IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JAMES ANTHONY DAVEGGIO AND **MICHELLE LYN MICHAUD,** Defendants and Appellants.	SUPREME CT. NO. S110294 Alameda Superior Ct No. 134147

AUTOMATIC APPEAL FROM A JUDGMENT OF DEATH
FROM THE SUPERIOR COURT OF ALAMEDA COUNTY
THE HONORABLE LARRY J. GOODMAN, JUDGE PRESIDING

APPELLANT'S OPENING BRIEF

on behalf of

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MICHELLE LYN MICHAUD

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STATEMENT OF THE CASE

STATEMENT OF APPEALABILITY

This is an automatic appeal, pursuant to Penal Code Section 1239,[1] subdivision (b), from a conviction and judgment of death entered

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[1]. Unless otherwise indicated, all statutory references are to the Penal Code.

against appellant MICHELLE LYN MICHAUD (hereinafter "appellant"), in the Superior Court of the State of California in and for the County of Alameda on September 14, 2000. (39CT 11312-11323.)

The appeal is taken from a judgment that finally disposes of all issues between the parties.

INTRODUCTION

Codefendant James Anthony Daveggio and appellant Michelle Lyn Michaud were convicted of acting together in sexually assaulting Daveggio's 16-year-old daughter April Doe and her 17-year-old friend Sharona Doe, and in sexually assaulting and committing the first degree murder of Vanessa Samson. The jury returned true findings to the special circumstances that Daveggio and appellant murdered Vanessa Samson while committing the crimes of kidnapping and rape by instrument and fixed the penalty at death.

As part of its guilt phase proof, the prosecution was allowed to present evidence that Daveggio and appellant had together sexually assaulted four other young women, including appellant's 13-year-old daughter Rachel, to prove intent, motive, and the existence of a common plan or scheme (and, in the circumstance of one young woman, to prove their identities) and their disposition to commit the crimes. (Evid. Code, §§ 1101, 1108.)

During jury selection, Daveggio pled guilty to three counts of oral copulation (counts 1-3). During guilt phase argument, his lead counsel told the jury that both he and his cocounsel believed the prosecution had established that Daveggio was guilty of first degree murder.

Appellant Michaud's defense made no equivalent admissions or concessions to any of the charges and, instead, presented evidence that appellant, who suffers from Post-Traumatic Stress Disorder and Battered Women's Syndrome as the result of her life experiences, lacked the required mental states for the crimes and acted under the domination and control of Daveggio.

Appellant will show below that during the selection process the trial court repeatedly instructed the jury concerning the reasonable doubt standard of proof in a manner that diluted the constitutional standard and reduced the prosecution's burden. The trial court also reduced the prosecution's burden of proof in this case in which the prosecution presented no evidence of the actual killing when it incorrectly instructed that the aider and abettor and the actual killer were equally guilty. These instructional errors; the character evidence improperly admitted to prove intent, identity, common plan, and propensity to commit the crimes; the instructional errors attending that character evidence; and the prosecutor's improper appeal to the jurors' passions and sympathies, which appellant discusses below, resulted in a judgment of conviction that must be reversed because the trial from which it was taken was fundamentally unfair.

PROCEDURAL HISTORY

On November 5, 1998, the Grand Jury of Alameda County returned a true bill against appellant and Daveggio (1CT 204-209), charging them by indictment with three counts of oral copulation, one count of murder, two special circumstances (kidnapping and rape by instrument),

and the allegation that Daveggio had been previously convicted of assault with intent to commit rape.[2] (1CT 211-213.)

On October 15, 1999, the prosecution filed a written notification of its intention to seek the death penalty against appellant. (1CT 227.)

Appellant was arraigned on the charges on June 2, 2000. (2CT 296-299.)

On May 15, 2001, the court ordered that: (1) motions made by one party are deemed made by both unless otherwise stated; (2) objections stated by one party are deemed made by both unless otherwise stated; (3) all objections made during the course of the trial are based on any grounds stated under the federal constitution; (4) any objection made on hearsay grounds is deemed to include an objection based on the Confrontation Clause of the Sixth and Fourteenth Amendments to the U.S. Constitution; (5) any objection made on relevancy grounds, or under Evidence Code section 352, is deemed to be made on the grounds of a violation of a guarantee of a fair trial under the Fifth and Fourteenth Amendments to the U.S. Constitution and the Due Process Clause of the federal constitution; (6) any objections made to the prosecutor's statements, comments or any actions as argumentative and inflammatory and prejudicial are also made under the authority of the Fifth and Fourteenth

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[2] Appellant was convicted as charged in the indictment. The crimes are more fully described in the counts of conviction set forth below. The indictment identified the victims in counts 1 and 2 by the generic Jane Doe. During jury selection, the parties agreed that Jane Doe No. 1 in counts 1 and 2 would be called Sharona Doe and Jane Doe No. 2 in count 3 called April Doe. (4RT 751.)

Amendments to the U.S. Constitution; (7) all objections made during the course of the trial include reference to the Eighth Amendment of the Constitution and the cruel and unusual punishment clause because this is a capital case and there is a heightened scrutiny of any process and any evidence; (8) all motions, including motions to strike, be deemed to be continuing objections; and (9) all in limine motions are binding during the course of the trial and need not be renewed. (1RT 32-35.)

Prior to trial, the prosecution moved to use evidence of other sexual offenses committed by Daveggio alone, by appellant alone, and by both Daveggio and appellant pursuant to Evidence Code section 1108 and as aggravating evidence during the penalty phase of the trial. (4CT 770-791, 871-891.) Both defendants filed separate oppositions to the motion. (4CT 963-970; 4CT 972-977.)

The prosecution also moved to introduce evidence of sexual offenses committed by both defendants pursuant to Evidence Code section 1101 to prove intent, identity, and the existence of a common plan or scheme. (4CT 945-955.)

The trial court, acting in its discretion (Evid. Code, § 352), admitted only evidence of uncharged acts committed by both defendants (*viz.*, evidence concerning Christina Doe, Rachel Doe, Aleda Doe, and Amy Doe) as disposition evidence (Evid. Code, § 1108) and as evidence of intent, motive, common plan and design (Evid. Code, § 1101). The court also ruled that evidence involving Aleda Doe was a signature crime admissible to prove identity. (5CT 1205-1206; 3RT 655.)

The case was called for trial on August 22, 2001. (5CT 1155; 4RT 658-720.)

On October 22, 2001, during the jury selection process, Daveggio entered pleas of guilty to the sexual offenses charged in counts 1 through 3. (9RT 2119-2122.)

On February 5, 2002, twelve jurors and eight alternate jurors were sworn to try the case. The court informed the jury that Daveggio had pled guilty to counts 1 through 3. (7CT 1617; 16RT 3584-3590.)

The prosecution began its guilt phase case-in-chief on February 6, 2002 (7CT 1621-1622) and rested on March 28, 2002 (7CT 1730; 28RT 6175).

Daveggio rested his case on the state of the evidence. (7CT 1733; 29RT 6205-6206.) Appellant presented witnesses in her defense. (7CT 1762; 29RT 6207ff.) The prosecution presented rebuttal evidence. (7CT 1765.) All parties rested their guilt-phase case on April 16, 2002. (32RT 6847.)

The jury began its deliberations on May 1, 2002. (7CT 1817.) On May 6, 2002, the jury returned verdicts convicting appellant of:

1. Oral copulation, acting in concert with force (§ 288a, subd. (d)), of Sharona Doe (8CT 1833; 34RT 7396-7397);
2. Oral copulation, acting in concert with force (§ 288a, subd. (d)) of Sharona Doe (8CT 1834; 34RT 7397);
3. Oral copulation with person under 18 years (288a, subd. (b)(1)) of April Doe (8CT 1835; 34RT 7397-7398);
4. First degree murder (§ 187, subd. (a)) of Vanessa Lei Samson (8CT 1837; 34RT 7399).

The jury returned true findings to the kidnapping special circumstance (§ 190.2, subd. (a)(17)(B)) and the rape by instrument special circumstance (§ 190.2(a)(17)(K)). (8CT 1837; 34RT 7399-7400.)

The jury convicted Daveggio of the first degree murder of Samson and found both special circumstances to be true. (8CT 1836; 34RT 7398-7399.)

On May 13, 2002, the prosecution began its penalty phase case. (8CT 1865.) During his penalty phase case, Daveggio testified that appellant sexually assaulted and killed Samson without his knowledge. (8CT 1881-1882; 36RT 7800ff.) Appellant did not testify. (8CT 1890.)

Jury deliberations on penalty began on June 5, 2002. (39RT 8625.) On June 12, 2002, the jury returned verdicts setting the penalty at death for appellant and for Daveggio. (8CT 1935-1938; 39RT 8633.)

On September 25, 2002, the court imposed sentence upon appellant, as follows:

> Count 4. Murder (§ 187, subd. (a)) = Death;
>
> Count 3. Oral copulation with person under 18 years (§ 288a, subd. (b)(1) = 3 years upper term because the acts involved a high degree of cruelty and callousness and the victim was particularly vulnerable;
>
> Count 2. Oral copulation, acting in concert with force (§ 288a, subd. (d)) = 2 years (1/3 the midterm) consecutive;
>
> Count 1. Oral copulation, acting in concert with force (§ 288a, subd. (d)) = 2 years (1/3 the midterm) consecutive.

The sentence in counts 1 through 3 was stayed pending the appeal on count 4. (September 25, 2002, RT 57-60.)

STATEMENT OF FACTS

THE PROSECUTION'S GUILT PHASE EVIDENCE

A. Appellant and Daveggio in September 1997

In the summer of 1997, appellant owned a green 1994 Dodge Caravan. She was working as a prostitute at the time and was able to buy it with the help of Burdell (Skip) Wulf, a friend and client. (16 RT 3762; 17RT 3846, 3924.)

The van was factory-equipped with two bucket seats for the driver and front passenger, two bucket seats in the van's middle section, and a three-passenger bench seat in the rear. The middle bucket and bench seats were secured by a system of fixed and ratcheting hooks. The van had a sliding door on the passenger side and a rear hatch door hinged at the top. Childproof locks, which had to be manually activated, were available to lock the sliding door so passengers could not get out. (17RT 3882-3886, 3900-3905.) Otherwise, the sliding door could be opened when the van was moving. (17RT 3899.) The van's rear hatch door could only be opened by a dashboard button or from the exterior of the van with a key. It was designed to be inoperative if the van was either in gear or moving. (17RT 3887-3888, 3918.) The van had a cassette tape player, tinted back windows, and a digital clock that shone green when the tape player was used. (17RT 3893, 3897-3898.)

Appellant was introduced to Daveggio in the winter of 1996 by neighbors she had helped to find their runaway daughter. (17RT 3830.) Appellant was living at the time in a house on McFadden Street in Sacramento with her son Randy and daughter Rachel. Daveggio moved in;

his daughters April, Jamie, and Briann also lived there from time to time. (16RT 3755-3757, 3759.) Appellant's father Leland and mother Regina lived a few houses away. For a time, appellant's sister Misty Michaud, her boyfriend Rick Boune, and their son Cody also lived in the same neighborhood. (16RT 3746-3753.) Boune saw appellant every day and Daveggio occasionally. Everyone called Daveggio by the nickname "Frog." Appellant called Daveggio "Frog," "Daddy," and her "Purple God of Thunder." (16RT 3755-3757.)

Boune, Daveggio, and appellant used methamphetamine (meth) or crank. Boune and Daveggio snorted it. Appellant smoked it in a glass pipe. (16RT 3760-3761.)

Boune testified that appellant did not use drugs until she met Daveggio. Appellant had been a prostitute since her teen years, but in 1997 appellant was essentially a stay-at-home mom. She was a member of the Altar Society and a school crossing guard. She sent Rachel to a Catholic school. (17RT 3830, 3846, 3854.) Appellant had the use of credit cards provided by her client William (Bill) Reed. (16RT 3800.)

According to Boune, things went downhill rapidly for appellant after Daveggio moved in. Randy, who had a history of emotional and psychological problems, and Rachel began using drugs. On one occasion, Rachel flipped out on acid and climbed onto the roof of the house. Rachel taught appellant how to smoke meth. Appellant's personality changed. (17RT 3831-3832.) In August 1997, appellant was evicted from her home. (17RT 3755.)

In early September 1997, Daveggio, appellant, Rachel, and a woman named Vicki stayed for awhile in the home of Janet and Ted

Williams[3] near the 65th Expressway in Sacramento. (18RT 4107-4111, 4128.) During this time, Janet saw Daveggio with her minicassette tape player. Ted saw Daveggio with a black or blue revolver. When they moved out, Daveggio and appellant left a small suitcase and a box filled with appellant's clothing and Daveggio's business cards in the Williams' garage. (18RT 4112-4113, 4146-4147.)

After that visit, on September 11, Janet and Ted drove to Petrolia in northern California to visit Ted's family. Janet alone returned home on September 14; she did not notice anything wrong about the house. (18RT 4114-4116.)

On September 19, Janet drove back to Petrolia to pick up Ted. Daveggio and Vicki accompanied her. While they were there, Ted's daughter Janelle cut Daveggio's hair, changing it from shoulder length to a crew cut. At this time, Daveggio had a mustache. The group spent one night in Petrolia before returning to Sacramento. (18RT 4120-4122, 4140.)

This time when she returned home, Janet noticed that the screen to the bathroom window was bent. All of her piggy banks had been emptied. Her minicassette player was gone; the tape that had been in it left behind. Daveggio's box and suitcase were still in the garage. When the Williams' phone bill arrived, Janet discovered that calls had been made from the house during the time she and Ted had been in Petrolia. (18RT 4117-4120.)

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[3] In the briefing, as was often the practice at trial, appellant refers to individuals who share a surname, including the Doe witnesses and murder victim Vanessa Samson and members of her family, by their given names in order to provide clarity in the narrative.

Soon after, appellant called Janet and said they had stayed at the Williams' house because they had nowhere else to go. Appellant said they knew Janet would have given them permission to stay if she had been at home. Appellant said they entered the house through the bathroom window. (18RT 4124-4125.) The Williams home had two bedrooms and one bath. There was a double bed in the master bedroom and twin beds in the second bedroom. The bathroom had been used. (18RT 4126-4127.) Janet did not give Daveggio and appellant permission to be in her house between September 11 and 14. She did not tell them it was okay to take a young lady there. (18RT 4123-4124.)

B. Uncharged Offenses involving Christina Doe[4]

In September 1997, Christina Doe was 13 years old and a friend and neighbor of Rachel and appellant. Christina sometimes visited with appellant when Rachel was not at home. She met Daveggio there. (18RT 4157-4159, 4162.)

Around 8:00 one night in mid-September, after appellant had been evicted from her home, appellant invited Christina to come out for a ride in the green van. (18RT 4163.) At this time, the van had no distinguishing stripe down the middle of its exterior length, but its middle seats had been removed. Appellant drove down the 65th Expressway, took

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[4] The trial court admitted evidence of uncharged acts involving Christina Doe as to all four charged counts under Evidence Code section 1101, subdivision (b), as relevant to intent, motive, and common plan and design, and 1108, subdivision (d), as relevant to disposition to commit the charged crimes. (5CT 1205-1206.)

an exit ramp, drove into a neighborhood, and stopped at a house. (18RT 4165-4166.)

Inside, Daveggio was watching a television program about the Italian mob and serial killers. Appellant told Christina to sit down. (18RT 4166-4168.)

Appellant and Daveggio went into the kitchen where appellant smashed and arranged meth into rails. (18RT 4174.) Christina had started using meth around the time she met Daveggio. He had given her meth in the past. (18RT 4170-4172.) She had also smoked meth with Rachel. (18RT 4173.)

Now, appellant and Daveggio each snorted a rail through a rolled-up dollar bill. Both of them told Christina the third line was for her. Christina said she wanted to get off meth, but they both told her to do it now for the last time. Christina snorted the rail, which was about three inches long and one-quarter-inch thick. (18RT 4177-4178.)

When Christina finished the meth, appellant grabbed her by the arms and took her into the bathroom. Daveggio said nothing. Appellant locked the bathroom door and used the toilet. She said she had been thinking about Christina and wanted to party with her. She asked if Christina understood what that meant. Christina said no. Appellant then pulled a small, flat, black handgun from the back of her pants, held it for a second, and then placed it on the counter within reach. Appellant told Christina not to worry, that the gun was for protection. Appellant told Christina to remove her clothes. Christina refused. Appellant removed Christina's shirt and bra and licked Christina's breasts. Appellant got down on her knees, but did not lick Christina's vagina. Christina felt scared and

disgusted. Appellant got up and removed her own shirt. She wore no bra. Appellant told Christina to do the same to her. Christina refused. Appellant told Christina to remove the rest of her clothes. Christina said she had her period and refused. (18RT 4180-4184, 4205.)

Appellant undressed Christina and opened the bathroom door. Christina attempted to cover herself. Appellant called out, "Here is your present." (18RT 4185-4187.)

Daveggio was seated on the couch watching television. He did not appear surprised to hear appellant's words. Daveggio kissed Christina and walked her backwards into a room. Appellant followed and removed Daveggio's pants. In the doorway, Daveggio stopped and kissed Christina while appellant licked his anus. (18RT 4187-4190.)

The room had a single bed and stuffed animals everywhere. Daveggio placed Christina on the bed, licked her genital area, and digitally penetrated her vagina. Christina cried quietly. Appellant sat on the bed near Daveggio and masturbated. She appeared to have an orgasm and yelled out, "Daddy." Daveggio put his fingers in Christina's vagina more than once. When he was done, appellant orally copulated his penis. Twice, appellant tried to push Christina's head down onto Daveggio's penis, but Christina pulled back each time. (18RT 4189-4194.)

Daveggio then got on top of Christina and raped her. The penetrations lasted for about 15 minutes. Christina did not think Daveggio would rape her because appellant had once said Daveggio could not maintain an erection. Christina cried quietly while Daveggio raped her. While he was doing this, appellant was licking his anus. (18RT 4197-4202.) Daveggio did not ejaculate. (18RT 4204.) Both appellant and

Daveggio knew that Christina was 13 years old and attending middle school, which only had 7th and 8th grades. (18RT 4195-4197.)

After it was over, appellant taught Christina how to take a "whore's bath." Appellant took a bar of soap and started cleaning her vagina while standing up. Christina had been bleeding and appellant told her to take the soap, wash her vagina, and rinse it with water. (18RT 4202-4203.)

Appellant drove Christina home in the van. She told Christina she would find out if Christina ever told anyone. Christina took this as a threat because appellant and Daveggio dealt with biker gangs. She did not tell anyone what had happened. (18RT 4204-4207.)

About a month later, in October 1997, appellant's daughter Rachel walked into Christina's home on a school day looking distraught. Rachel had red marks and black lines around her cheeks, mouth, and wrists. (18RT 4208-4209.) She said she was going to Santa Cruz with Daveggio and appellant. Christina decided to go along with them because Rachel looked scared. (18RT 4223-4226.) Twenty minutes later, in the bathroom of the AM/PM market on Mack Road, Christina told Rachel for the first time that appellant and Daveggio had sexually assaulted her. (18RT 4209-4210.)

C. Uncharged Offenses involving Aleda Doe[5]

In September 1997, Daveggio and appellant were in Reno, Nevada. On September 28, Daveggio pawned a pair of Black Hills gold opal earrings in a pawnshop near the Circus Circus Casino. Pawnshop owner Munesh Sakhrani matched Daveggio's physical appearance to the physical description on Daveggio's California driver's license. (17RT 3860-3861, 3865-3867, 3870.) The following day, appellant pawned a Black Hills gold man's ring in Sakhrani's shop. Sakhrani matched

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[5] Aleda Doe was the first of the witnesses to testify to evidence admitted under Evidence Code sections 1101, subdivision (b), and 1108, subdivision (d).

Before Aleda Doe testified, the court instructed the jurors that they were permitted to consider the testimony of these witnesses for the limited purpose of determining if it tended to show a characteristic method, plan, or scheme, which would further tend to show the existence of the intent that is a necessary element of the murder charged in court 4.

The court further instructed that the Aleda Doe testimony could also be considered to prove the identity of the person or persons who committed the murder charged in count 4.

The court also instructed that the jury was permitted to use evidence that the defendant committed a prior sexual offense to infer that the defendant had a disposition to commit sexual offenses and the charged crimes. (17RT 3989-3991.)

