez-Diaz, supra*, 129 S.Ct. at p. 2533, the Court held that the Confrontation Clause applies to all witnesses who testify against the defendant, not just to those who are accusatory. The Court rejected the proposition that evidence of scientific testing is inherently reliable:

---

[30](...continued)
Amendment grounds to sentence which violated Sixth Amendment was not forfeited because counsel could not have anticipated decision in *Cunningham v. California* (2007) 549 U.S. 270.)] Given the futility of such an objection at the time this case was tried, this Court must reach the merits of this argument.

[31] This Court has accepted a number of cases for review in light of the *Melendez-Diaz* decision. Appellant will submit supplemental briefing on this issue at the appropriate time, if necessary.

[32] The cases in which this Court has granted review in the wake of the *Melendez Diaz* decision are: *People v. Dungo*, No. S176886 [non-testifying pathologist]; *People v. Lopez*, No. S177046 [non-testifying criminalist]; *People v. Anunciation*, No. S179423 [non-testifying criminalist]; *People v. Gutierrez*, No. S176620 [non-testifying nurse practitioner and non-testifying criminalist]; *People v. Benitez*, No. S181137 [non-testifying criminalist].

"forensic evidence is not immune from the risk of manipulation" or incompetence, and cross-examination is the only means to ensure accurate forensic testimony. (*Id.* at pp. 2536-2537.)

The Supreme Court also held that courts should focus on whether the statements "'were made under circumstances which would lead an objective witness to reasonably believe that the statement would be available for use later at trial." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532.) This is inconsistent with *Geier's* conclusion that where a statement represents the contemporaneous recordation of observable events, it is not "testimonial" within the meaning of the Confrontation Clause. (*People v. Geier, supra,* 41 Cal.4th at pp. 606-607.)

Finally, the Supreme Court held that statements in official records produced for use at trial may not be admitted under the hearsay or public records exception without violating the Confrontation Clause. (*Melendez-Diaz, supra*, 129 S.Ct at pp. 2538-2540.) In contrast, *Geier* cited with approval case law from other states holding that forensic records are admissible as business records. (*People v. Geier, supra,* 41 Cal.4th at p.606.)

A review of Faulkner's testimony at Appellant's trial shows why *Melendez-Diaz* disposes of this issue in Appellant's favor. 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 in connection with Appellant's case. He first received the material in June of 1996. (8 RT 1776.)

He examined insects in three containers 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 received from Joseph Muto (an employee of the medical examiner) that the flies were collected and preserved on May 13 and May 14. (8 RT 1774, 1783.) Muto did not testify at trial.

Dr. Scheinin testified that she removed some maggots from the body on May 14, between 9:00 A.M. and noon, and sent these to Mr. Faulkner. (6 RT 1342-1343.) Faulkner's conclusions about when the body was placed in the lot were based upon the stage of development of the oldest maggots, those supposedly seized on May 13, not those taken during the autopsy by Dr. Scheinin. (8 RT 1772-1776, 1783, 1787.)

Faulkner concluded that the earliest time the flies were on the body was around 10:00 A.M. on May 9. The latest the flies 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 have been 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, however, did not match the first report he did

in the case, dated June 1995[33]. Faulkner testified the report he wrote was wrong. 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 arrived on the body sometime between 11:00 AM and 4:00 PM on May 10, well after the time Appellant was taken into custody. (8 RT 1801-1802, 1913-1914 .)

After he wrote the first report, Faulkner was subpoenaed by both the defense and the prosecution in this case. (8 RT 1815.) On November 6, 1998, Faulkner received a letter from the District Attorney which contained much more detail than the information Mr. Faulkner 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 admitted that he was originally due to testify on November 16, ten days after receiving the information from the prosecution, and he changed his report the very morning of the 16th. (8 RT 1803-1804.)

Faulkner also 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.)

---

[33] It appears that Faulkner meant June 1996. (8 RT 1777.)

In sum, Faulkner's initial report put Monique's body at the vacant lot at a time when Appellant was in custody. He changed his opinion nearly a year and a half later, on the morning he was to testify, after he had been sent police reports and correspondence from the prosecution. Perhaps most importantly, no testimony was presented to prove that the insect tube with the May 13 notation actually contained evidence seized in connection with this case or, if removed from the victim in this case, that it was properly collected and handled. Faulkner's testimony is unreliable on its face, but it is constitutionally unreliable in light of *Melendez-Diaz*.

//

//

VI

CONCLUSION

For all of these reasons, as well as all of the reasons stated in Appellant's Opening Brief, Appellant's convictions and sentence must be reversed.

DATED: June 1, 2010

Respectfully Submitted,

MICHAEL J. HERSEK

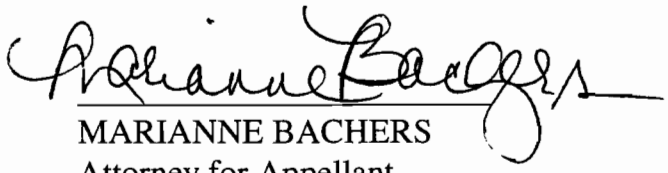
MARIANNE BACHERS
Senior Deputy State Public Defender

Attorneys for Appellant

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 25, 801 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 REPLY 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.
300 South Spring Street
5th Floor, North Tower
Los Angeles, CA 90013

Los Angeles County Superior Court
Attn: Addie Lovelace, Death Penalty Coordinator
210 West Temple Street, Room M-3
Los Angeles, CA 90012

Los Angeles County District Attorney
Attn: Anne Ingalls, D.D.A.
210 West Temple Street
Los Angeles, CA 90012

Los Angeles County Superior Court
Honorable Charles D. Sheldon
415 W. Ocean Blvd.
Long Beach, CA 90802-4591

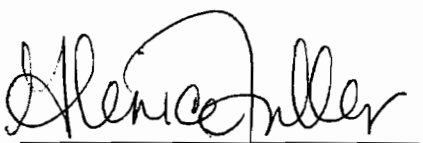
Peter Larkin, Esq.
805 South Gaffey Street
San Pedro, CA 90713

Mr. Eloy Loy
(Appellant)

Each said envelope was then, on June 1, 2010, 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.

Signed on June 1, 2010, at San Francisco, California.



DECLARANT