The court further instructed the jury that both defendants were convicted in federal district court in Nevada of committing crimes against Aleda Doe on or about September 29 and 30, 1997, and that both defendants received substantial prison terms for their convictions.

The court specified that it was taking judicial notice that Daveggio had been adjudged guilty of conspiracy to commit kidnapping, kidnapping, and aiding and abetting a kidnapping and that appellant had been adjudged guilty of kidnapping and aiding and abetting a kidnapping on August 23, 1999, and August 12, 1999, respectively. (17RT 3991-3992.)

appellant's physical description to her California driver's license. (17RT 3869.)

On September 29, Aleda Doe, a 20-year-old dental assistant, finished her last evening class at Morrison College in Reno at 10:00 p.m. (17RT 3993-3995, 4038.) She waited outside with the security guard for her boyfriend to pick her up. After 15 or 20 minutes, when her boyfriend did not arrive and the security guard wanted to go home, Aleda decided to walk home. Her route took her over an overpass for Interstate 80. She was 4 feet 10 inches tall, weighed 120 pounds, and wore her dark-brown hair down to her shoulders. She was carrying her purse and a backpack filled with books. (17RT 3997-3999.)

An oncoming van passed by Aleda on the freeway overpass. A minute later, a dark-colored van with a light stripe stopped next to her. She thought it was her boyfriend. A big man got out of the van's sliding door, grabbed her by her hair and backpack, and threw her into the van. The man closed the door and the van took off. (17RT 4001-4005.)

The man told her to not say anything and to stay quiet. Aleda was too frightened to scream. She was right behind the woman driver and saw her face in the rear view mirror. The driver had a long pale face and wore clear glasses. The woman's hair, which had damaged ends, was down to her shoulders. (17RT 4009-4010.)

The van was so full of stuff – blankets, pillows, clothes – that Aleda couldn't tell if there were seats in the rear of the van. (17RT 4008.)

The man gave the driver directions. Aleda put her head up and saw they were on Interstate 80 heading west. She thought they had gotten on the freeway at the Keystone ramp. (17RT 4011-4013.)

At trial, Aleda identified Daveggio as the man who had pulled her into the van. At an earlier time, she had picked his picture out of a photographic lineup. (17RT 4013.) In the van, Aleda agreed to everything Daveggio told her to do because this is what she had been told to do in such a situation. Now, Daveggio began touching her. He touched her breasts, her body, and put his hands in her pants. He penetrated her vagina with his fingers and said, "This is good," and that he liked it. (17RT 4011, 4013-4016.) Daveggio's voice, which at first had been strong and angry, and made her fearful, was no longer angry. (17RT 4017.)

Aleda was dressed in a white top and blue jeans. Daveggio told her to remove her clothing. Aleda did. Daveggio removed Aleda's bra. (17RT 4017-4018.) All of these events took place in the middle of the van. Aleda was directly behind the driver. Daveggio was near the slider door. (17RT 4013.) The driver said nothing during this time. (17RT 4017-4018.)

Daveggio kissed and touched Aleda's entire body. He tried to bite her cheeks and lips. He pushed his fingers into her vagina once more. He forced her to orally copulate him on two occasions. His penis never got completely hard. (17RT 4022-4024.) He raped her. Aleda cried but did her best to hide her crying so Daveggio would not know she was afraid. She pulled on the driver's hair a little in a request for help, but the driver gave no response. (17RT 4025-4016.) Daveggio made her insert two of her fingers in his rectum at one time and, in turn, inserted his fingers into her rectum. He forced her to hold his testicles. He scratched her back and her breast. (17RT 4027-4029.)

At one point, Daveggio covered Aleda with a jacket and pillow. He told her to stay down and to stay quiet. They were passing through the agricultural checkpoint between Nevada and California. (17RT 4030.) The driver spoke to one of the agricultural inspectors. Aleda remained silent out of fear. When they started moving, Daveggio said, "Good girl." He still had not ejaculated. (17RT 4030-4033.)

In California, Daveggio made Aleda orally copulate his penis. He then masturbated with his hand and ejaculated into her mouth and onto her face and hair. (17RT 4033-4036.)

Aleda cleaned herself up a little and started to talk to Daveggio so she could learn information to give to the police later. Daveggio said he was a truck driver on his way to Oregon. Both the driver and Daveggio sang along with a tape the driver played. Daveggio said the song was about a man from Reno who killed another man just to see him die. Aleda asked Daveggio if he had ever done that and he said no. (17RT 4038-4042.)

Aleda had no children, but told Daveggio she had a baby and had to get home because her mother, who was watching the baby, was mean and treated the baby badly. She said she had to go to work and to school. (17RT 4044.)

Daveggio called the driver Mickey and asked her for cigarettes. Both the driver and Daveggio smoked. (17RT 4047-4048.) Daveggio asked Aleda if she liked women and if she wanted the driver to come in the back. Aleda did not answer. (17RT 4047-4048.)

Daveggio told Aleda he could not take her back to Reno because he had kidnapped her and was concerned about going to jail. She

asked him about a long dangling earring in his left ear and he said something about a horse. Aleda asked the driver where she was from and the driver said she was asking too many questions. (17RT 4045-4047.)

The van was pretty new, but it was full of food-related garbage – Burger King cups, containers of drinks near the driver. Aleda asked if they could stop so she could get something to drink. Instead, the driver handed Daveggio a cup of flat orange soda for Aleda. (17RT 4050.) Aleda did not see a gun but asked Daveggio if he had one. He told her he had had one before. (17RT 4063.)

Daveggio and the driver began a conversation saying, "What do you think? What should we do? What have you decided?" They did not say what the plan was. The driver asked Aleda, "You have kids? What is his name?" Aleda answered, "Luis. Are you going to let me go?" The driver said, "Let me think about it." (17RT 4052-4056.) Daveggio said, "What have you decided?" and "I'll leave it up to you."[6] (17RT 4058.)

The driver exited the freeway and drove down a dead end street where she stopped and told Aleda to get out. Aleda got dressed, picked up her backpack and purse, and got out quickly. Daveggio got into the driver's seat. The woman told Aleda she was lucky, that she should not walk on the streets by herself again because the next time the people might not be as nice. (17RT 4061.) The woman told Aleda to count to 20 and to not look back. (17RT 4062.)

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[6] The parties stipulated that the transcript of the federal trial showed that Aleda said the female kidnapper told the male kidnapper he was talking too much and that Aleda was asking too many questions. (17RT 4073-4076.)

In all, Aleda had been with Daveggio and the woman for about an hour and a half. (17RT 4050.) Aleda waved down a car and was taken to a gas station. She telephoned her parents and then the police. She gave police a description of the people and helped in the preparation of a picture of the man who had kidnapped and raped her (People's Exhibit 76.) (17RT 4067.) A sexual assault response team (SART) nurse examined her and took samples from her face and neck. (17RT 4067.)

Placer County Sheriff's deputies Jeffrey Adams and Don Murchison were the first responders to the Meadow Vista Chevron station, where Aleda called for help at 12:07 a.m. on September 30. Adams and Murchison reached the station within two minutes of the call. Aleda was standing next to the phone booth. She had been crying; her eyes were red; her hair on the right side was matted. She described her assailants and said the woman was called Mickey. She said the van was a newer model minivan and its exterior color was either a dark blue or green. She said there was a blue light emanating from the dashboard and the seats where she was assaulted were split seats, like captain's chairs. (17RT 4090-4091.)

Aleda described where the van had left her and Adams drove Aleda to the Clipper Gap exit off Interstate 80 and then to Applegate Road. When they got there, Aleda said she was sure this was the place. (17RT 4083-4090; 4092-4093.)

Washoe County Crime Laboratory senior criminalist Renee Romero tested the swabs taken from Aleda Doe's cheeks and neck and found epithelial cells, but no sperm cells. (24RT 5501.) Department of Justice senior criminalist Richard Waller tested Aleda Doe's cheek swabs and found that they contained a protein found in seminal fluid and also

found the enzyme amylase, which is found in high concentrations in saliva, in all three swabs. (25RT 5624-5626.) Waller stated his opinion that the mixture of saliva and seminal fluid was consistent with a circumstance where a victim was forced to orally copulate the penis of her assailant who subsequently ejaculated on her face. (25RT 2526-2527.) The parties stipulated that Daveggio had had a vasectomy on December 15, 1993. (25RT 5647.)

Substance from the Aleda Doe facial swabs and biological materials from Daveggio and appellant were subjected to DNA (deoxyribonucleic acid) analysis by Lisa Calandro of Forensic Analytical. Calandro determined that Daveggio could not be eliminated as the source of DNA from the right cheek, left cheek, and neck swabs. (26RT 5728-5731.) For the neck and left cheek swabs, Daveggio was identified as a donor at a frequency rate of one in 510 billion Caucasians. The present world population is six to eight billion. Calandro stated her opinion that the fact that Daveggio could not be eliminated as a source, as well as the frequency of his profile in the Caucasian population, was strong evidence that he was the source of the biological material on those two swabs. (26RT 5732-5733.)

D. Uncharged Offenses involving Rachel Doe[7]

Appellant's daughter Rachel was born on December 7, 1984. (19RT 4272.) She, appellant, and Randy, who was born on July 21, 1983, lived in a house near her grandparents' home. Christina Doe also lived in the neighborhood and was her best friend. (19RT 4272-4274.) When Rachel was eleven, they all moved into a house they called the "tri-level" in the same neighborhood. William Reed, whom Rachel described as a "sugar daddy," bought the furniture for the house and lived with them. Reed bought them nice things all the time and took appellant on vacations. Reed slept in a bedroom downstairs. Rachel never saw any romantic involvement between appellant and Reed. Reed gave appellant money. (19RT 4276.)

Burdell Wulf was another "sugar daddy." He gave Rachel money when she got A's on her report card. (19RT 4277.)

When Daveggio moved into the tri-level, Reed moved out. Daveggio's stepdaughter Briann and his daughters April Doe and Jamie also moved in. (19RT 4279-4280, 4283-4284.)

Daveggio offered Rachel a joint when she was 10 years old. In addition to marijuana, Rachel used meth and acid. Randy and April Doe gave the acid to Rachel. (19RT 4279-4280.)

When appellant was evicted from the tri-level in August 1997, Rachel went to live with Alma Lara, her boyfriend's mother. Rachel

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[7] Uncharged acts involving Rachel Doe were admitted as to all counts as relating to intent, motive, and common plan and design (Evid. Code, § 1101, subd. (b)) and as relating to evidence of disposition to commit the charged crimes (Evid. Code, § 1108.) (5CT 1205-1206.)

stayed in Alma's home for a couple of months. When Rachel was twelve, appellant and Daveggio came to Alma's house. Appellant said they were moving to Oregon. (19RT 4287-4288.) Daveggio had changed his hairstyle from a mullet to a short cut all around. (19RT 4303.)

Rachel went with appellant and Daveggio to see appellant's friend Clara. The van's middle seats had been removed, but the bench seat in the rear remained. (19RT 4288-4289.) Daveggio sold his car to Clara. People at Clara's house were doing meth. (19RT 4291-4292.)

Appellant asked Rachel if she wanted to go to Oregon with them. Rachel agreed and they left Sacramento without even returning to Alma's house to get Rachel's clothes. (19RT 4923.)

Appellant began the drive. Rachel fell asleep on the rear bench seat. When she awakened, it was still daylight and Daveggio was massaging her leg. Rachel did not think it was sexual. She sat up and crossed her legs "indian style." Daveggio was seated on the van floor and leaning up against the bench seat. He began to massage the inside of Rachel's thigh and then moved his hand up as though he was going to put his hand into her pants. Rachel moved his hand away. Daveggio repeated his action. Rachel picked up his hand, moved it, and went to sit in front with appellant. This was the first time Daveggio had bothered Rachel in this way. (19RT 4295-4296.)

Rachel sat and talked with appellant. Daveggio moved up behind Rachel and began massaging her shoulder on the side away from appellant. Rachel did not say anything but repeatedly pushed Daveggio's hand away. (19RT 4298.)

When appellant stopped at an area near a lake, Rachel told appellant that Daveggio had been massaging her leg and asked appellant to tell Daveggio to stop. Appellant said she would. (19RT 4299-4301.)

When they returned to the van, Rachel got back in and appellant spoke with Daveggio outside. Rachel sat in the front with appellant. (19RT 4302, 4303.)

As she was driving, appellant told Rachel that she had had sex with everyone Rachel knew and that Rachel was her "secret lust." Appellant said she had had sex with Rachel's brother, grandfather, grandmother, and said, "Nobody can ride like your Aunt Misty." (19RT 4306.) Appellant said she had let the dog lick her and that she had had sex with Rachel's friend Christina. Appellant said Rachel was her fantasy and that Rachel was going to be an adventure. Appellant said they had had adventures in Reno, that Christina was one of their adventures, and that Rachel was going to be the next one. Appellant said she had orally copulated Rachel when Rachel had passed out on marijuana.[8] Appellant said she liked it best when Rachel had her period because she liked the taste of blood. Rachel testified appellant said she would "eat me out." (19RT 4307-4308.)

During this conversation with Rachel, appellant would interject, "Right, James, isn't that right?" Rachel looked back and saw Daveggio nodding. (19RT 4310-4311.)

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[8] Rachel said there were incidents when she smoked a lot of "weed" and was the first to pass out. On some of those occasions, her brother and friends would write on her with magic marker and put lemon juice in her mouth. (19RT 4309.)

Appellant stopped at a gas station. When Rachel got a drink and dropped it, appellant told Rachel she was getting "wet" just thinking about it. Rachel understood this to mean that appellant was getting "turned on" by the conversation. Rachel felt disgusted. (19RT 4313-4314.)

After it got dark, appellant said she was going to pull over so they could talk. Rachel asked appellant not to, but appellant pulled over near a gate to a long driveway. (19RT 4316.) Rachel decided to run. She put on one of her tennis shoes. Before she could pull on the other, appellant pushed the button that locked all the doors. Rachel responded by trying to kick out the window. (19RT 4317-4318.)

Suddenly, Daveggio pulled the lever that made Rachel's seat recline. Appellant jumped on top of Rachel, faced her, straddled her, and undid her pants while Daveggio held Rachel's arms down. Appellant told Rachel she could go along with this willingly or they would take it from her. Appellant inserted her fingers in Rachel's vagina. Rachel said, "Mommy, stop." Appellant told Rachel not to call her that. Rachel started crying. Daveggio pulled Rachel over the top of her seat and into the back of the van. (19RT 4319-4323.)

Daveggio put Rachel on the bench seat and placed her legs on the floor. He orally copulated her vagina. Rachel screamed and cried. Appellant, who was facing Rachel, began masturbating. At some point, appellant pulled Daveggio's pants down to his knees and licked Daveggio's butt. (19RT 4325.) After a long while, both appellant and Daveggio stopped. They acted like nothing had happened. Rachel pulled her pants back up and went to sleep. (19RT 4327.)

When Rachel awoke, they were at a Quality Inn motel and appellant was helping Rachel walk into the room. Rachel got into one of the two beds and went to sleep. (19RT 4327-4330.) When Rachel got up, appellant was lying on the bed facing her. Appellant was nude. She asked, "Is it okay if James fucks you?" Rachel said no, forcefully. Daveggio was lying on the other bed watching television. He said, "Don't worry, I'm not going to do that." (19RT 4335-4336.)

Appellant pulled the covers off Rachel. Either appellant or Daveggio duct-taped Rachel's mouth from ear to ear while the other held her down. Next, they turned her over and duct-taped her hands behind her back. (19RT 4337-4339.) Rachel struggled, but could not stop them. Someone removed Rachel's pants, shirt, and bra. Daveggio orally copulated Rachel's vagina. Rachel cried. Appellant was lying on the bed masturbating. She wiped away Rachel's tears while continuing to masturbate. (19RT 4339-4344.)

This assault lasted longer than the one in the van. It stopped when appellant just stopped masturbating and said, "Okay, James, you can stop now," and Daveggio stopped. When they stopped, Rachel rolled over. Appellant and Daveggio moved to the other bed. Appellant orally copulated Daveggio's penis and licked his butt. (19RT 4343, 4352.)

When they were done, appellant left Rachel, who was still crying and taped up, and went into the bathroom. Daveggio began watching television as though nothing unusual had happened. Appellant took a shower. About a half hour later, appellant asked Rachel if she was going to be good and not scream. Rachel agreed and appellant removed the duct tape. Appellant and Daveggio continued to act as though nothing

unusual had happened. Daveggio shaved his head to the scalp. He said the Devil's Horsemen Motorcycle club was looking for him and he didn't want them to recognize him. (19RT 4344-4347.)

After they left the motel, Daveggio bought a bottle of rum and drank from it until they stopped at a casino. Daveggio went into the casino while appellant and Rachel stayed in the van and drank from the bottle of rum. When they left the casino, Daveggio snorted meth until they reached Sacramento. Appellant drove to Christina's house in Sacramento because appellant and Daveggio wanted Christina to go to Santa Cruz with them. Daveggio hid in the back of the van with a blanket over him while appellant and Rachel went in to talk to Christina. (19RT 4349-4350, 4411-4416.)

Christina saw the adhesive residue from the duct tape on the side of Rachel's face. Rachel told Christina that something had happened to her and that appellant and Daveggio had done it. Christina then told Rachel what had happened to her, but not in detail. (19RT 4352.)

Appellant, Daveggio, Christina, and Rachel drove to Santa Cruz. Later, on their return to Sacramento, Daveggio drove off the road into an area with trees. He pointed a gun out of the window and fired it. Rachel thought she and Christina were going to be killed, but Daveggio turned the car around and drove back to the freeway. (18RT 4259; 19RT 4353.) This gun was bigger than the one appellant had shown Christina in the bathroom. Christina interpreted Daveggio's firing the weapon as a threat to Rachel and herself to be quiet about the sexual assaults. (18RT 4260.) At the end of the trip, when Christina and Rachel left the van,

appellant said if they ever told anyone she and Daveggio would track them down and kill them. (19RT 4354.)

E. Uncharged Offenses involving Amy Doe[9]

On November 1, 1997,[10] Amy Doe was feeling depressed because the anniversary of her father's death was approaching. She was 29 years old and addicted to meth. Amy was staying at the house of a woman named Fawnie, where most of the occupants used meth. Amy had used meth with appellant in Fawnie's back room. (19RT 4439-4441.)

Appellant stopped at Fawnie's on the night of November 1st and invited Amy to go out for a drive. Amy, who was a little high on meth, needed some company and agreed. As they were driving, appellant said she had to stop at the Motel 6 because Daveggio was going to call her there. (19RT 4441-4445.)

It was close to midnight when appellant and Amy reached the Motel 6 at the truck stop off Elsie Road and facing Mack Road. Appellant led the way to an upstairs room and opened the door. The interior was very dark. Appellant either turned on a light or the television and then sat on the

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[9] The court admitted evidence of uncharged offenses against Amy Doe as to all counts to show intent, motive, common plan and design (Evid. Code, § 1101, subd. (b)) and to show a disposition to commit the charged crimes (Evid. Code, § 1108.) (5CT 1205-1206.)

[10] There is some conflict about the date of the uncharged offenses involving Amy Doe. Amy Doe did not immediately report the sexual assault and told the district attorney's investigator and testified at trial that she thought the assault occurred on November 4th and 5th rather than November 1st. (19RT 4441, 4485; 32RT 6772.)

corner of the bed. Amy sat on the other corner with her back to the bathroom. (19RT 4445-4449.)

Amy talked about her father and the fact that she was depressed. They talked about men and appellant began crying. She put her head in Amy's lap and Amy consoled her. Suddenly, Amy felt a blow to the back of her head. Her ex-husband had once hit her on the head with a gun and this felt like that – harder than a fist would ever feel. The blow brought Amy close to blacking out. She slumped over. When she came out of the daze, someone was grabbing her wrist and she was fighting and screaming. (19RT 4552.)

Amy felt something snap over her left wrist and hit the person in front of her with her right hand. Later, she learned that she had punched Daveggio as he cuffed one of her hands. Amy was then 5 feet 4 inches and 112 pounds. Daveggio punched her in the mouth with his fist. Her bottom lip split open and began bleeding. Amy screamed for help. Daveggio told her to shut up or die. Appellant told her to shut up and listen. They cuffed her second hand behind her back. (19RT 4452-4456.)

Appellant placed a bandana over Amy's eyes and tied it behind her head. Amy continued to scream, kick, and spit blood. She was able to see a little under the bandana. Someone tried to duct-tape her mouth, but there was so much blood, the tape would not stick. They finally succeeded in placing the tape over her mouth. (19RT 4456-4459.)

They placed Amy on her stomach on the bed. Appellant straddled Amy's buttocks and legs and grabbed Amy's hair. Appellant cut off Amy's gray hooded, zip-up sweat shirt, her shirt and her bra. She removed Amy's shoes and pulled her pants and underwear off. Appellant

pulled Amy's head back by pulling on her waist-length hair. From beneath the bandana, Amy could see Daveggio standing in front of her. (19RT 4459-4462.)

Daveggio tried to move the duct tape up and put his penis in Amy's mouth. Amy refused to open her mouth. Daveggio did not have an erection and could not insert his penis into her mouth. They rolled Amy over onto her back and appellant put her mouth on Amy's breasts. Amy heard the sound of Daveggio masturbating. Daveggio told appellant to go down on Amy. Appellant first said no, then laughed, and said okay. Amy screamed through the duct tape on her mouth. Daveggio got on the bed and penetrated Amy's vagina with his penis for a long time. Then, they both rolled Amy over. Appellant straddled Amy's back again and separated her buttocks. Daveggio sodomized Amy for about twenty minutes. (19RT 4463-4467.)

Amy continued to cry. Appellant told her to shut up. Daveggio got off Amy and Amy could feel appellant and Daveggio moving on the bed and then she heard Daveggio groan. After that, Amy heard footsteps and someone unlocked the handcuffs. Someone removed the blindfold and appellant pulled the duct tape off Amy's mouth and hair slowly. (19RT 4468-4469.)

At a point during the assault, before the rape and while Amy was screaming, Amy felt the gun behind her left ear and then she heard a click. (19RT 4469-4470.)

Appellant gave Amy a washcloth for her lip, which was still bleeding. At one point in the assault, Amy lay face down on the bed choking on her own blood. When the blindfold was removed, Amy could

see blood on the wall, the floor, and the bed. (19RT 4470-4471.) Appellant gathered up all of the bloody things and left the room. She returned about an hour later with the items washed and folded. (19RT 4472.) They told Amy if she said anything she would die. (19RT 4472.)

Amy dressed herself in her own jeans, tennis shoes, and appellant's shirt. She had been in the motel room about six or seven hours. They got back into the van. Daveggio drove, stopping once at the welfare office on Bowling Drive and Florin Road where appellant went in. Amy stayed in the van with Daveggio, who told her to be quiet. (19RT 4475-4476.)

When appellant was done at the welfare office, they took Amy back to Fawnie's house. On the way, they talked about Amy's injuries. Appellant told Amy that she had called Fawnie and reported that Amy had fallen down at a bar. When they dropped her off, both appellant and Daveggio warned Amy that she would die if she told anyone. (19RT 4476-4477.)

About four days later, appellant and Daveggio came to Fawnie's house when Amy was there. A couple named Todd and Tina was also there. When appellant and Daveggio walked into the house, Amy walked out the back door. Todd came out to check on Amy and she told him what they had done to her. When appellant and Daveggio left, appellant said, "I see you didn't tell." Amy said she was still alive. Daveggio was right behind. At another time, Amy also told appellant's son Randy about what happened to her. (19RT 4477-4480.)

F. Sharona Doe (Counts 1 and 2)[11]

On November 3, 1997, Sharona Doe was 17 years old and working the 4:00 p.m. to midnight shift at a laser tag arena in Dublin called Q-Zar. Her best friends were Daveggio's daughters April Doe and Jamie. (20RT 4507, 4516.) Sharona had often visited Jamie at appellant's tri-level home and knew appellant and Daveggio. Daveggio supplied Jamie and Sharona with meth at no charge. (20RT 4511-4512.) Jamie had also worked at Q-Zar for a couple of weeks and during that time appellant and Daveggio had come to Q-Zar for a visit. (20RT 4513-4514.)

On this evening, Sharona was standing outside Q-Zar smoking when appellant and Daveggio drove up in a van and parked a couple of stalls away from her car. Daveggio asked Sharona if she wanted to do a rail of meth. (20RT 4516-4519.)

Sharona did not want to be seen getting out of the van and suggested doing the rail in the bathroom, but appellant and Daveggio refused. Appellant got into the back seat and appeared to be chopping up the meth. As she was doing so, appellant knocked the mirror over and asked Sharona for help in locating the meth. Sharona entered the van through the slider. The two middle seats of the van had been removed. Appellant suddenly pushed Sharona down to the van floor, but Sharona managed to push appellant off. Daveggio jumped from the driver's seat into the back and hit Sharona on the top of her head. (20RT 4520-4524.)

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[11] During the jury selection process, James Daveggio entered pleas of guilty to counts 1 and 2 (oral copulation, acting in concert with force (§ 288a, subd. (d)) involving Sharona Doe. (5CT 1264-1265; 9RT 2119-2122.)

Sharona fell to the van floor disoriented. She saw flashing lights. Daveggio cuffed her hands and began tying her legs. Sharona began to cry. (20RT 4526-4528.) Appellant drove out of the Q-Zar parking lot and across the street to the Dublin Bowl where she parked in the front. Daveggio yelled out that this was a stupid place to stop. Appellant then drove onto the freeway. Sharona told Daveggio that the handcuffs were digging into her and he unlocked them. Daveggio sat on the bench seat and told her to suck his dick and act like she enjoyed it. Sharona cried and orally copulated his penis. Daveggio told appellant to get off the freeway. Appellant took the First Street exit in Livermore and parked next to a big field. Daveggio said this was also a stupid spot. Appellant started driving again and then stopped in front of some big houses. (20RT 4529-4532.)

Daveggio told Sharona that the slider door was locked and there was no way she could get out. Appellant removed Sharona's pants and underwear and orally copulated Sharona's vagina for about 20 minutes. During this time, Daveggio sat on the floor facing them and masturbated. Sharona cried and said her stepfather used to assault her when she was younger. Daveggio told appellant to stop. Daveggio pulled out a camera and photographed Sharona nude from the waist down. He told her he would show the picture if she ever told anyone. (20RT 4533-4536.)

Daveggio got behind the wheel and began driving. Appellant sat in the back with Sharona. Appellant and Daveggio began talking about how they could not let Sharona go because she knew them. Sharona said she would make up a story if they would let her go. Sharona asked appellant to rip her shirt and said she would tell the police that a bunch of

kids took her and that she didn't know who they were. Appellant actually ripped Sharona's shirt. (20RT 4537-4538.)

Daveggio stopped at a gas station in Dublin at the corner of Dublin road and San Ramon Valley Boulevard. Daveggio told Sharona things that helped Sharona make up a lie about what happened. Both appellant and Daveggio threatened to kill Sharona. She had seen a gun in the van before and had seen appellant and Daveggio with a gun. At the gas station, Sharona pulled her pants on and got out. Daveggio pulled out a gun from behind the passenger seat and flashed it. Sharona had been with appellant and Daveggio for two to three hours. (20RT 4538-4540.)

Appellant and Daveggio watched Sharona walk away from them before they drove off. Sharona called the assistant manager at Q-Zar and he came to pick her up. When they got back to Q-Zar, the police were there. The manager had called her grandfather and he was there also. Sharona told them a story about three guys because she was scared. She stuck to her story about the three guys until December 8 when she learned that Daveggio and appellant had been taken into custody. After they were arrested, Sharona told Sergeant Michael Hart of the Dublin Police Department what had really happened. (20RT 4542-4543.)

Dublin police officer Rebecca Gandsey interviewed Sharona on her return to Q-Zar the night of November 3. Sharona's shirt was torn; she was emotional, almost hysterical. She said she had been kidnapped by three guys. (21RT 4744-4745.) Dublin police detective Michael Hart also interviewed Sharona and inspected the marks and scratches on her wrist. The marks were characteristic of those he'd seen on people who struggle when they are being handcuffed. (21RT 4760.) Later, Hart and Gandsey

compared what each had been told by Sharona. Hart was suspicious about the inconsistencies and interviewed Sharona again on November 15. During that interview, Sharona repeated the story about being kidnapped by three guys. (21RT 4762-4765.)

At Q-Zar, Sharona showed police where the van used by her kidnappers had been parked in the parking lot. Appellant and Daveggio had been smoking Benson & Hedges Ultra Lights 100s and the cigarette butts were on the ground.[12] (20RT 4517, 4546.)

On December 8, 1997, after learning that Daveggio and appellant were in custody, Hart interviewed Sharona once more. (21RT 4765.) This time, Sharona said that she was outside on a smoke break when appellant called her over to the van to snort meth. Appellant told Sharona the meth was in the back. When Sharona looked, appellant struck her between the shoulder blades and tried to handcuff her without success. Sharona told Hart that after the assault she convinced Daveggio and appellant to let her live and that she told the police the story she and appellant made up. Sharona said she was shown a gun as she got out of the van and she took that as a threat. (21RT 4768.)

Sharona also testified about the sexual assaults before the grand jury that returned the indictments in this case and said then that she had lied to the police about the involvement of Daveggio and appellant because they were still on the streets, because she was scared, and because she believed her best friends (Daveggio's daughters) loved their dad. (20RT 4543, 4558.)

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[12] Rachel Doe also testified that appellant and Daveggio smoked Benson & Hedges cigarettes. (19RT 4299-4301.)

G. Appellant Learns Christina and Rachel Talked to Police

Appellant and Daveggio stayed with appellant's sister Misty and Rick Boune in their Sacramento home on November 4, 5, and 6, 1997. On the first evening appellant and Daveggio spent there, Boune saw appellant reading a book titled *Sex Slave Murders* about Sacramento-area serial killers Gerald and Charlene Gallegos. During a conversation about the book, Daveggio said that if he ever became a serial killer he would like to be like the Gallegos. Appellant then pulled a box of trading cards out of her bag. The Gallegos' card was at the top of the stack. (16RT 3781-3787.) Appellant said if they ever became serial killers, they would have a card like that; she would have a card like that. (17RT 3805.)

The next morning, Daveggio wanted to leave, but appellant wanted him to stay. They got into an argument, screaming and yelling in the van in front of the house. Daveggio took a .38 revolver and pointed it at the middle of appellant's forehead and said, "Get out of the van, bitch, or I'll blow your fucking head off." Daveggio threw all of appellant's things on the sidewalk and drove away. Daveggio returned the next morning and he and appellant stayed another night. When they left on the 6th, appellant said they were going to Santa Cruz to get a welfare check. (16RT 3790.) They left the van's two middle bucket seats and assorted luggage with Boune. At this point, there was an after-market stripe on the van's exterior. (16RT 3767-3769, 3771-3774, 3778.)

Around November 15, Christina Doe saw a television news report and composite drawing matching Daveggio arising from the Aleda Doe investigation. Christina told her father about the sexual assault and he

called Sacramento police. Christina and Rachel Doe both gave statements to police. (18RT 4210-4211, 4216-4221.)

During her interview with police, Rachel called appellant to try to get appellant to admit the sexual assault. Appellant said, "Do you think I'm stupid. I know what you are trying to do. I am not going to say anything over the phone." (19RT 4355-4358.)

Two weeks later, appellant's father Leland came to Boune's home just before appellant pulled into the driveway in the van. She was alone. Leland screamed at appellant that the police were looking for her and Daveggio for what they had done to Rachel and Christina. Appellant said they had done nothing to Rachel and Christina. Boune loaded the bucket seats and luggage into the van. Appellant took the .38 revolver and said that's what she had really come to get. (16RT 3795, 3799.)

H. April Doe (Count 3)[13]

Daveggio's daughter April Doe was born on July 13, 1981. April first met appellant during Christmas 1996 in appellant's tri-level home where Daveggio was living. Appellant was not using drugs then, but started soon after April moved into the house. April lived in the tri-level from Christmas 1996 to February 1997 with appellant, Daveggio, Randy, Rachel, and Briann. At that time, Daveggio and appellant shared a bedroom and April and Briann shared a bedroom. (20RT 4585-4587, 4690.)

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[13] During jury selection, Daveggio entered a plea of guilty to count 3 (oral copulation with person under 18 years (§ 288a, subd. (b)(1)) involving his daughter April Doe. (5CT 1264-1265; 9RT 2119-2122.)

In 1997, Thanksgiving fell on November 27 and Daveggio and appellant were in Pleasanton where April was now living with her mother Annette, her stepfather Chris Carpenter, her sister Jamie Daveggio, and her stepbrother and stepsister Andrew and Cassie Carpenter. (21RT 4880-4881.) Daveggio and appellant were driving the green van. The van's middle seats had been removed; but the rear bench seat was in place. (20RT 4602-4605.)

At this time, April noticed that appellant was really skinny and pale; she had been much bigger and more robust when April lived in appellant's home in Sacramento. April described weight loss as one of the consequences of heavy meth use and said appellant was a "ghost person." (20RT 4693.) April too was addicted to meth during this time, consuming $60 to $70 worth a day. Daveggio gave her one ounce of meth, which is worth a couple of thousand dollars on the street. April gave half to a friend, sold a portion of the remaining half and used the rest for herself. (20RT 4608.)

Appellant and Daveggio stayed at the Candlewood Suites Motel on November 25, 26, 27.[14] April and Jamie stayed over with them. April snorted and smoked meth with appellant and Daveggio and did not sleep the entire time she was at the motel. (20RT 4610-4611, 4616, 4618.)

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[14] On December 6, 1997, Pleasanton police officer Debbie Blumenthal obtained a registration card and receipt dated November 25, 1997, in Daveggio's name from the Candlewood Suites Motel on Johnson Drive in Pleasanton. (21RT 4735.) Candlewood front desk clerk Melissa Lynch testified that she handled Daveggio's registration and that he took a room on November 25 and checked out on November 28, 1997. (32TY 4822-4826.)

On Thanksgiving Day, April's mother cooked the holiday dinner for the entire family, including Daveggio and appellant. At one point during the day, April was in her room with Daveggio, appellant, and Jamie. Daveggio handed April a gun, a small gray and black automatic. April had never seen her father with a gun before. (20RT 4619, 4621-4624.)

After dinner, Daveggio suggested that April spend the night at the Candlewood Motel so he could take her to get her driver's license the next morning. The motel was close to a branch office of the Department of Motor Vehicles. (20RT 4627-4630.) When Daveggio said he was ready to return to the Candlewood, Jamie, who had also stayed at the motel the previous two nights, got ready to leave. Daveggio stopped Jamie, telling her it would be better if she stayed home and got some rest. (21RT 4897.)

When they returned to the Candlewood, April and Daveggio sat and talked for two hours. Appellant was on the bed but awake. As April talked with her father, appellant made sighing or giggling sounds. Daveggio spoke about the perfect way to rob an armored truck. He asked April if she wanted to go on a "hunting," which he described as "where you stalk someone to kill." (20RT 4634-4636.) He talked about serial killers who are able to go on with their everyday life without anyone knowing what they had done. He said he had studied serial killers and knew their flaws and would not make the same mistakes himself. (20RT 4636-4640.)

Earlier, Daveggio had given April a book about serial killer Henry Lee Lucas. At the Candlewood, Daveggio said Lucas had a girlfriend who lured the women and together they killed a lot of people. He said if you torture someone you can watch the fear in their eyes and get an

adrenaline rush. (20RT 4642, 4644.) Toward the end of the conversation, Daveggio talked about sex. Then, he went to take a shower. (20RT 4650, 4651.)

Appellant approached April. Although appellant and Daveggio had not spoken privately since their return, appellant told April Daveggio intended to have oral sex with her. Appellant said she thought April would feel better if she knew what was going to happen. April was in shock and said nothing. It was nighttime and she didn't know what to do. (20RT 4652-4653, 4698.)

Daveggio emerged from the bathroom in shorts and nothing else. He sat next to April and said, "You know that I love you, right." He began to touch April. April said, "No." Appellant stood and went into the bathroom and closed the door. (20RT 4653-4655.)

Daveggio removed April's pants and underpants. He told her she would enjoy herself. He kissed her stomach, her legs, and orally copulated her vagina for an hour. He said he had seen her in her bedroom at the house and she was the only girl he could touch that would make him "nut," meaning ejaculate. April cried through the entire assault. The clock was in her view and she marked the time. The assault began at 12:07 and ended at 1:09. (20RT 4656-4658.)

At some point, appellant came out of the bathroom. April was on her back on the bed. Her father was kneeling on the floor with his head between April's legs. Appellant gave Daveggio "head." (20RT 4658.) The portion of the assault that involved appellant lasted about 15 to 20 minutes. Daveggio told April that appellant didn't enjoy oral sex. (20RT 4659.) Daveggio ejaculated in appellant's mouth. Daveggio

climbed onto the bed, kissed April's stomach and neck, then gave her a kiss and said, "You know I love you." April, who was still crying, felt violated. "Right at the last moment, I just wanted to die." (20RT 4660.)

The next day, the Friday after Thanksgiving, Daveggio and appellant took April home. Appellant asked April if she wanted to go "hunting" with Daveggio and herself. Appellant said the day after Thanksgiving was the biggest shopping day of the year and would be the best day to go on a hunt. April said she had things to do. Appellant got angry and said they would have to leave soon. (20RT 4704-4705.)

April's view of appellant's relationship with Daveggio was that appellant was able to stand up to him. April thought that appellant was her own person. (20RT 4699.)

Later that night, April went to the home of her boyfriend Spencer Burton. When Spencer began to get intimate, April cried and told him that her father and appellant had sexually molested her. (20RT 4707; 21RT 4713-4714.)

I. Vanessa Samson (Count 4)[15]

On Sunday, November 30, 1997, appellant told Jamie that she and Daveggio were going to Lake Tahoe for a few days because appellant

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[15] In his summation to the jury, Michael Ciraolo, lead counsel for Daveggio, stated that he and cocounsel Michael Berger were of the opinion that the state of the evidence was such that the jury could find Daveggio guilty of first degree murder, but the special circumstances of kidnapping and rape by instrument had not been established. (34RT 7225-7226.)

had a court appearance there. Appellant and Daveggio left their belongings in Jamie's room. (21RT 4898-4903.)

At 6:51 p.m. on November 30, 1997, Daveggio and appellant purchased two curling irons, a man's shirt, and a flashlight from the K-Mart store in Hayward, California. (21RT 4866-4869, 4874.)

On November 30th and December 1st, Daveggio and appellant were still in the Pleasanton area. Daveggio called Jamie on the night of the 30th and said he was staying at the Motel 6 in Pleasanton. The next night, December 1, Daveggio called Jamie and said he was still at the Motel 6 in Pleasanton and that he and appellant were going to Tahoe for appellant's court appearance. (21RT 4908-4911.) Registration records of the Motel 6 on Hopyard in Pleasanton showed that Daveggio used his driver's license in registering for a two-day stay for two persons on November 30, 1997, and that he checked out on December 2, 1997. (21RT 4833-4836, 4842.)

Also, on December 1, Federal Bureau of Investigation (FBI) special agent Lynn Ferrin, who had been assigned to investigate the Aleda Doe kidnap and sexual assault, showed Aleda Doe a photographic lineup that included a photograph of Daveggio. Aleda had completed a composite sketch of one of her kidnappers soon after the defendants released her and that sketch had already been aired on television stations by Placer County detectives. (24RT 5401) Aleda selected Daveggio's picture from the photo lineup as her captor and assailant. (24RT 5404.) Aleda was also shown a photo lineup that included appellant's photograph. She selected the photograph of a woman other than appellant as looking most like the van's

driver. (26RT 5462.) Aleda told Ferrin that the female driver of the green van was called Mickey. (24RT 5464.)

At 6:17 p.m. on December 1, 1997, Daveggio and appellant purchased a ball gag and a cassette tape entitled *Submissive Young Girls* from the adult entertainment store Not Too Naughty in Livermore, California. Their images were captured on the store's surveillance tape and played for the jury. (21RT 4844-4856.)

Rick Boune saw a newspaper article about the Aleda Doe case that included a composite sketch of Daveggio. He had heard appellant refer to herself as Mickey. (16RT 3775.)

On December 2, 1997, Ferrin obtained an arrest warrant for Daveggio from a federal magistrate. (24RT 5404.) He was unsuccessful in getting one for appellant. (24RT 5462.)

Around 7:00 or 7:30 on the morning of December 2, appellant appeared briefly at the home of her friend Fred Martinez and asked to borrow $20. Martinez thought she looked like someone who was using a lot of meth. Martinez did not see Daveggio in the van. Appellant acted normal and did not say anything was wrong. She said they were going to the welfare office and then to Lake Tahoe where she had to make a court appearance. (30RT 6387-6392.)

That same morning, Vanessa Samson left her Pleasanton home to walk to work, but never arrived at her workplace. Vanessa was 22 years old and living at home with her parents and brother and sister. She did not own a car and customarily walked to her job in an insurance office a mile away. Her usual route took her along Singletree Way where she cut

through a Lucky's Market shopping center, crossed Hopyard, and walked down West Las Positas Boulevard to her office. (22RT 4928-4930.)

Vanessa spoke with her mother Christina before leaving the house between 7:20 and 7:45 a.m. She was dressed in blue jeans, a gray San Diego State University sweatshirt with red lettering given to her by her boyfriend Robert Oxonian, a black jacket, and white tennis shoes. She carried a green Jansport backpack and a red Safeway lunch pack. Her hair was down. (22RT 4935-4038.)

Around 7:45 or 7:50 that morning, David Valentine and David Elola were working on the roof of Valentine's home when their attention was caught by a loud scream, a woman's voice. Both men looked toward Singletree Way, the direction of the scream. On hearing the scream, Valentine thought in his heart that something was wrong. Elola described it as a screeching scream, loud, high-pitched, violent, chilling. (22RT 4943-4945, 4975, 4980.) The sound of the scream was immediately followed by the sound of a sliding door shutting quickly. (22RT 4953, 4975.)

Valentine saw a forest green van driving slowly away. Its light-colored California license plate began with the number 3. (22RT 4951.) He did not see the person who screamed. He thought the van's driver was a woman because the driver had long hair, but he did not see the driver's face. (22RT 4950.) At the intersection near Lucky's, the van stopped, then turned to the right. (22RT 4951.)

Elola saw a forest green Ford minivan traveling at a slow pace before it moved in a smooth acceleration in the direction of Lucky's, where it stopped at the corner, and turned right. The driver was a woman with long brown or black shoulder-length hair. (22RT 4977-4978.)

Elola turned to Valentine and told him, relax, it's okay. It's a woman driving the van and she's probably dealing with her daughter. (22RT 4979.) Because the van drove away slowly, Valentine accepted Elola's thinking and did nothing more. (22RT 4959.)

When Christina Samson returned home at 5:30 that afternoon, Vanessa, who usually reached home before her, was not there. Instead, there was a phone message from Vanessa's supervisor Heidi Wolfe[16] saying that Vanessa had never arrived at work. At 9:00 that night, Vanessa's sister Nicole Samson telephoned the police and reported her missing. (22RT 4939-4940.)

Pleasanton police officer Sabrina Sams took a telephonic missing person report for Vanessa Lei Samson at 8:46 p.m. on December 2. (23RT 5231.) Sams arrived at the Samson home on Siesta Court at 9:12 p.m. and gathered identifying information. Sams also tried to page Vanessa, but received no response. She returned to the station and entered the missing person information into the system. (23RT 5233-5235.)

Two days later, David Valentine saw a flier posted on his front door about a missing girl. (22RT 4953.) Valentine went into his house and cried and then tried to remember what he had seen. He called police on December 4 and told them about the forest green van with the California license plate beginning with the number 3. (22RT 4960.)

At 9:44 on the morning Vanessa disappeared, appellant went into the Florin Road branch office of the Sacramento County Department of

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[16] Heidi Wolfe testified that Vanessa usually arrived in the office ahead of her 8:00 a.m. start time. She had always shown up for work when expected. At 9:00 a.m., Wolfe went to personnel to get Vanessa's home phone number and called and left a message. (23RT 5227-5229.)

Human Assistance (welfare office) near Highway 99 in Sacramento. Appellant was known to clerk Terri Hardy. (22RT 4987-4990.) Hardy thought appellant looked and acted as she normally did. Appellant always presented herself nicely, dressed nicely, her hair and makeup were nicely done. This morning, appellant did not appear upset and did not say she needed help although there was a security guard in the office. (22RT 5001.) Appellant displayed her California driver's license as is required and received an AFDC (Aid to Families with Dependent Children) check for $538.00 and a Fair Card for food stamps. Appellant left the office at 9:52 a.m. (22RT 4494-4498.)

At 10:04 a.m. that morning, appellant cashed the AFDC check at Check Mart, a check-cashing facility less than a minute by car from the welfare office. Appellant had a customer account with Check Mart that she had opened in January 1997 with her California driver's license and social security number. Skip Wulf was her reference. (22RT 5007-5011.) Before cashing appellant's AFDC check, Check Mart clerk Tanyia Marie Chinn Martinez verified appellant's identity through a computer check of appellant's driver's license and appellant's right thumbprint. (22RT 5012-5015.)

At 11:40 a.m.[17] that day, park employee Michael Petersen saw a dark green Dodge or Plymouth minivan in the parking lot of the Sly

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[17] At a later time, Petersen also told FBI special agent Kent Hittmeier that he saw the van at 11:40 a.m. Park ranger Mike Reeves was present during that interview and Reeves corrected Petersen and said Petersen was not in Sly Park at 11:40 a.m.; he was there at 2:00 p.m. (22RT 5040.) However, Petersen told Pleasanton police officers he saw the

Park recreation area in Pollock Pines. Sly Park is 4.5 miles off Highway 50, the route linking Sacramento and Lake Tahoe. The park has a self-service pay station where park users place fee monies in an envelope and deposit it in a lock box. (22RT 5022-5023, 5027.) The van had a five-inch wide white-colored stripe below the windows that ran the length of the van. Petersen wondered why someone would deface their new van with the stripe. A white male in a brown jacket and blue jeans was at the back of the van. He was 5 feet 10 or 11 inches, between 180 to 200 pounds, and slightly overweight with a pot belly. Petersen also saw a white female with longish brown hair dressed in light-colored clothing in the front passenger seat. (22RT 5027-5031.)

Sometime between 11:15 and 11:30 a.m. that day, Daveggio rented a smoking room for two people at the Tahoe Sundowner Motel in South Lake Tahoe. The motel's owner-manager Mukesh Patel thought Daveggio looked as though he had not had enough sleep and had not shaved for a couple of days. Patel matched Daveggio to his driver's license photograph. (22RT 5053-5056.)

Daveggio moved his green van and parked it in front of room 5, the assigned room. The motel is at the 6225-foot elevation; there was snow on the ground. (22RT 5059-5060.)

Ten minutes later, Patel saw a white woman with black hair driving the green van out of the motel grounds. The van returned about 25 minutes later. The woman parked it near room 5. (22RT 5061-5063.)

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green van at 11:40 a.m., consistent with his testimony at trial. (22RT 5043-5045.)

Later that night, when it was dark, Patel noticed that all of the windows to room 5 were fogged, which happens when people take long showers. The drapes were closed but Patel could see there was a light on in the room. The green van was gone. (22RT 5063-5064.)

The next morning at checkout time at 11:00, Patel entered room 5 and found it nice and clean. The contents of the trash can, including the liner, had been removed. Patel saw a light coffee-colored stain on the bedspread. He removed the bedspread and washed it. (22RT 5064-5065.)

At 7:19 p.m. that same evening, Daveggio and a dark-haired woman registered for a room at the Lakeside Inn & Casino in Stateline, Nevada. Lakeside desk clerk Gary Marchesano looked at Daveggio's California driver's license and made a record of it. Daveggio described the car he was driving as a 1995 Dodge. (23RT 5080-5086.)

The next morning, December 3, FBI agents went to Rick Boune's home looking for Daveggio and appellant. Boune told them appellant was in court in Lake Tahoe because she had been caught passing bad checks. (16RT 3801.)

On December 3, appellant appeared in her bad check case in Douglas County, Nevada, Justice Court, across the street from the Lakeside Inn. (23RT 5100, 5111.) Deputy district attorney Alan Buttell had first discussed appellant's case with her on November 10, 1997, and had worked out a proposed disposition of the case contingent on appellant's repaying the casino to which money was owed. On November 12, 1997, appellant was out of custody and her next appearance was set for December 3, 1997. On December 3, appellant made a payment of $40, which was some but not

all of the money due. Buttell agreed to extend the time in which appellant would complete the payment to December 24, 1997. Buttell described appellant's demeanor as "at ease and very cooperative." (23RT 5103-5110.)

That same day, FBI special agents Mike West and Michael McKinley located the green Dodge minivan in the parking lot of the Lakeside Inn and Casino and kept it under surveillance. (23RT 5123-5127.) Daveggio was arrested by FBI special agents Bruce Wick and Kepp Steele in the casino on a federal warrant for kidnapping Aleda Doe. (23RT 5115-5116.) After West learned that Daveggio had been arrested, he learned that someone presumed to be appellant was in room 133. West could see lights and hear a voice in the room. Special agent Christopher Campion donned a maroon hotel uniform as a disguise and knocked on the door to room 133. Appellant opened the door and Campion entered the room. Special agent Lynn Ferrin, the case agent for the Aleda Doe case, entered the room immediately after Campion and took appellant into custody and into an adjacent room. (23RT 5131; 24RT 5405-5407.) Appellant was arrested under a state warrant. (23RT 5145.)

Agents West and Campion cleared the room and then searched it. West found a pay envelope for Sly Park parking that had been ripped into four pieces. He also assisted Campion in clearing a loaded .25 automatic Colt pistol located in a black cash box. The cash box also contained two bags of green substance resembling marijuana, a pipe, a torch, plastic bags with a white substance, a digital scale, and a premier credit card bearing Daveggio's name. (23RT 5137-5138.)

Douglas County deputy sheriff Aaron Crawford transported appellant to the Douglas County jail facility where she was booked. Appellant was still dressed in the clothes in which she was arrested. Deputy sheriff Rick Sousa searched appellant at the jail facility while she was still cuffed. He felt a lumpy object in appellant's right front jean pocket and asked appellant what was in there. Appellant made no response. Sousa removed a 2 ½ to 3 foot length of yellow nylon rope. (23RT 5200, 5202.) After that, appellant's restraints were removed and she was placed in a holding cell where she undressed as instructed on a clean sheet and changed into jail clothing. Appellant's street clothes were booked into evidence. (23RT 5178-5180.)

Deputy Crawford also recovered the following items from room 133: Clothing, the contents of appellant's fanny pack, a Benson & Hedges cigarette pack, drugs and drug paraphernalia, the .25 semi-automatic firearm, ammunition, and a note written on Lakeside Inn stationery. (23RT 5162-5174.)

On December 4, 1997, John Schoettgen found Vanessa Samson's body along Highway 88. Sometime between 10:30 and 11:00 a.m., Schoettgen pulled over in a plowed-out turnout and got out of his car. (23RT 5239-5240.) He saw a body lying face down in the snow on the downhill grade at the side of the road. He yelled, but there was no response. The body was dressed in blue jeans, white tennis shoes, a blue jacket. Schoettgen did not go down to the body. Instead he got into his car and went to call for help from a small store in Woodfords, about three minutes away. (23RT 5240-5243.)

First, Alpine County sheriff Henry "Skip" Veatch and then deputy sheriff Everett Brakensiek arrived at the location of the body. Brakensiek looked over the snowbank and saw a human body, small in stature, lying face down in the clean and undisturbed snow. There were no footprints. There was no snow on the top of the body. (23RT 5265-5266.)

Brakensiek walked down and saw that the body was that of a woman, who was deceased and frozen. He saw a ligature-type mark surrounding the neck. He could see a red nylon lunch bag under the body. (23RT 5267-5269, 5272.)

Brakensiek and other officers recovered a six-foot length of rope with human hair stuck to it twisted in a type of loop; a dark green backpack; a Snapple-brand drink bottle; a smashed 12-ounce Coca-Cola can.[18] (23RT 5276-5278, 5283, 5284.) There was no snow on the green backpack. Inside the backpack, everything was neat. Brakensiek saw a hair clip, pager, hair scrunchies, cassette tape player, numerous cassettes, and a California driver's license for Vanessa Lei Samson. (23RT 5286-5287.)

Vanessa's clothes were in disarray; her jeans were buttoned at the top, but not zipped; her left tennis shoe was tied, but her right shoe was not. She wore a watch. (23RT 5182-5282.)

Using information from her driver's license, Brakensiek ran Vanessa's information through the missing persons' database and matched her name to a report out of Pleasanton. (23RT 5290.)

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[18] The parties stipulated that the Snapple bottle and crushed Coca-Cola can were examined for latent prints and that no prints sufficient for comparison were found on either. (28RT 6104.)

An autopsy was performed on Vanessa's body on December 5, 1997, in the Placer County Coroner's Office in Auburn, California, by pathologist Dr. Curtis Rollins. (23RT 5304-5305.) Representatives of a number of law enforcement agencies were present. Vanessa's finger and palm prints were taken. (23RT 5309-5310, 5325.) Her clothing and property, including her backpack, wallet, credit card, California driver's license, day planner, lunch bag, watch, gold heart bracelet, and black hair scrunchy were recovered. (23RT 5307-5309, 5311-5324.)

The prosecution engaged forensic pathologist Dr. Brian Peterson to review the work done by Dr. Rollins[19] and to review case-related investigatory materials and render his own opinion about the autopsy, the cause of death, and the injuries sustained by Vanessa. (28RT 6039-6040.) Peterson determined that the forensic protocol met all the necessary requirements and provided enough detail for him to render his own opinion. (28RT 6050.)

The autopsy revealed no visible injury on the outside of the scalp but the presence of actual bleeding on the inside of the scalp. There was no injury to the bone or membranes around the brain or to the brain itself. The scalp injuries were caused by blunt force injury either through

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[19] Forensic pathologist Dr. Curtis Rollins performed the autopsy of Vanessa Sampson's body on December 5, 1997. In February 1998, Dr. Rollins concluded that he was addicted to the prescription medication Demerol and sought treatment. (32RT 6792-6808.) The prosecution called Dr. Brian Peterson to testify to the result of the autopsy in its case-in-chief. In turn, the defense called forensic pathologist Dr. Gregory Reiber to testify concerning the autopsy. (29RT 6207ff.) The prosecution then called Dr. Rollins as a rebuttal witness. (32RT 6779ff.)

application of blows to the head or blows by the head against something else. (28RT 6054-6055.)

There was a ligature furrow around the neck measuring 10 ¼ inches in length and ¼ inch in width; areas of weaving were present in the ligature furrow. (28RT 6055-6056.)

Other external findings included bleeding or petechial hemorrhages in the white of the eye and the lining of the eye socket, which is a soft sign of asphyxia and consistent with the ligature pattern on the neck. (28RT 6058.)

Internal findings of the neck included extensive and deep bleeding in the strap muscles that surround the larynx, trachea, and esophagus, as well as petechial hemorrhage in the epiglottis and back of throat. In Peterson's opinion, the bleeding exceeded what he would expect to see in a ligature strangulation, leading him to conclude that manual strangulation had also been applied. Moreover, because the bleeding involved multiple layers of muscles all the way to the back of the neck, the finding implied that substantial manual force was involved. Peterson testified that the ligature and manual strangulation could have occurred at separate times or simultaneously. (28RT 6060.)

Photographs of the dissected esophagus with bleeding supported the conclusion that ligature and manual strangulation had been applied. The presence of blood-tinged foam within the trachea fit with everything else regarding the mechanism of death. (20RT 6061-6062.) The diagnosis of asphyxial death was also supported by findings of petechial hemorrhages of the pericardium and the pleura. (28RT 6063.)

Rollins had assigned mechanical asphyxia due to ligature strangulation as the cause of death. Peterson testified he would add the aspect of manual strangulation. (28RT 6066.) Peterson was unable to speak to whether asphyxia was the only cause of death or whether freezing temperatures played a part. (28RT 6078.)

Rollins described bruising and scraping on the right front chest wall and the left front armpit. Peterson said such injuries could have been caused by Samson being grabbed and thrown into a van. (28RT 6064.)

The final set of injuries described was a series of bruises to both the left and right buttock. The left buttock group measured 3 ¼ inches by 3 inches made up of several individual bruises. The right buttock group of three separate injuries together measured 1 ½ inches by 1 inch. The bruising was deep and went beyond the skin down to the gluteus maximus on both sides. Peterson said the bruises were inflicted by blows with a blunt object; simple slapping or spanking would not cause the deep bruising. (28RT 6065-6066.)

Vanessa Samson was 64 inches tall and weighed 120 pounds. There were no drugs or alcohol in her system. (28RT 6066.) There was no evidence of defensive wounds; no visible marks that her extremities were restrained. (28RT 6067.) Rollins described no injuries to vaginal, anal, or rectal areas. (28RT 6087.)

Pleasanton police detective Kris Phelps observed no abrasions on Vanessa's wrist, a matter of significance to him. There was fecal matter on the inside of her underwear. (23RT 5326.) Department of Justice (DOJ) senior criminalist Ricci Cooksey collected clothing, hair, fiber, and other

evidence, including tape lifts of ligature marks, not normally the concern of the pathologist during the autopsy procedure. (24RT 5332.) Cooksey observed fecal matter exuding from the anus and on the underwear. He saw no body fluids on the underwear, no signs of bleeding on the body, no broken fingernails. (24RT 5356.) He observed Dr. Rollins perform the tests and take the samples for the sexual assault kit. (24RT 5346.)

The green van was towed to the Washoe County Crime Laboratory in Reno, where it was searched on December 4, 1997, and again on December 8, 1997. (23RT 5141-5143; 24RT 5411-5412.) The following were among the items relevant to this case that were recovered from the van: a cassette tape titled *Submissive Young Girls* seized from the van's dashboard player; duct tape roll; a hairbrush with fibers; carpets; 16-count .25 caliber cartridges and 19-count .38 caliber cartridges; a white towel; a cocked crossbow; an Arizona iced tea can; a Pepsi can; an AM/PM cup from the side drink compartment in the cargo area; an empty Benson & Hedges 100s package; a Candlewood Inn notepad; two Revlon curling irons with duct tape; orange nylon rope; red nylon rope; a green ball gag; and stained napkins. (24RT 5416-5425, 5437-5451, 5544-5557, 5761-5767, 5778-5820.)[20]

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[20] The police also recovered several carpets from the van interior. Four slits had been cut into one of the carpets. (24RT 5420-5425.) The district attorney's investigator Tim Painter, created a template by replicating the carpet with evidence paper. Painter then placed the template in the van's cargo area and found the cuts in the carpet allowed access to the recess bracket anchor points that had held the middle chairs and rear bench seat in place before they were removed. (28RT 6110.) The combined presence of ropes in the van and the accessibility of the anchor points suggested a method of restraints. However, none of the women who

Department of Justice crime laboratory DNA expert Brian Burritt examined and performed DNA tests on items relevant to the investigation in the case, including items seized from the green van. Burritt determined there were no semen stains in Vanessa's underwear. (27RT 5913-5914.)

He examined the two curling irons. The first curling iron was 12 inches long and had been modified. The electrical cord had been cut off; the clasp had been removed and the portion of the curling iron where the clasp had connected to the iron was wrapped in duct tape. The tip of the curling iron was ¾ inches long and brown material was packed in there. Burritt also observed brown stains and brown material in the grooves of the tip of the curling iron. Burritt dislodged a pellet of brown material from the tip of the curling iron and observed what appeared to be mold or fungal growth on the material. (27RT 5918-5927.) The brown pellet and grooves of the first curling iron tested positive for blood. (27RT 5937-5941.)

The second curling iron had been similarly modified. The electrical cord had been cut off; the clasp had been removed; and the area where the clasp had connected was wrapped in duct tape. There were brown stains at the tip. There was a brown pellet in the folds of the wrapping for the second curling iron. The brown pellet was similar to the

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had been sexually assaulted in the van reported or testified to being restrained in this manner. And, the prosecution's forensic pathologists reported that Vanessa Samson's body showed no sign her extremities were restrained. (28RT 6067, 6068; 32RT 6840.) During his penalty phase testimony, Daveggio testified he attempted to create restraints by running ropes through the anchor bolts, but learned in the process that the anchor bolts were not in the right position to tie someone down. (37RT 7497-7951.)

brown pellet found in the first curling iron but had no microbial activity. This brown pellet tested positive for blood. (27RT 5941-5943.)

Burritt concluded that the brown pellets had the appearance and characteristics of fecal material. (27RT 5967-5969, 5972.) Fecal matter contains DNA. A DNA test for feces existed at the time of trial, but was not in place at the time Burritt tested the materials. (27RT 5984-5985.)

Burritt also examined and tested a green ball gag attached to a black leather harness, which was recovered during the search of the green van. There were three sets of bite marks made by a small mouth and small set of teeth on the green ball gag. (27RT 5948.)

Burrit also tested stains found on three paper napkins recovered from the green van. The napkin stains bore a distinct U-shaped appearance. There were several brown stains at the base of the U, a shape consistent with the napkin being used to wipe off the curling iron. The stains on all three napkins tested presumptive for blood. (27RT 5954, 5960.)

Burritt developed DNA profiles for Vanessa, Daveggio, and appellant from reference blood stains. (27RT 5976.) Appellant and Daveggio were excluded as donors of any biological material from the items Burritt tested. (27RT 5977.) Vanessa was included as a possible contributor for stains on the napkins and swabs from the curling irons and ball gag. Both PCR (polymerase chain reaction) and RFLP (restriction fragment length polymorphism) results showed Vanessa was the likely source of stains on two napkins. The DNA profile based on RFLP alone is 1 in 8.9 billion for Caucasians and 1 in 22 billion for Hispanics, leading Burritt to conclude that both PCR and RFLP results from the two napkins

were consistent with Vanessa's profile. (27RT 5977-5979.) Vanessa was Filipino and there is no Filipino database. (27RT 5995-5998.) PCR results from the ball gag and both curling irons were also consistent with Samson's profile. (27RT 5979-5980.)

A second DNA expert, Department of Justice criminalist Matthew Piucci, later took Burritt's extractions and ran his own DNA profiles for appellant, Daveggio, and Vanessa. (27RT 6013-6016.) Piucci performed STR (short tandem repeat) profile tests on the biological materials and found strong evidence that Vanessa's DNA was present on the two curling irons and the ball gag. (27RT 6016-6022, 6024.) Piucci ran the statistics for the probability that a random person could possess the STR profile developed from the two curling irons and the ball gag and approximated within the following ranges – 1 in 23 to 220 trillion African-Americans; 1 in 14 to 51 trillion Caucasians; 1 in 66 to 86 trillion Hispanics. (27RT 6023.) Piucci also located one FBI-prepared database for Filipinos in Guam and determined the probability based on that database was 1 in 19 trillion. (27RT 6027-6028.)

Department of Justice latent print analyst Felita Chapman matched appellant's known prints to four prints found on the 13-inch curling iron and the duct tape wrapping it. Three prints on the curling iron were reversals, i.e., prints transferred from the sticky side of the duct tape to the curling iron. The fourth print was on the sticky side of the duct tape. (28RT 6122, 6135-6142.) Chapman matched appellant's known prints to two prints found on the 12-inch curling iron, one on the nonadhesive side of the duct tape and the second a reversal on the curling iron. (28RT 6145-6146.)

Chapman matched two of appellant's prints to the Arizona iced tea can; three of appellant's prints to the Coca-Cola bottle; six of appellant's prints to the Pepsi bottle. (28RT 6148-6149.) Daveggio's prints were found on the book *Dead of Night*; the cassette tape, and the cassette tape case, and on the black cashbox. (28RT 6149-6151, 6155.)

Chapman made eight identifications from the AM/PM cup – four matches to appellant; three to Daveggio; and one to Vanessa Samson. (28RT 6153-6154.)

APPELLANT'S GUILT PHASE DEFENSE EVIDENCE

Forensic pathologist Dr. Gregory Reiber reviewed Dr. Rollins' autopsy report and attachments and his grand jury testimony, Dr. Peterson's report and trial testimony. (29RT 6209-6210.) Dr. Reiber had known Dr. Rollins, who had received his pathology training at the University of California at Davis under Dr. Reiber's supervision, since 1993. (29RT 6211.) Dr. Rollins had spoken to Dr. Reiber in January 1998 concerning his Demerol addiction and his intention to enter a drug diversion program. (29RT 6212-6213.)

Because the pathologist's ability to attend to detail is critical to the autopsy record and because Demerol affects the ability to attend to detail, Dr. Reiber would only rely upon those observations of Dr. Rollins he could personally verify through other means. (29RT 6212-6214.) Photographs provided independent confirmation. (29RT 6215.)

In this case, Dr. Rollins through Dr. Peterson suggested asphyxiation as cause of death. Dr. Peterson testified that the presence of substantial bleeding in the strap muscles suggested asphyxiation was the

cause of death. Dr. Reiber examined the photographs of the strap muscles and found that the areas of hemorrhage all pretty much followed a line that corresponded to the ligature mark on the outside of the neck. That raised a strong possibility that asphyxiation was the cause of death. But Dr. Reiber felt it was also necessary to look at other variables to see whether there was another reasonable mechanism to explain death. (29RT 6216.)

He explained that a person can be strangled, but not fatally. A person can be strangled into unconsciousness and to a level of unconsciousness where the person is not moving and the breathing would be shallow and infrequent. The person is alive but does not look alive. (29RT 6286-6287.)

The body was found in the snow so exposure as a cause of death would have to be considered with some weight. An individual in a cold environment, incapacitated from having been severely but nonlethally strangled with a ligature, might not be able to extricate herself from the situation and might succumb to hypothermia. The presence of petechiae would be consistent with both lethal and nonlethal strangulation, as is true of bleeding in the strap muscles. (29RT 6216-6217.)

Dr. Reiber's opinion was that Vanessa Sampson may have frozen to death based on fact that she was in a cold environment and that she suffered injuries that could have been either fatal or nonfatal but very incapacitating. She could have succumbed to hypothermia. (29RT 6223.) As a pathologist, it would be very difficult to say the strangulation itself was fatal rather than less than fatal but incapacitating and the person died of another environmental problem, i.e, from exposure. (29RT 6288.)

Dr. Reiber also testified that the rectum and anus are fairly tender organs. He would expect to find signs of trauma if these organs were penetrated by a hard metallic object such as the curling irons because the tip is very blunt, the irons are not very tapered, and the tip is a hard object. (29RT 6276.) He also stated that the bruising on Vanessa Sampson's buttocks could be consistent with someone having been tossed from the car and landing on rough gravel. (29RT 6218.)

Phil Everall Schmaling lived in the tri-level house with appellant and Daveggio and their children. (30RT 6369.) Schmaling used meth in the house, as did appellant. He knew appellant was a prostitute, that she had a "sugar daddy" named Bill Reed. Schmaling had also met Skip Wulf, the client who had helped appellant acquire the green van. (30RT 6371-6373, 6374.) On one occasion Schmaling saw and heard an argument between appellant and Rachel. Rachel screamed at appellant and then pushed her down the stairs. Appellant fell and slid across the entryway floor. (30RT 6370.)

Schmaling left the house after an incident during which Rachel had threatened to falsely report to the police that he had raped her. Schmaling said the incident began after Rachel refused to do the dishes. Schmaling offered to help if Rachel would do them. Rachel replied she did not have to do what he said. Rachel said something to the effect of, "All I have to do is make a phone call and you will be history. I will tell them you raped me or tried to rape me." (30RT 6371.)

Fred Martinez was a friend of appellant and Daveggio. He noticed a change in appellant's appearance and demeanor in 1997. Appellant was using drugs. She was no longer outgoing. (30RT 6382.)

Daveggio too had increased his meth use. He looked like things were bothering him, like things weren't going right. (30RT 6383.)

Tina Murrell knew both Rachel Doe and Christina Doe when they were nine and ten, respectively. Both said they were gang members. (30RT 6449-6450.) Rachel came home from school one day and told Randy that a boy from school pulled down her skirt. Randy left to beat the boy up. After he left, Rachel laughed and told Tina that the boy never pulled her skirt down. She was mad at the boy over something and wanted Randy to beat him up. (30RT 6451.)

From March 1997 to March 1998, Murrell lived in a home with Sheri James, whom she called her mother, and with Sheri's sister Fawnie James, and with Amy Doe. Murrell saw Amy daily and never saw bruises or marks or cuts on her face. Amy never said she was attacked by anyone. (30RT 6451.) Murrell had seen Amy use drugs and hallucinate. (30RT 6471.) Sheri and Fawnie dealt in meth sales from the house, but Murrell never saw appellant or Daveggio buy meth from them. (30RT 6453.)

Sheri James met appellant when appellant was 16 years old and came to apply for a job. Sheri ran Happy Massage for five years, a place where prostitution took place. Appellant brought her own client base with her, including her father Leland. Sheri thought Leland was just a client at first. He would go into the room with appellant two or three times a week over the five years. Leland would bring customers to Happy Massage to see appellant. He would collect money from appellant. Sometimes he came alone and would go into the room with appellant alone. Sheri walked in one day and Leland and appellant were engaged in

missionary-position sex. On other occasions, Sheri saw Leland leave appellant's room while fastening his pants and shirt. (30RT 6505-6506, 6522.)

At Happy Massage, appellant did not take the role of a dominatrix and her room did not contain handcuffs or dominatrix paraphernalia. (30RT 6512-6517.) Appellant did carry a small knife for her safety. (30RT 6519.)

In addition to her abusive relationship with her father, appellant had an abusive relationship with a boyfriend named Johnny Garcia. Appellant would show up for work with bruises on her arms and face. Once, Garcia brought appellant to work, dragged her by the hair out of the car, and kicked her in the face. Another time, he pulled her out of the massage parlor and broke her arm. (30RT 6506-6507.) Appellant once told Sheri that Garcia poured Drano down her throat and burned her throat. (30RT 6537-6538.)

James said appellant was beautiful when she moved into the tri-level house. She placed her children in a private Catholic school. (30RT 6507.) After Daveggio moved into the house, appellant quit caring about herself and got very thin. (30RT 6508.)

Psychiatrist Dr. Pablo Stewart was qualified by the court as an expert in the area of psychiatric treatment of alcohol and drug abuse and posttraumatic stress syndrome. (31RT 6585-6598.)

Posttraumatic Stress Disorder (PTSD) is a syndrome, a variety of symptoms that result from exposure to trauma. Trauma is either an actual assault upon one's body where there is significant injury and/or

possible loss of life or the witnessing of this occurring to someone else. (31RT 6598-6599.)

Stewart had an extensive clinical interview with appellant over six hours; reviewed the report by psychologist Dr. Michael Fraga; discussed appellant with Sheri James, Skip Wulf, and with psychologist Dr. Helga Mueller who treated appellant's son Randy; and reviewed the testimonies of Rick Boune and Aleda Doe. (31RT 6600.)

Stewart diagnosed appellant as suffering from complex posttraumatic stress disorder as a result of chronic, severe trauma over an extended period of time. (31RT 6606.) Domination is a form of extreme trauma. (31RT 6607.) Complex PTSD is a diagnosis that is intended to separate people who have experienced multiple incidents of trauma from those who experience single-incident trauma. (31RT 6602.) Under normal circumstances, a person who is exposed to trauma "numbs out" as a coping mechanism that allows her to exist. Persons who are exposed to chronic severe trauma, e.g., repeated sexual abuse and domination by another person, develop different responses. (31RT 6603.) Complex PTSD is a very serious debilitating stress disorder and a very serious debilitating psychiatric condition. A person with this disorder can display a variety of symptoms not seen in persons not exposed to trauma. People presented with a threat will do what they can to minimize the threat by removing it or getting out of threat's way. (31RT 6605.) People with PTSD and Complex PTSD lose their ability to seek their own escape, described by the term "learned helplessness." The inability to get out of the traumatic situation is part of the illness. (31RT 6606, 6607.)

It is common for people with PTSD to attempt to self-medicate the effects of the trauma with the use of substances. Alcohol abuse is the most common concurrent psychiatric condition associated with PTSD. (31RT 6608.) Sex between a father and daughter constitutes sex abuse in its most severe form. Stewart stated it was hard to fathom the extent of the traumatic nature of a relationship where a parent manages a daughter's prostitution and receives money from her customers. Such a relationship, as well as having a gun waved in your face, are exceptionally traumatic experiences. The combination of these traumatic experiences contributes to a person's inability to extricate herself from it. (31RT 6609.) In Complex PTSD situations, the traumatized person goes along with the perpetrator of the trauma. In Stewart's work with prostitutes and with battered spouses, he sees individuals returning to their settings. Returning is part of the illness. People return because resisting causes more difficulties than simply going along. (31RT 6610-6611.)

Appellant manifested symptoms that resulted in Stewart's diagnosis, including documentation that she was exposed to traumatic events and the evidence she was re-experiencing traumatic events. (33RT 6612.) Stewart concluded that appellant had a propensity to be controlled by someone in a relationship. His opinion was that she would be more controllable or more subservient to someone. (31RT 6613.) In reaching this opinion, Stewart did consider the testimony of Aleda Doe that Daveggio yielded the decision about what to do with Aleda Doe to appellant. Complex PTSD is progressive. Stewart found that at the time of the Aleda Doe incident, there was still an element of appellant's "personness" that helped Aleda live. But, after the Aleda Doe incident,

appellant was traumatized by the experience in which Daveggio waved a gun in her face and that event removed that part of appellant that had made the difference for Aleda Doe. (31RT 6708.) The fact that Christina Doe, Rachel Doe, and Amy Doe said appellant willingly participated in events did not alter Stewart's opinion. (31RT 6692.) Stewart also considered that the events leading to Vanessa's death were the latest example of domination and control to which appellant was subjected. (31RT 6671-6672, 6678.)

Stewart explained that Complex PTSD did not so much result in being dominated; rather it resulted in the actual submission on the part of the person being abused to the person who was actually inflicting the trauma as the ultimate attempt of the brain to deal with the trauma. (31RT 6700.) Consequently, someone with Complex PTSD can make plans. There is nothing to say that a person with Complex PTSD could not try to be in control in any given situation. That person could use deceit or sex or money to control a situation and try to gain control over another person. (31RT 6681.) That person could suffer from any number of additional psychiatric disorders. (31RT 6680.)

Based on appellant's degree of Complex PTSD, Stewart categorized appellant as being severely mentally ill. (31RT 6708.)

DAVEGGIO'S GUILT PHASE REBUTTAL EVIDENCE[21]

Vicki Fairbanks met Daveggio in mid-1995 while he was working at a bar in Sacramento. They became romantically involved for a

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[21] At the guilt phase trial, codefendant Daveggio initially rested on the state of the prosecution's evidence. (7CT 1733; 29RT 6205-6206.)

period and remained friends afterwards. Daveggio introduced Fairbanks to appellant. (32RT 6724-6725.)

Fairbanks found appellant to be obsessed by Daveggio. She did anything and everything he asked or needed. (32RT 6726.) When Daveggio went to live with Liz Bingenheimer for a period, appellant drove by Bingenheimer's home, became friends with people Daveggio knew, and went to places he frequented just to have a connection with him. (32RT 6726-6727.) She collected information about him from his friends and called him to find out where he was and what he was doing. (32RT 6733.)

Fairbanks also saw that appellant manipulated Daveggio in certain kinds of behavior. She kept him stirred up; she would not let things drop. She controlled Daveggio. (32RT 6729.) For example, appellant told Daveggio that she had received threatening phone calls from members of the Devil's Horsemen Motorcycle Club when she had not. She told Daveggio about graffiti on the Devil's Horsemen club house when the graffiti did not exist. She drove by the homes of members of the club and called them. (32RT 6732.)

Daveggio had lived with appellant in the tri-level house for two or three months in the spring and summer of 1997. He then moved in with Liz Bingenheimer in July and August. (32RT 6743-6744.) While Daveggio was living with Bingenheimer, the Devil's Horsemen took Daveggio's motorcycle because he owed them money. Fairbanks had never seen any member of the motorcycle club do anything threatening to Daveggio. After appellant lied about the phone call from the Devil's Horsemen, appellant and Daveggio went on the run. In this way, appellant had Daveggio all to herself. (32RT 6749.)

Fairbanks has known appellant to lie (32RT 6736) and once witnessed someone restraining appellant from throwing a glass during an escalating verbal argument in Bobby Joe's bar. (32RT 6727, 6745.)

PROSECUTION'S GUILT PHASE REBUTTAL EVIDENCE

Dr. Curtis Rollins[22] autopsied Vanessa Samson's body. (32RT 6779-6792.) In Rollins' opinion, injuries to the buttocks were not consistent with falling on gravel because the injuries were deep intradermal contusions that went down deep into the fatty area of the buttocks and into the muscle. Moreover, there was no abrasion, such as would be present with a fall on gravel. (32RT 6819.) The scalp injuries were not visible from the outside. If a person was struck on the head with a fist but without enough energy to cut or lacerate the head, there would be bruising underneath the scalp. Vanessa had three bruises on the left and two on the right side of the scalp. (32RT 6820.)

Rollins described the ligature mark as a patterned injury. An object was placed on the neck with enough force to cause a friction abrasion. (32RT 6821.) An internal examination of the neck indicted there were extensive hemorrhages, but these were mainly restricted to the area

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[22] Dr. Rollins testified that he is an addict and had abused alcohol at an early age; cocaine and marijuana in college; ecstasy in the 1990s; and Demerol since 1985. He performed the autopsy on Vanessa Samson on December 5, 1997, and in February 1998 he concluded that he was addicted to Demerol. He stated he had been in an 11-year relationship that ended, that he was in counseling in 1995 and 1996, that he realized that the counseling was not going to work and that the relationship was in fact going to end, that he began using Demerol and almost died, which caused him to seek treatment. (32RT 6792-6808.) He was positive he was not "loaded" on Demerol when he performed the autopsy. (32RT 6816.)

immediately under the ligature mark. (32RT 6824.) Rollins followed the protocol in removing the neck so no bleeding was caused by the autopsy. (32RT 6824-6825.) There was no doubt in Rollins' mind that Vanessa died from ligature strangulation. She had some of the worst neck injuries he had ever seen. There was no evidence she died from hypothermia, which is a diagnosis of death by exclusion. She did not have the cherry red lividity, the severe skin discoloration, seen with hypothermia. Instead, she had a clear anatomic reason to be dead. He was absolutely certain the cause of death was strangulation. (32RT 6825-6827.) Rollins looked at the black and green and red rope found next to the body and could only say the rope was consistent with the furrow mark in Vanessa's neck, but it was not the only rope in the world that could do that. On the other hand, the yellow rope recovered (from appellant's clothing) was inconsistent with the furrow mark because the weave pattern and the porosity were too tight. They did not match the pattern on the neck. (32RT 6831-6832, 6842.)

Rollins was unable to say with certainty that Vanessa was dead before she was placed in the snow bank. But factors suggested she was dead, e.g., her posture in the snow bank was not natural; the lividity was fixed on the right lateral exactly as if she'd been placed in the snow bank so she did not move once she had been placed in that position. When they rolled the body over in the snow, there was nothing in the snow under or around the body illustrative of death throes. The reasonable medical certainty was that she was dead when she was placed in the snow bank. (32RT 6828-6829.)

There was no external trauma to the vaginal and rectal area. The published data says 50 to 56 percent of the time there will be trauma

when there is forcible entry into the rectum. In hindsight, he would have done a rectal exam, but the facts presented to him at the time of the autopsy and the absence of trauma informed his decision. (32RT 6833-6835.) He was unable to say there was any kind of penetration of the vagina or rectum. (32RT 6841.)

There were no defensive wounds on the body, no areas of nail chipping, bruising to hands, to arms, or nails in ligature marks. (32RT 6835, 6843.) There were no obvious signs of restraints to the wrists or extremities – no cuff, chain, or rope marks. (32RT 6840.)

PROSECUTION'S PENALTY PHASE EVIDENCE

Liz Silos and Vanessa were high school friends who regarded each other as sisters. They planned to be in each other's weddings, to live near each other so each could be an aunt to the other's children. (35RT 7486-7489.)

Robert Oxonian hoped to marry Vanessa after he finished college. She made him feel special. They saw each other on Thanksgiving Day 1997 and then on the Sunday following. He put together collections of songs on cassette tapes for her. (35RT 7541-7546.)

Vanessa's sister Nichole and brother Vincent missed her presence in their close-knit family. Vanessa was outgoing, caring, giving, kind. The family felt the pain of her loss. (35RT 7655-7666, 7667-7671.)

Vanessa's father Daniel went to Vanessa's gravesite every day. He missed the daughter who was his fishing buddy. (35RT 7673-7677.)

Vanessa's mother Christina described Vanessa as "sunshine" and said it was difficult to come home after work and realize that Vanessa is not there. The family and children were close. Christina spoke of the difficulty of learning that Vanessa was missing, of seeing the trial photographs, of seeing family photos. (35RT 7680-7692.)

Rachel Doe testified that when they returned to Sacramento after Daveggio fired his gun into the forest near Santa Cruz, appellant stopped in a parking lot on Florin Mall Road. Daveggio said he was going to kill Liz Bingenheimer. Daveggio put his revolver into his pants and got out of the van. Bobby Joe's bar was about three or four blocks away. Appellant told him to be careful. (35RT 7636-7640, 7643.)

Rachel described appellant as being obsessed with Daveggio. Appellant hated men, but not Daveggio. He was the first person who did not judge her; he told her all the right things and so she fell in love. (35RT 7647.)

The prosecution presented penalty phase evidence against Daveggio concerning his kidnapping and forcible sexual assault of Beverly Doe on July 25, 1985. During the incident gunshots were fired at Beverly Doe. (35RT 7503-7529.) The prosecution also presented evidence that Daveggio kidnapped and attempted to forcibly sexually assault 14-year-old Hope Doe (35RT 7552-7569) and that Daveggio kidnapped and forcibly sexually assaulted Pattie Doe in July 1984 (35RT 7600-7607, 7615). In 1982, Daveggio brought his friend Gary Silverstri into the bedroom he shared with his wife Donetta Doe and held Donetta's hands over her head while Silverstri orally copulated Donetta against her wishes. (35RT 7620.)

DAVEGGIO'S PENALTY PHASE EVIDENCE

Codefendant James Daveggio testified in his own behalf and told the jury he was testifying because he accepted responsibility for his crimes and because he had been touched by the testimony of Vanessa Samson's mother Christina. (36RT 7800.) Before testifying he had reviewed the discovery, including the videotaped interviews over four days that appellant had with law enforcement following her arrest. Appellant testified against him at the Aleda Doe trial. (37RT 8042, 8043.)

While Daveggio and appellant were at the Motel 6 in Pleasanton, they discussed kidnapping somebody. It was going to be a long drive to Lake Tahoe and they wanted entertainment for the road trip. They drove down the street and appellant spotted Vanessa Samson. Appellant stopped the van. Daveggio grabbed Vanessa and pulled her in the van. Vanessa screamed and asked, "What have I done? What have I done?" (36RT 7803, 7878.) Daveggio had a crossbow in the van because he was having problems with the bikers' club, but he did not threaten or hit Vanessa with either the crossbow or a gun. (36RT 7803-7804.)

Sexual gratification was one motive for grabbing Vanessa. He also knew it was going to be a kidnap and violence and aggression would feed the thrill of it. He saw nothing to suggest that appellant enjoyed grabbing girls off the street. (36RT 7875.) Daveggio said when he left the motel he had the intent to kidnap the next victim, the intent to sexually assault that victim, and the intent to murder the victim if necessary. All three intents existed at the time he left Motel 6. (37RT 7974.)

Daveggio told Vanessa to shut up and to not move. He asked if he needed to tie her and she said no. At a point, Daveggio and appellant

changed places in the van. Appellant moved to the rear and Daveggio drove. Daveggio got onto the freeway to Sacramento enroute to the welfare office. Daveggio saw that appellant was seated against the back of the van with Vanessa's head between appellant's legs. Appellant did not have her pants on. (36RT 7805; 37RT 7991.) Daveggio and appellant were living in the van; they removed all the seats in late October. Daveggio stopped for gas in Lathrop. Appellant bought sodas and candy. Vanessa was in the back under the covers. (36RT 7805-7806.)

When they got back on to the highway, appellant got under the covers with Vanessa. (36RT 7806.) At the welfare office, Vanessa remained under the blankets. When appellant returned with the welfare check, she and Daveggio took turns going to the bathroom. Daveggio saw both curling irons and the ball gag next to the slider door. He saw nothing noticeable on them. Appellant cashed her check and gave all but $40 of it to Daveggio. (36RT 7806-7807; 37RT 7988-7989.)

On their way to Pollock Pines, Daveggio heard appellant tell Vanessa "her ass was nice." Daveggio began looking for a place to park so he could have sex with Vanessa. He took the two-lane road to Sly Park. Both appellant and Vanessa were nude at this point. Samson was on all fours and appellant had her whole hand inside Vanessa's vagina. Daveggio could see the strap of the ball gag on the back of her head. (36RT 7808-7810; 37RT 7992, 7994.) Appellant did this for Daveggio's benefit and pleasure in addition to her own. She asked him if he had ever seen anyone "fist fucked" before. (37RT 7997.) Appellant used one of the curling irons and began sodomizing Vanessa, who began defecating. That was the source of the stains on the white napkins. Appellant said Vanessa needed

to use the bathroom. Daveggio stopped in Sly Park and appellant and Vanessa went to the bathroom. Daveggio smoked in front of the van and saw park employee Michael Peterson who testified at trial. (36RT 7810-7811.)

Daveggio drove on to Lake Tahoe and stopped at the Sundowner Motel. Either he or appellant told Vanessa to take a shower so they could talk in her absence. (36RT 7811-7812.) After her shower, Vanessa came out in a towel. She was cold and was allowed to put on a sweatshirt and pants. Appellant left to get some food. Vanessa ordered a Happy Meal. Daveggio did dope while appellant was gone and did not sexually assault or touch Vanessa. (36RT 7813-7814.)

When appellant returned, Vanessa took one bite of her cheeseburger and asked if she could save it for later. Appellant told Daveggio the van tire was going flat. Daveggio went to look and told appellant he was going to get it fixed. (36RT 7815.)

When he returned to the motel room ten minutes later, appellant and Vanessa were nude on the bed in the 6/9 position. Appellant orally copulated Vanessa's vagina and Vanessa orally copulated appellant's vagina. Appellant undid Daveggio's pants and he put two fingers inside Vanessa's vagina. Appellant orally copulated Daveggio. When he ejaculated, the sexual activity ended. Appellant and Daveggio argued because Daveggio wanted to leave so he could gamble. He told Vanessa to take another shower so he and appellant could talk. (36RT 7815-7816; 37RT 8014.) He had no more sexual contact with Vanessa. (37RT 8014-8016.)

Daveggio thought they should release Vanessa. She had never fought or screamed. She was like Aleda Doe. Appellant said they should kill Vanessa because she could identify them both. Daveggio was not aware that Aleda Doe had gone to the police and that the police were looking for him. He didn't know until he was arrested that Aleda had given a detailed description of him. Appellant pointed out that Aleda knew what Daveggio looked like, but not what appellant looked like. Daveggio and appellant had a pretty heated discussion; he was amazed they were not heard by their neighbors. At the end, Daveggio believed they had agreed to release Vanessa. When Vanessa came out of the shower, he told her to get dressed. Appellant said Vanessa's stuff was thrown all over the van, including her shoes and socks. Appellant and Vanessa went out to the van while Daveggio went to the bathroom. When he came out, appellant was in the doorway alone. She told him she had killed Vanessa. (36RT 7817-7818; 37RT 8016-8018, 8021-8022.)

Daveggio went to see if Vanessa was dead. It was not the first time appellant had said she killed someone. He opened the slider and the smell of defecation was very strong. He assumed Vanessa was dead from the smell. She was lying on her stomach with her head facing toward the rear. A black rope was tied around her jacket and wrists and then went through a hole in the back door of the van. Daveggio did not believe the black rope was used to kill Samson because he did not think it long enough to go beyond her wrists. Daveggio returned to the room and argued with appellant about what to do next. (36RT 7818-7820; 37RT 8026.)

They started driving back toward Sacramento. Daveggio told appellant to gather Vanessa's things. Appellant said the knots were tight on

the rope and she was having trouble getting them off. Daveggio stopped at a turnout, opened the slider, and took Vanessa's body out of the van. Vanessa slipped from his hands and her face hit the ground. He set Vanessa on the snow bank and pushed her down the hill. Appellant threw out the backpack, lunch pail, the black rope, and everything else. (36RT 7821-7823.)

Daveggio believed Vanessa was dead when he disposed of her body. He does not believe she froze to death. (37RT 8027.) Appellant said she killed Vanessa with the yellow rope. (37RT 8033.)

Daveggio and appellant returned to the Sundowner and cleaned up. (36RT 7825; 37RT 8035-8036.) When they left the Sundowner, they went to McDonald's to throw things away. Daveggio was shocked to learn the curling irons and other things had not been thrown away. (36RT 7826; 37RT 8038.) After McDonald's, Daveggio got a room at the Lakeside Inn because it was close to the courthouse. (36RT 7826-7827; 37RT 8037.)

Daveggio spoke of Christina Doe and said he had dared appellant to bring her to the Williams' house. Daveggio knew Christina was thirteen. (36RT 7832-7834.) Both appellant and Christina were naked when they came out of the bathroom. Appellant said, "Christina wants to party with us." She did not say, "Here's your present." (36RT 7837.) After the incident with Christina, Daveggio and appellant talked about it and both reached orgasms. (36RT 7849.) Christina did not cry during the incident. She had a "caught-in-the-headlights" look about her. Her fear gave Daveggio an adrenaline rush. (37RT 7916.)

Daveggio said both he and appellant were equally manipulative, confident persons. (36RT 7834.) Appellant had a .25 caliber firearm; he had a .38 caliber. They carried weapons because of the bikers' club problem. (36RT 7835-7836.) Appellant was aggressive; she could stand up to him. She was manipulative and good at acting. She would do anything he asked her to do, but that was a way of manipulating him. (36RT 7865.) They didn't sit down and make a plan about the seven girls. It just happened. Neither one of them controlled the other. He was not under appellant's domination and she was not under his. He didn't force her to do these crimes; she didn't force him. (36RT 7867.) They were together 98 percent of the time from August 22 to December 2, 1997. (36RT 7887.) Appellant told him she killed a bail bondsman in Sacramento for the Hells Angels. She put a gun to the bondsman's forehead and said, "Leo, you fucked up." She also said a black male raped her and that she and others lynched and castrated him. (37RT 7900-7901.)

After Christina, they were on drugs 24/7. Drugs did not cause the crimes, but it changed their way of thinking and the level of their conversation. While they were in Reno, he suggested they grab a girl. He committed the crimes for sexual gratification. The violence and aggression aroused and titillated him; that was even more true for appellant. (36RT 7837-7840.)

Appellant did tell Aleda to shut up and that she was asking too many questions. Appellant also told Daveggio to shut up. (37RT 7925.) Appellant told Aleda when they left her on the roadside to count to 20 and not look back. When he asked appellant whether they should go ahead with the plan he was thinking about the plan to sell the person.

Appellant said she knew how to sell people to someone in Mexico. The plan fell through when Aleda talked about having a nine-month-old son. (36RT 7858.)

Daveggio bought the handcuffs used on Amy and Sharona for $2.99 at a Sacramento liquor store. He never bought duct tape because there was plenty of that already in the van. The scissors were in the van. Appellant had ropes and scarves in her prostitute bag. She told him about her dominatrix (master and slave) roles at the massage parlor. (36RT 7845, 7921.) Appellant said she enjoyed sodomy. They used a vibrator, but no other foreign object. He never used the two curling irons in this case on appellant. (36RT 7848.)

Daveggio said he and appellant were involved in sex at Sheri Wallace's house and talking about Christina when he suggested sex with Rachel. Appellant thought of it as teaching Rachel. (36RT 7847.) Daveggio and appellant agreed to sexually assault Rachel before they picked her up at Alma Lara's house. Appellant was the first one to jump Rachel when Rachel was in the front passenger seat. It was dark in the van and he wasn't aware that appellant had pulled Rachel's pants down and inserted her fingers in Rachel before he assaulted Rachel. (36RT 7851-7852.) Daveggio realized after the assault upon Christina that he faced a life sentence. When appellant rolled on top of Rachel, he thought in his mind that she was kidnapped because she was being held against her will for purposes of sexual assault. (36RT 7854.)

Daveggio began touching Rachel while she was sleeping on the bench seat in the rear of the van. When they stopped at Lake Shasta for the bathroom, he overheard Rachel telling appellant that he was touching

her. (37RT 7906.) They were on a two-lane road in Oregon when appellant pulled the van over. She told Rachel about her "secret lust" and that she had "fucked" Rachel's brother Randy. Earlier, appellant told Daveggio that she had had sex with Randy. Appellant said she called Randy to her room and she was masturbating when he came in. She had sex with Randy and had him sodomize her. She told Randy, "I bet you didn't know your mother could do this." (37RT 7907.) Daveggio spoke with Randy and learned that this had happened on more than one occasion. (37RT 7908.) After appellant sexually assaulted Rachel, Daveggio orally copulated Rachel. It was dark, but he did not doubt that appellant was masturbating while he orally copulated Rachel. (37RT 7910.) Rachel cried during the whole assault in the van. (37RT 7916.)

The next morning he brought the duct tape into the room. Appellant was not lying next to Rachel. She was next to him at the vanity when he tore the duct tape so she knew what was going on. Rachel's hands were bound, but not her mouth because she was not screaming. (37RT 7914.) While he was assaulting Rachel, appellant was on the opposite bed masturbating. (37RT 7919-7921.)

Neither Daveggio nor appellant directed each other concerning the sex acts with others because they were basically equal partners. Appellant knew he preferred to have woman orally copulate him that and he preferred to orally copulate women. He knew appellant preferred to be sodomized. He did not have to direct appellant to do anything during these events. She orally copulated his penis, not his anus. He forced three of the seven girls to orally copulate him. (36RT 7860-7862.)

Appellant did not physically touch Aleda or April. She just orally copulated him when he "went down" on April. (36RT 7876.) April did not lie about what he did to her. (36RT 7877.) He thought Christina and Rachel ad libbed a few things, but did not think they were lying about anything. (36RT 7875.)

Regarding Amy, Daveggio said appellant went to Fawnie's to get drugs. When she returned to the motel, she said she hugged Amy at Fawnie's and Amy made her horny. Appellant said Amy had drugs and she could bring Amy to the motel. They agreed that appellant would bring Amy over and that Daveggio would remain hidden until he jumped out and assaulted Amy. (36RT 7878-7880.) Daveggio cut the sweatshirt off Amy and appellant handed him the handcuffs. (36RT 7883-7884.)

It was Daveggio's idea to buy the curling irons to be used as sexual toys. They were cheaper than vibrators and dildos. He paid for them. Appellant altered them. (36RT 7886-7887.) He bought the yellow rope to tie suitcases on to the top of the van. (37RT 7953.)

Daveggio described other assaults or attempted assaults upon women, including a black prostitute and a friend's daughter. He described one incident after they acquired the curling irons when he and appellant drove around looking for someone but without success. (37RT 7944-7945.)

Of his troubles with the bikers' club and Liz Bingenheimer, Daveggio said someone stole a safe from the bikers' club. After he and Bingenheimer had a fight, she called the club and said he stole the safe. The club retaliated by taking his motorcycle. Daveggio blamed Bingenheimer and threatened to kill her. When he and appellant returned from Santa Cruz with Christina and Rachel, appellant dropped him off near

Bobby Joe's bar. Appellant knew he had a loaded firearm and that he planned to kill Bingenheimer. Appellant did not agree with the plan, but knew of it and agreed to pick him up after she dropped off the girls. (37RT 7892-7893.)

Daveggio said all of the sexual encounters were for the sexual gratification of appellant and himself. (37RT 7919.)

Daveggio put ropes through the eyebolts in the van to see if they would work as restraints, but learned there was no way to tie the hands and feet. He tried it out himself. Appellant knew the ropes were there, but no one else did. The ropes were never pulled through the slits in the carpet and were thrown away at McDonald's on December 2nd. (37RT 7947-7951.)

It was Daveggio's idea to go to Not Too Naughty, which he found in the phone book. Appellant paid for the ball gag and the *Submissive Young Girls* cassette tape, which turned out to just contain moaning throughout the tape. (37RT 7959.) He was not sure why they bought the ball gag, a novelty item used by people into sadomasochism. It did not prevent screaming. Appellant put it into her mouth and attempted to scream. Daveggio did not know where the ball gang had been stored. (37RT 7960-7961.)

Daveggio denied telling April she was the only one who could make him "nut." (37RT 7964.) He denied using the word "hunting" with April. Appellant first talked about "hunting" on the morning after Thanksgiving. (37RT 7962.) He had not intended to assault April until they talked in the motel room. After the assault, he felt evil and felt that appellant was evil. (37RT 7964.)

Daveggio described appellant's relationship with her father Leland as "strange" and said appellant's mother was possessive of her. Leland asked Daveggio whether he knew appellant was a prostitute and walked away when Daveggio said he did. (37RT 8062-8063.)

Daveggio met appellant when his friend Ken Miller was searching for his runaway 12-year-old daughter. Appellant played a big part in finding her. Later, appellant came to the bar where Daveggio was working. He moved in with appellant in October 1996, three weeks after he left Bingenheimer. Appellant said Randy had hit her and she needed a man in the house to control her two kids. Daveggio did not have a sexual relationship with appellant at that time. He planned to leave after three weeks, but appellant told him she was dying of colon cancer. Her father said she was lying. Daveggio took appellant to Kaiser. Her doctor confirmed she didn't have cancer. After that, appellant stopped seeing her parents. Appellant kept Daveggio with her by bringing his daughters to live in the house. (37RT 8080; 38RT 8353.) When Daveggio moved in with Sheri Wallace, appellant came after him. His two daughters were still living with appellant. (37RT 8080; 38RT 8349-8350.)

In June 1997, Daveggio moved out of Wallace's home and back in with Bingenheimer. On August 22, when Bingenheimer told the bikers he stole their safe, he moved back in with appellant. (37RT 8081-8083.)

Daveggio said he and appellant were equal partners. Neither told the other what to do. He acted of his own free will with Vanessa. Appellant was not to blame. (37RT 8083.) He never isolated appellant from her family. Appellant had a learning deficit with numbers, but not

with reading. (38RT 8352.) She once left a voicemail message for him about another woman in which she said she would "stick a knife up the other woman's ass and slit it all the way up to her clit." (38RT 8373.)

Daveggio never hit or belittled appellant. He pointed a gun at her on one occasion when they had both been drinking and arguing. He was angry and waved the gun, a loaded .9 millimeter, and it went off. (38RT 8351, 8356.)

He is a diabetic and suffers from erectile dysfunction. (37RT 8084.) Appellant preferred anal sex, which requires keeping a hard erection. (38RT 8354.)

Terry Harrington, Daveggio's older sister, said Daveggio and his two sisters were raised by a single mother until she remarried. She loved Daveggio and said he came from a decent family. After he was arrested, he sent her a Bible from jail. (36RT 7695-7704.)

Deta Daveggio married Daveggio in April 1988. They lived together until they separated in 1995. They have one son. During the time they were together, Daveggio worked and contributed to the support of the family. (36RT 7729.) Daveggio was supportive and loving, but he had always seen other women throughout their relationship. He loved and revered women. (36RT 7731.) Although she knew he was a registered sex offender,[23] she allowed him to be near her eight-year-old daughter Briann. (36RT 7745.)

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[23] The parties stipulated that "the defendant James Anthony Daveggio was convicted of a felony, a violation of Penal Code section 220, in San Joaquin County Superior Court case number 37227, namely, assault with intent to commit rape, on September 18, 1986, by a guilty plea. Mr.

Washoe County, Nevada, jail chaplain Perry Leach provided Daveggio with Christian literature in the jail. Daveggio was always polite, said thank you, and was not manipulative. He asked Leach to pray for him. (36RT 7773-7776.) Daveggio was baptized in early 1998 in the jail. (36RT 7794-7798.)

Washoe County jailer John Hamilton said Daveggio was a model inmate and in-house worker. (36RT 7779-7780.) He had no disciplinary problems and provided jailers with information about problems in the unit. (36RT 7782-7786.)

Daveggio had no record of assaultive conduct in the Alameda County jail from his arrival in October 1999 to the time of trial. (36RT 7793.)

APPELLANT'S PENALTY PHASE EVIDENCE

Burdell Wulf met appellant in the massage parlor 15 years before he testified at trial. She was then in her late twenties and he was 45 years old and married. (37RT 8095, 8097, 8102.) They had "usual sex" at the massage parlor and then in the tri-level house. He did not tell an investigator they practiced anal intercourse or that appellant liked sodomy. (37RT 8097, 8100, 8114.) He paid money to appellant's parents for her services and paid for the tri-level. (37RT 8095-8096.) He subsidized appellant's lifestyle for awhile. He felt sorry for her based on what she told him. (37RT 8104-8111.) He bought appellant a .25 caliber gun (37RT 8101) and was a guarantor on the van loan. (37RT 8113.)

Daveggio was sentenced to probation and successfully completed probation." (36RT 7772.)

Appellant's behavior, attitude, and appearance changed after she met Daveggio. (37RT 8096.) She did whatever he wanted her to do. When he came into the room, appellant acted like a puppet on a string. (37RT 8098.)

Appellant had difficulty with numbers. When she applied for a job at K-Mart, he tried to teach her how to make change. (37RT 8098-8099.)

Rachel attended St. Patrick's School, which was connected to St. Rose Parish. From 1991 to 1996, appellant attended the Altar Society and the Prayer Society at St. Rose. (37RT 8117-8120, 8130.) She was a school crossing guard and helped in the thrift shop. (37RT 8121, 8130.) She helped St. Rose's director of religious education Maria Alcala in the office and brought her children to be instructed in the faith. (37RT 8128.) Appellant also helped St. Rose's religious educator Pamela Jiacomo as a teacher's aide. Jiacomo thought Randy had a behavior problem that today might be diagnosed as Attention Deficit Disorder (ADD). (37RT 8134-8135.)

Father Edward Kavanagh, the parish pastor, said appellant was a good friend who did much work for the school and parish. (37RT 8172-8175.)

Dolores Guitierrez was appellant's friend and neighbor when appellant lived in the tri-level. The neighborhood was a friendly place, but changed after Daveggio moved in with appellant. Daveggio once gave a large party that filled the street with motorcycles. (37RT 8138-8141.) Guitierrez knew appellant was a prostitute, knew her clients came to her

home, and knew appellant's lifestyle was supported by Skip Wulf and Bill Reed. (37RT 8143.)

Another of appellant's neighbors, Moises Baldizan, also believed their friendly neighborhood changed after Daveggio moved in. Daveggio raced his chopper up and down the street, taking corners fast. It was loud and dangerous to the children playing in the street. (37RT 8162-8165.) Appellant changed. She no longer interacted with her parents and her neighbors. (37RT 8165.)

Donetta Doe was married to Daveggio from May 1982 to November 1987. Daveggio worked for about six months. She worked as a waitress. They would take her paycheck to Reno and Daveggio would blow it gambling. (38RT 8203-8204.) Daveggio had to be in complete control. He controlled where she sat in the bar. (38RT 8206.) He would tell her she was pretty and special and then say she was stupid, ugly, boring and no one liked her. He made her feel worthless. (38RT 8208.)

In 1985 she became pregnant with Daveggio's child. The night she told him she was pregnant, sometime between July 12 and 20, 1985, he was arrested in Tracy for oral copulation, kidnapping, and illegal possession of a firearm. When she picked up his car, she found a bra in the back seat. He told her the woman had given him "head." (38RT 8209-8210.)

Daveggio was jailed for this incident. He told Donetta the jail guards liked him. He did what they said; he went to church and told them he had found God. (38RT 8210-8212.) He said he knew that's what he had to do, to get them to let him out, to get what he wanted. (38RT 8212.)

Dr. Helga Mueller, qualified as an expert in the general field of psychiatry by the court, treated Randy in 1988 and 1989. Randy suffered from schizophreniform disorder, which is different from schizophrenia. (38RT 8230-8231.) He was five or six years old and an extremely aggressive and angry child. He exhibited strange behavior toward appellant. He was at times very clingy and loving and at other times very angry. He would hit her and try to bite her. Randy had attentional problems and oppositional defiant disorder. He was extremely anxious. (38RT 8236-8237.)

Mueller spent 40 to 50 percent of the time allotted for Randy with appellant. She was the primary source of information about Randy's behavior. Over time, Mueller saw appellant with bruises on her arms and legs; welts on her face; blackened eyes. (38RT 8237-8240.)

Appellant was both passive and helpless. A passive personality goes along with the flow, doesn't make a lot of decisions on her own, prefers to have others make decisions. An active personality is opposive, self-confident, assertive, unafraid. Someone who can pretty much kill their own snakes. (38RT 8240.)

Mueller concluded that appellant was really overwhelmed. She had difficulty controlling her children partly because she was overwhelmed. Appellant was very depressed, which robbed her of the energy to deal with her children appropriately. Appellant was also being physically injured frequently. Mueller believed appellant was a battered woman based on observations made over a period of a year in 1990. (38RT 8241, 8257.)

Battered Women's Syndrome (BWS) is not in the Diagnostic and Statistical Manual of Mental Disorders revised (DSM-IV) as a diagnosis. (38RT 8242.) Typically people with BWS have some elements of PTSD, if not full-blown PTSD. Studies have borne out that almost all battered women have PTSD. A woman can suffer from PTSD and also be a battered woman. (38RT 4242.)

Women who are battered tend to be passive. They are dependent; they prefer to have someone else make major decisions for them. They have a poor sense of self; they require other persons to give them a sense of self. They are fearful and lack self-confidence. Even though the person who regularly harms them is doing bad things to them, they still need that person to give them a sense of self. Battered women do a lot of things to protect the batterer because loss of the batterer means loss of emotional support. Battered women tend to cling to the abuser. (38RT 8243.)

Battered women characteristically become isolated from family and friends. This is part of the dynamic between the two people in the relationship. (38RT 8250.) Battered women frequently self-medicate with alcohol or drugs. And, such women generally have a history of physical, sexual, or emotional childhood abuse. (38RT 8250.)

Mueller believed appellant also suffered from borderline personality disorder. People with this disorder have severe problems with interpersonal relationships. They tend to enter and leave relationships quickly. Their relationships are unstable and volatile. They tend to have a lot of chaos in their lives and they tend to create chaos. They are often in crisis; have a poor sense of self; and have associated identity problems.

They generally have little self-confidence and poor coping skills. (38RT 8252.)

Battered women are found in all walks of life; they may be educated and functional. But, the battered woman generally does whatever the controller tells her to do. Battered women fear reprisal. The threats frequently are nonverbal. (38RT 8253.) The abuse can be physical or emotional; it makes the woman feel worthless. The abuse is a method of control; it continues the cycle of decreasing self-worth. (38RT 8254.)

Evidence of Battered Women's Syndrome is often offered by the prosecution in cases involving domestic batteries when the battered woman recants her claim of abuse. The prosecution also offers it in cases involving domestic injury to demonstrate behavior by the victim that is consistent with the syndrome but contrary to what a non-battered person would do. (38RT 8332.) BWS deals with the effect of physical, emotional, or mental abuse on beliefs, perceptions, and behaviors. (38RT 8333.)

Women with BWS often don't report the assaultive conduct; when they do they often recant. Also, BWS sufferers don't leave the abuser when they can. They tend to protect the controller. BWS is a continuum that becomes more severe over time. (38RT 8333.) It is a downward spiral of abuse. The more the abuser threatens the woman, verbally or nonverbally, the more the woman is frightened and the less likely she is to leave and the more likely it is for the abuser to become more and more violent or aggressive. (38RT 8334.)

The batterers often take money from the woman, make most of the major decisions, make the woman feel bad about herself, humiliate

her, isolate her from friends and relatives. Batterers seek out vulnerable women. (38RT 8337.)

Women with dependent personality disorder generally have been dominated by a father, brother, or other male person early in life. The young girl learns she is inadequate to make decisions on her own, that she requires guidance from the man in her life. The result is that the woman's self-esteem and self-confidence are slowly but surely eroded. This causes the woman to be passive, to need someone in life to give guidance and reassurance. (38RT 8335-8336.)

In Mueller's opinion, much of the conduct attributed to appellant during the sexual assaults is consistent with these diagnoses and disorders. Conduct in which appellant is said to have tricked a 13-year-old girl into a house and saying, "I've been thinking about you lately," and then assaulting the girl at gunpoint is consistent with dependent personality and borderline personality disorders and with BWS. A woman with these disorders will go to extreme lengths to satisfy her abuser and keep him happy because she doesn't want to lose him. He provides her with a sense of self that she lacks. A woman in this position might have done this because she knew that her controller became aroused/excited on seeing her do things with young girls. (38RT 8287.)

Similarly, forcing a girl's head down on a man's penis and saying, "it's your turn," fits in with the woman's sensing what the man's desires are and anticipating what he likes. (38RT 8288.) Appellant pleases her controlling partner when she lures a friend back to a room and allows him to jump out with a gun, when she holds the friend's head back so that the partner can shove his penis into her mouth (38RT 8297), when she

separates the friend's buttocks so her partner can sodomize the victim (38RT 8298). Battered women have been known to rape, sodomize, and lie to cover up. (38RT 8298.)

When appellant watched a girl being assaulted and masturbated and called her lover "Daddy," this was disassociative conduct, i.e., compartmentalizing what she is doing and not integrating it into her consciousness, part of the borderline personality disorder problem. (38RT 8288.) When appellant watched Daveggio molest Rachel and masturbated, appellant disassociated because Rachel was her daughter. Mueller has known women who were battered who chose to abandon their children in favor of staying with the abusing partner. (38RT 8294.)

Threatening girls after the assault or telling the victim not to walk on the streets alone because next time she wouldn't be as lucky or refusing to participate in a telephone call because she suspected a police trap demonstrated conduct that identified with the abusing dominating partner. (38RT 8290-8291, 8295-8296.)

Most battered women were molested in their childhood and they, in turn, are eight times more likely to abuse their own children physically, emotionally, and sexually. Child abuse goes from generation to generation with the person either denying it was happening to their children or identifying with the abuser and doing it to their own children. (38RT 8299, 8302, 8312.)

GUILT PHASE ARGUMENTS

I.

THE TRIAL COURT COMMITTED STRUCTURAL ERROR AND VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A JURY TRIAL AS GUARANTEED UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS BY INCORRECTLY INSTRUCTING THE JURY ON THE BEYOND A REASONABLE DOUBT BURDEN OF PROOF

A. INTRODUCTION

During jury selection, the trial court amplified upon the concept of reasonable doubt through instructions that lowered the prosecution's burden of proof in multiple ways.

The trial court did not include as part of these extemporizations the definition of reasonable doubt as it is set forth in Penal Code section 1096 or CALCRIM 220 or CALJIC 2.90 (see court's comments set forth below). Nor was the definition of reasonable doubt as set forth in these authorities included within the questionnaires each potential juror was required to complete and return to the court (see, e.g., completed questionnaire of Juror No. 6 (prospective juror Black 48 (15RT 3475-3476)) at 134CT 35312-35364).

After the jury and alternate jurors were sworn, the court did not instruct further on reasonable doubt prior to the prosecutor's opening statement (16RT 3584-3597) or prior to the calling of the first prosecution witness (16RT 3743-3746).

It was not until after the completion of guilt phase evidence that the court instructed the jury once more on reasonable doubt, this time in the language of CALJIC 2.90. (138CT 36377; 34RT 7343-7344.)

As appellant will explain below, the court's elaborations on the reasonable doubt burden of proof amounted to incorrect instructions that had the effect of reducing the prosecution's burden of proof. The instructional errors were structural and require reversal without resort to harmless error review. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.)

B. APPELLANT MAY PROPERLY RAISE THIS ISSUE UNDER PENAL CODE SECTION 1259

Defense counsel did not object below to the trial court's amplifications upon the reasonable doubt instruction.

However, appellant has not forfeited this claim of error. Penal Code section 1259 authorizes a defendant to properly raise any instruction given, refused, or modified to the appellate court in the absence of objection at trial if the defendant's substantial rights are affected. "Although respondent argues defendant forfeited this claim by failing to object, we find defendant may properly raise the issue under [Penal Code] section 1259, which provides in part: 'The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.'" (*People v. Brown* (2003) 31 Cal.4th 518, 539 fn. 7.)

A defendant's substantial rights are affected by an instruction that reduces the prosecution's burden of proof. (*People v. Johnson* (2004)

115 Cal.App. 1169, 1172 (*Johnson I*).) Here, nothing less fundamental is at stake than the denial of appellant's due process protection 'against conviction except upon proof beyond a reasonable doubt.'" (*In re Winship* (1970) 397 U.S. 358, 362-364.)

Accordingly, therefore, appellant respectfully submits that this issue is cognizable on appeal pursuant to Penal Code section 1259 even though defense counsel failed to make the appropriate objection below.

C. THE REASONABLE DOUBT STANDARD AND PENAL CODE SECTIONS 1096 AND 1096A

Penal Code section 1096 dictates that every criminal defendant is presumed to be innocent and that the effect of that presumption requires the state to prove him or her guilty beyond a reasonable doubt.

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. . . . (§ 1096.)

In addition, section 1096 provides the following express definition of reasonable doubt.

> . . . Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Pen. Code, § 1096.)

> The beyond a reasonable doubt burden of proof thus imposes a requirement of evidentiary certainty or near certainty. Section 1096 requires that the doubt be of a certain depth ("not a mere possible doubt") and of a certain strength ("that state of the case, which, after the entire comparison and consideration of the evidence leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge"). The United States Supreme Court has repeatedly recognized that the beyond a reasonable doubt standard requires "evidentiary certainty," the "utmost certitude," and "near certainty." (*Cage v. Louisiana* (1990) 498 U.S. 39, 41; *In re Winship* (1970) 397 U.S. 358, 364; *Victor v. Nebraska* (1994) 511 U.S. 1, 15.)

The beyond a reasonable doubt standard also requires a certain permanency or durability of certitude in the juror's mind ("an abiding conviction of the truth of the charge"). (*People v. Stone* (2008) 160 Cal.App.4th 323, 334 (holding that "abiding conviction" in CALCRIM 220 adequately conveys standard of duration and certitude); *People v. Haynes* (1998) 61 Cal.App.4th 1282, 1299 (holding that term "abiding conviction" in CALJIC 2.90 adequately conveys standard of duration and certitude).)

The United States Supreme Court has described an "abiding conviction" as one that is "settled and fixed." (*Hopt v. Utah* (1887) 120 U.S. 430, 439.) The California Supreme Court has described it as one that is "lasting [and] permanent." (*People v. Brigham* (1979) 25 Cal.3d 283, 290). The Court of Appeal has described it as a "settled conviction" (*People v. Castro* (1945) 68 Cal.App.2d 491) and, more recently, as a

readily understood term that does not require definition[24] (*People v. Pierce* (2009) 172 Cal.App.4th 567, 573).

The Legislature has specifically stated that the explications of presumption of innocence and reasonable doubt in section 1096 are complete in themselves.

> In charging a jury, the court may read to the jury Section 1096, and no further instruction on the subject of the presumption of innocence or defining reasonable doubt need be given. (§ 1096a.)[25]

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[24] See, in addition, concurring opinion in *People v. Pierce*, *supra*, of Hull, J.: "Thus in my view, the concept of an 'abiding' conviction speaks to the strength, depth and certainty of that conviction and to its duration, but must take into account the natural possibility that a juror may learn something that relates to the case after conclusion of the trial that changes the juror's view of it. Taking that possibility into account, I think a juror may say that he or she has an abiding conviction of the truth of the charge when, after fully considering the evidence presented during the course of the trial, the arguments of the attorneys, the instructions on the law provided by the trial judge and the points of view presented by fellow jurors during the course of the jury's deliberations, he or she is convinced beyond a reasonable doubt that the defendant is guilty of the charge and that this conviction will last, or "abide" for so long as that juror's knowledge of the case remains the same as it is at the close of trial." (*People v. Pierce*, *supra*, 172 Cal.App.4th at p. 581.)

[25] In *People v. Simms* (1956) 144 Cal.App.2d 189, the Court of Appeal noted that section 1096a was enacted to eliminate claims of error resulting from judicial amplifications upon the reasonable doubt instruction. "The court gave an instruction on reasonable doubt which departed from the established formula. (Pen. Code, § 1096.) Without determining whether the instruction correctly stated the law we refer to *People v. Castro* [(1945)] 68 Cal.App.2d 491, 497, where the court said: 'Trial courts have been repeatedly admonished to follow . . . the language of section 1096. Failure to do so is simply inviting error.' It was to

Here, however, during the jury selection process in appellant's case, the trial court expanded upon the definition of reasonable doubt set forth in Penal Code section 1096 and, however well-intentioned, did so in a way that misdescribed the prosecution's burden, requiring reversal of appellant's conviction. (See, e.g., *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986 (*Johnson II*) [reversing conviction for structural error where trial court erroneously instructed jurors on reasonable doubt during jury selection].)

For these reasons, the court's erroneous instructions on the reasonable doubt burden of proof are structural and require reversal without resort to harmless error review. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.)

D. THE TRIAL COURT'S INSTRUCTION ON THE PROSECUTION'S BURDEN OF PROVING APPELLANT'S GUILT BEYOND A REASONABLE DOUBT

In this section, appellant first sets forth a representative example of the trial court's effort to instruct the potential jurors on the concept of proof beyond a reasonable doubt through, inter alia, an analogy to the movement of the scales held by the Lady of Justice.[26]

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eliminate such claims of error as here made that the legislature enacted Penal Code section 1096a." (*People v. Simms*, *supra*, 144 Cal.App.2d at p. 199.)

[26] A familiar image, generally depicted blindfolded and holding her scales and sword – Themis to the ancient Greeks; Justitia to the Romans; and in the United States, Lady of Justice (Chambers County Courthouse, LaFayette, AL); Lady Justice (Shasta County Courthouse, Redding, CA); Justice (Los Angeles County Courthouse); Goddess of

Appellant then explains why the court's instructions that the reasonable doubt burden of proof required the prosecution to tip the scales held by the Lady of Justice "substantially" in favor of the truth of the charges failed to adequately describe the certitude of guilt required for conviction.

Appellant also explains that a serious and prejudicial omission in the court's reasonable doubt instruction exists in the court's failure to instruct that section 1096 requires a permanency or durability of certitude, or "abiding conviction," as to the defendant's guilt in the minds of the jurors. As well, the court's instructions incorrectly directed the jury to evaluate the evidence according to common sense and reason and to apply the standards used in everyday interactions to the reasonable doubt standard.

On nine occasions during the jury selection process, the trial court discussed the presumption of innocence and reasonable doubt burden of proof with separate panels of prospective jurors in similar, though not identical, language. (See, e.g., 4RT 677, 740-741, 773-774, 809, 832, 865-866; 5RT 898, 928, 962.)

The following excerpt, which includes portions of the court's comments necessary for context, is representative of the court's instructions regarding the prosecution's burden of proof beyond a reasonable doubt to the different panels of prospective jurors.

Justice (San Joaquin County Courthouse, CA). (http://mdean.tripod.com/justice.html, "Images of the Goddess of Justice.")

The court began by explaining the presumption of innocence.

> The most important concept we deal with in the criminal system is the presumption of innocence. The fact that the defendants have been charged with the crime I just read to you, the fact that this trial is taking place, is no evidence whatsoever of the truth of those charges or any evidence of their guilt. 4RT 771:27-772:4; see also 4RT 675, 739, 807, 830-831, 864; 5RT 897, 926, 960.)
>
> Each of the defendants has entered a plea of not guilty to all of those charges. That amounts to a complete denial of each and every element of each and every charge that was filed. (4RT 772:5-8; see also 4RT 675, 739, 808, 831, 864; 5RT 897, 926-927, 960.)
>
> The defendants sit here cloaked in innocence. Because they entered a plea of not guilty, it is up to the prosecution to prove the defendants' guilt. They must prove each and every element of each and every charge that they have filed against the defendants, and they must prove it to beyond a reasonable doubt, which I will discuss with you in a moment. (4RT 772:9-14; see also 4RT 675, 739, 808, 831, 864; 5RT 897, 927, 961.)

The court further explained that because the defendants are presumed to be innocent, the defense has no duty to present evidence and the defendant has a constitutional right to not testify. (4RT 772:24-773:5; see also 4RT 676, 739-740, 808-809, 831-832, 865; 5RT 897-898, 927-928, 961-962.)

The court then moved on to instruct on the prosecution's burden of proof and what is meant by beyond a reasonable doubt.

> The burden of proof that the prosecution has to meet is what we call beyond a reasonable doubt. And it is the highest burden of proof provided for in the law. It does not mean beyond all possible or imaginary doubt, because every time

you talk about human affairs and human interaction you can always conjure up some imaginary doubt. (4RT 773:16-21; see also 4RT 676-677, 740, 809, 832, 865; 5RT 898, 928, 962.)

Basically, it is an evaluation of the facts and the evidence, based upon common sense and reason, to see if you are left with any reasonable doubt after you hear the testimony and see the other evidence. (4RT 773:22-25; see also 4RT 677, 740, 809, 832, 865; 5RT 898, 928, 962.)

You have all seen the Lady of Justice who has the scales, maybe not all of you, but some of you have. In a criminal case, the scales of justice start out tipped in favor of the defense, because the defendants are presumed to be innocent. The burden the prosecution must meet is to bring those scales into balance and then substantially tip them in favor of the truth of the charges that were filed against the defendants. (4RT 773:26-774:5; see also 4RT 677, 740-741, 809, 832, 865-866; 5RT 898, 928, 962.)

There is no number we assign to this and no percentage. But you can see that it is a fairly substantial burden that the prosecution must meet to prove their case. (4RT 774:6-8; see also 4RT 677, 741, 809, 832, 866; 5RT 898, 928, 962.)

Also, all 12 jurors have to agree that that burden of proof has been met before a verdict of guilty can be returned.[27] (4RT 774:9-10; 4RT 677, 741, 809, 832-833, 866; 5RT 898, 928, 962.)

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[27] As to this point, the trial court told the jury in one of the sessions, "Also, all 12 jurors must agree that that burden has been met before *any kind* of verdict can be returned." (4RT 677:17-18; emphasis added.)

E. THE TRIAL COURT'S REASONABLE DOUBT INSTRUCTIONS WERE ERRONEOUS AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW

Federal due process requires that a criminal defendant's guilt be proven beyond a reasonable doubt and that the court correctly instruct the jury on this burden of proof. (*In re Winship* (1970) 397 U.S. 358, 364.) The beyond a reasonable doubt burden of proof requires that jurors have an "abiding conviction of the truth of the charge," and the burden refers to "'a subjective state of certitude of the facts in issue.'" (*Ibid.*, quoting Dorsen & In re Gault and the Future of Juvenile Law, 1 Family Law Quarterly, No.4, pp 1, 26 (1967).) In other words, a defendant cannot be "adjudge[d] . . . guilty of a criminal offense without [the prosecution] convincing a proper factfinder of his guilt with utmost certainty" and that the factfinder "'need[s] to reach a subjective state of near certitude of the guilt of the accused." (*Id.*, at p. 364; *Victor v. Nebraska*, *supra*, 511 U.S. at p. 15, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 315.) A "strong and convincing belief" is short of the certainty a juror must have in finding guilt beyond a reasonable doubt. (*People v. Brigham* (1979) 25 Cal.3d 283, 291.)

"Modifying the standard instruction [on reasonable doubt] is perilous and generally should not be done." (*People v. Freeman* (1994) 8 Cal.4th 450, 504.) The court may convey erroneous concepts about reasonable doubt when extemporizing during jury selection. (See, e.g., *People v. Johnson* (*Johnson II*), *supra*, 119 Cal.App.4th at pp. 985-986; *People v. Johnson* (*Johnson I*), *supra*, 115 Cal.App.4th at p. 1171.) When the court has misdescribed the beyond a reasonable doubt burden of proof

for the jurors, the error is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.)

1. THE TRIAL COURT'S FAILURE TO INSTRUCT THAT SECTION 1096 REQUIRES AN ABIDING CONVICTION AS TO THE DEFENDANT'S GUILT IN THE MINDS OF THE JURORS WAS ERRONEOUS AND MISDESCRIBED THE PROSECUTION'S BURDEN

As appellant has observed above, section 1096 requires a permanency or durability of certitude, an "abiding conviction" in the language of the statute, as to the defendant's guilt in the minds of the jurors. Both CALCRIM 220[28] and CALJIC 2.90[29] use the language "abiding conviction" to convey the requirement that there exist permanency and durability of certitude in the jury's assessment of the truth of the charge.

The "abiding conviction" language can be traced directly to the instruction approved in *People v. Freeman*, *supra*, 8 Cal.4th 450, in

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[28] CALCRIM 220 defines reasonable doubt as follows: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt."

[29] CALJIC 2.90, with which the court instructed the guilt phase jury before it began its deliberations (138CT 36377; 34RT 7344), defines reasonable doubt as follows: "Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

which the California Supreme Court explicitly sanctioned language defining reasonable doubt as "that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (*Id.*, at p. 504, fn.9; CALCRIM 220 Bench Notes, citing *People v. Freeman, supra*, as authority for the instruction.)

Other California cases have held similarly. "The phrase 'abiding conviction,' . . . adequately conveys the subjective state of certitude required by the [reasonable doubt] standard of proof. The modifier 'abiding' informs the juror his conviction of guilt must be more than a strong and convincing belief." (*People v. Zepeda* (2008) 167 Cal.App.4th 25, 31.) Use of the term "abiding" tells the juror his conviction must be of a "lasting, permanent nature[,]" and it informs him "as to how strongly and how deeply his conviction must be held." (*People v. Brigham, supra*, 25 Cal.3d at pp. 290-291.) The term "abiding conviction" in the reasonable doubt instruction "convey[s] the requirement that the jurors' belief in the truth of the charge must be both long lasting and deeply felt." (*People v. Light* (1996) 44 Cal.App.4th 879, 885.)

The concept of an "abiding conviction" was also approved in *Victor v. Nebraska, supra*. The U.S. Supreme Court stated: "Although in this respect moral certainty is ambiguous in the abstract, the rest of the instruction . . . lends content to the phrase. The jurors were told that they must have 'an abiding conviction, to a moral certainty, of the truth of the charge.' . . . An instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government's

burden of proof. [Citations.]" (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 14-15.)

The trial court's instructions regarding the reasonable doubt standard made no mention, as appellant has asserted, of the "settled and fixed," the "lasting and permanent," nature and the depth of certitude required under the standard. (*Hopt v. Utah*, *supra*, 120 U.S. at p. 439; *People v. Brigham*, *supra*, 25 Cal.3d at p. 290; *People v. Haynes*, *supra*, 61 Cal.App.4th at p. 1299; *People v. Stone*, *supra*, 160 Cal.App.4th at p. 334.)

The instruction thus omitted a critical and important aspect of what it means to prove appellant's guilt beyond a reasonable doubt. As such, the instruction was incomplete in its failure to inform about the nature and depth of certitude necessary for conviction and for that reason diluted the standard of proof. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

2. THE TRIAL COURT'S INSTRUCTION THAT THE PROSECUTION'S BURDEN WAS TO PRESENT EVIDENCE THAT WOULD SUBSTANTIALLY TIP THE SCALES HELD BY THE LADY OF JUSTICE IN FAVOR OF THE TRUTH OF THE CHARGES WAS ERRONEOUS AND MISDESCRIBED THE PROSECUTION'S BURDEN

Appellant has explained above that the reasonable doubt burden of proof imposes a requirement of evidentiary certainty or near certainty. In *People v. Garcia* (1975) 54 Cal.App.3d 61, the Court of Appeal reviewed the existing case law and concluded there had been just one authoritative departure from the strict language of Penal Code section 1096. *Garcia* pointed to Justice Traynor's declaration in *People v. Hall* (1964) 62 Cal.2d 104, to wit: "To justify a criminal conviction, the trier of

fact must be reasonably persuaded to a near certainty." (*Id.*, at p. 112; *People v. Garcia*, *supra*, 54 Cal.App.3d at p. 66.) *Garcia* noted that "this concept of reasonable persuasion 'to a near certainty' is now a necessarily implied element of section 1096's definition." (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 66.)

The United States Supreme Court has relied upon similar language to convey the level of certainty required by the reasonable doubt standard. Proof beyond a reasonable doubt requires "a subjective state of near certitude of the guilt of the accused." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315.)

The trial court here instructed the jury on the burden of proof associated with the reasonable doubt standard through the use of a graphic analogy to the scales held by the Lady of Justice. The trial court instructed that the "scales of justice start out tipped in favor of the defense" and that the prosecution's burden "is to bring those scales into balance and then substantially tip them in favor of the truth of the charges." The court further described the burden of proof as a "fairly substantial burden" to which "no number" and "no percentage" is assigned.[30]

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[30] Appellant repeats the relevant portion of the trial court's instruction here to facilitate this Court's review of the issue.

> You have all seen the Lady of Justice who has the scales, maybe not all of you, but some of you have. In a criminal case, the scales of justice start out tipped in favor of the defense, because the defendants are presumed to be innocent. The burden the prosecution must meet is to bring those scales into balance and then substantially tip them in favor of the truth of the charges that were filed against the

At its most demanding, then, the burden of proof described as necessary by the court was a "fairly substantial burden." The court's instruction included no language informing the jury that the burden of proof was so high as to require "near certainty" or "near certitude" of appellant's guilt in the minds of the jurors. As a result, the trial court's instruction diluted the reasonable doubt standard of proof.

In *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, the prosecutor illustrated the reasonable doubt standard in closing argument with a PowerPoint depiction of six different puzzle pieces coming onto the screen sequentially to form a figure immediately and easily recognizable as the Statue of Liberty, except that a piece that included a portion of the statue's face and another piece in the upper left corner of the image were missing. The prosecutor told the jury that even with the two puzzle pieces missing all present knew the completed puzzle would depict the Statue of Liberty. (*Id.*, at p. 1266.)

On review, the Court of Appeal reviewed the PowerPoint presentation and determined that most jurors would recognize the image well before the initial six pieces were displayed. The court also found that the presentation combined with the prosecutor's accompanying argument left the impression that the reasonable doubt standard might be met by a few pieces of evidence and would invite the jury to impermissibly jump to

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defendants. (4RT 773:26-774:5; see also 4RT 677, 740-741, 809, 832, 865-866; 5RT 898, 928, 962.)

> There is no number we assign to this and no percentage. But you can see that it is a fairly substantial burden that the prosecution must meet to prove their case. (4RT 774:6-8; see also 4RT 677, 741, 809, 832, 866; 5RT 898, 928, 962.)

a conclusion. (*Id.*, at pp. 1266-1267; relying on *People v. Wilds* (N.Y.App.Div.1988) 141 A.D.2d 395, 397-398 [reversible error in trial court's use of jigsaw puzzle of Abraham Lincoln to illustrate prosecution's burden of proof because average juror would recognize Lincoln before all of the pieces are in place and that is not quantum of proof required in criminal case].)

Katzenberger also found that the prosecutor's puzzle analogy contained a quantitative component that impermissibly suggested a quantitative measure of reasonable doubt. The Statue of Liberty puzzle comprised eight pieces. When six of the eight pieces were in place, the prosecutor told the jury "this picture is beyond a reasonable doubt," which suggested 75 percent as a specific quantitative measure of reasonable doubt. (*People v. Katzenberger*, *supra*, 178 Cal.App.4th at p. 1268.)

Katzenberger reasoned the prosecutor's use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt and concluded the prosecutor had committed misconduct. (*Ibid.*; see also *U.S. v. Pungitore* (3d Cir. 1990) 910 F.2d 1084 [prosecutor's argument that prosecution's case was analogous to 500-piece puzzle with eight pieces missing improperly suggested quantitative measure of reasonable doubt]; *Lord v. State* (1991) 107 Nev. 28 [prosecutor's argument that having 90 to 95 percent of the pieces of a puzzle met reasonable doubt standard constituted improper quantitative measure of reasonable doubt].)

In appellant's case, the trial court too used a familiar iconic image, the Lady of Justice and her scales, to illustrate the reasonable doubt standard of proof. The court provided a quantitative measure of reasonable doubt by graphically describing the movement of the scales. The court said the scales of the Lady of Justice, which started out tipped in favor of the defense, had to be brought into balance and then substantially tipped in favor of the truth of the charges. Although the trial court here used no numerical reference, the court's use of the phrasing "substantially tipped" carries with it a quantitative component – one that is not very consequential because whatever quantitative amount is suggested by the adverb "substantially" is more than offset by the common usage of the word "tipped." The phrase "tip the scales" may be defined as "to offset the balance of a situation," which is in keeping with the description provided to the jury by the court and which can accommodate a very small movement away from balance. (Free Online Dictionary, Thesaurus and Encyclopedia.)

Here, as in *Katzenberger*, the combination of the use of the imagery of movement of the scales of the Lady of Justice and the trial court's definition of the reasonable doubt standard as "tipped" and "substantially tipped" conveyed the impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt. The trial court's instruction was incorrect.

In *People v. Garcia*, *supra*, the Court of Appeal considered a variant instruction on the concept of proof beyond a reasonable doubt and found it had been erroneously given to the jury.

The trial court in *Garcia* instructed on the principle of proof beyond a reasonable doubt according to Penal Code section 1096 at the conclusion of the evidence. The trial court then amplified that instruction with the following language that, as with the instruction given the prospective jurors in appellant's case, called upon the jurors to weigh the evidence presented by the prosecution on the scales:

> In other words, reasonable doubt means just what the term implies, doubt based upon reason, doubt that presents itself in the minds of reasonable people who are weighing the evidence in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth. (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 68.)

The Court of Appeal found this supplemental instruction comparable to the civil standard of "preponderance of the evidence," which calls upon the jury to weigh the evidence in the scales in order to determine the truth. *Garcia* stated: "This 'weighing' process, where a tipping of the scales determines the 'truth,' is wholly foreign to the concept of proof beyond a reasonable doubt." (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 69.)

In appellant's case, the trial court instructed the jury that the prosecution's burden was to present evidence that "substantially tip[ped]" the scales in favor of the truth of the charges, a burden the court further described as "fairly substantial."

Notably, as stated above, a "fairly substantial" production of evidence does not connote a burden of producing evidence of the truth of the charges to a "near certainty" or "near certitude."

Where evidentiary burden is concerned, this Court has in fact characterized "[s]ubstantial evidence" as a "deferential" standard. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1114, 1140; *People v. Alvarez* (1996) 14 Cal.4th 155, 182; *People v. Williams* (1988) 45 Cal.3d 1268, 1301.) "Although 'substantial' evidence is not synonymous with 'any' evidence . . , the standard is easily satisfied." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 363, p. 413.)

Recently, in *People v. Wilson* (2008) 44 Cal. 4th 758, 821, this Court articulated a different standard of review to be applied in juror removal cases, which had previously been decided upon a substantial evidence standard. *Wilson* described the difference in the evidentiary showing required of substantial evidence and the heightened "demonstrable reality" standard, which this Court found necessary in juror removal cases to protect a defendant's fundamental rights to due process.

> Although we have previously indicated that a trial court's decision to remove a juror pursuant to section 1089 is reviewed on appeal for abuse of discretion (see, e.g., *People v. Leonard* [(2007)] 40 Cal.4th [1370], 1409), we have since clarified that a somewhat stronger showing than what is ordinarily implied by that standard of review is required. Thus, a juror's inability to perform as a juror must be shown as a "demonstrable reality" (*People v. Cleveland* (2001) 25 Cal.4th 466, 474), which requires a "stronger evidentiary showing than mere substantial evidence" (*id.* at p. 488 (conc. opn. of Werdegar, J.)). As we recently explained in *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052: "To dispel any lingering uncertainty, we explicitly hold that the more stringent demonstrable reality standard is to be applied in review of juror removal cases. That heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair

trial by an unbiased jury." (*People v. Wilson*, *supra*, 44 Cal. 4th at p. 821.)

In concluding that the supplemental instructional language before it had been erroneously given to the jury, the *Garcia* court reasoned that the effect of the misinstruction was "to divert the [jurors] in some degree from their constitutionally prescribed duty not to find guilt unless they 'be reasonably persuaded to a near certainty.' (See *People v. Reyes* [(1974)] 12 Cal.3d 486, 500.)" (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 69.) The court found that the misinstruction diluted the burden of proof required under the reasonable doubt standard. "It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.)

The instruction by the trial court in appellant's case – that the prosecution was required to present evidence that tipped the scales of justice a "fairly substantial" degree in favor of the truth of the charges – was incorrect for the reasons set forth above. The error resulted in a dilution of the reasonable doubt burden of proof.

3. THE TRIAL COURT'S INSTRUCTIONS THAT COMMON SENSE, IN ADDITION TO REASON, MAY SERVE AS THE BASIS OF DOUBT WAS ERRONEOUS AND MISDESCRIBED THE PROSECUTION'S BURDEN

The trial court expressly instructed the prospective jurors that the reasonable doubt standard of proof required that they evaluate the facts

and the evidence based upon common sense and reason.[31] The trial court did not elaborate further on the intersection of reason and common sense.

In *People v. W.E. Paulsell* (1896) 115 Cal. 6, the defendant objected to the trial court's instruction that the jury apply reason and common sense in evaluating the evidence. The Supreme Court reversed the judgment, stating, "It is sufficient to say . . . that the phrase "common sense" is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own sense; and there is no warrant for the unnecessary use of such a term when there is apt language to express the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used." (*Id.*, at p. 12.)

Common sense is "sound and prudent judgment based on a simple perception of the situation or facts." (Merriam-Webster OnLine Dictionary.) It is also "sound judgment not based on specialized knowledge; native good judgment." (Answers.com; The Free Dictionary by Farley.) It is "sound practical judgment that is independent of specialized knowledge, training, or the like; normal native intelligence." (Dictionary.com.) As well, it is "ordinary good sense or sound practical judgment." (Your Dictionary.com.)

Nothing in Penal Code section 1096 sanctions a juror's application of his "own sense" in lieu of "reason" in evaluating the evidence.

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[31] The trial court instructed: "Basically, it is an evaluation of the facts and the evidence, based upon common sense and reason, to see if you are left with any reasonable doubt after you hear the testimony and see the other evidence." (4RT 773:22-25; see also 4RT 677, 740, 809, 832, 865; 5RT 898, 928, 962.)

The trial court erred in instructing the potential jurors that each could apply his or her own common sense in addition to reason in evaluating the evidence. Once more, the court's misinstruction diluted the reasonable doubt standard of proof. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

4. THE TRIAL COURT'S INSTRUCTIONS COUPLING HUMAN AFFAIRS AND "HUMAN INTERACTION," EXPLAINED TO ONE PANEL OF JURORS AS HOW "PEOPLE TREAT EACH OTHER AND DO THINGS IN SOCIETY," WAS ERRONEOUS AND MISDESCRIBED THE PROSECUTION'S BURDEN

The trial court instructed the jury on what reasonable doubt is not.

Penal Code section 1096 states of reasonable doubt: "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt."

When the trial court instructed, however, it included a reference to "human affairs *and human interaction*" in its charge to one panel: "It does not mean beyond all possible or imaginary doubt, because every time you talk about human affairs and human interaction you can always conjure up some imaginary doubt." (4RT 773:16-21; see also 5RT 898:10-13.)

Because the trial court extemporized when giving the instructions to the various panels, the versions understandably varied, but each panel heard an incorrect definition of reasonable doubt. Thus, the court told one panel of prospective jurors, "It doesn't mean beyond all

possible or imaginary doubt, because you can always conjure up some possible or imaginary doubt based upon people's interactions and how they – people treat each other and do things in society." (5RT 928:6-10.)

To another panel, the court said: "It does not mean beyond all possible or imaginary doubt, because whenever you talk about people interacting and human affairs, you can always conjure up some imaginary or possible doubt." (5RT 962:5-8.)

In another version, the court instructed: "It doesn't mean beyond all possible or imaginary doubt, because we can always conjure up some sort of doubt when we talk about how people interact and what people do in everyday life." (4RT 677:2-5.)

The court instructed another panel: "Now, it doesn't mean beyond all possible or imaginary doubt, because we can always conjure up some sort of doubt about anything." (4RT 740:17-19.)

To another panel, the court instructed: "It doesn't mean beyond all possible or imaginary doubt because when you talk about humans interacting and human conduct, you can always conjure up some possible doubt." (4RT 809:6-9.)

And, "It does not mean beyond all possible or imaginary doubt when you are talking about people's interactions and people's affairs." (4RT 832:13-16.)

And, also, "It does not mean beyond all possible or imaginary doubt, because whenever you talk about human action or human interaction you can conjure up some possible or imaginary doubt." (4RT 865:21-24.)

The trial court's introduction of references to "people's interactions," "how people interact," "what people do in everyday life," and

to "how they – people treat each other and do things in society" into the reasonable doubt standard also introduced reversible error into the instruction.

In *People v. Brannon* (1873) 47 Cal. 96, our Supreme Court concluded that references to the ordinary affairs of life had the effect of lowering the prosecution's burden of proof. *Brannon* said: "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required." (*Id.*, at p. 97.)

In *People v. Johnson I*, the Court of Appeal followed *Brannon* and reversed the judgment of conviction. During the jury selection process the trial court amplified upon the concept of reasonable doubt with references to the ordinary affairs of life:

> The burden is proof beyond a reasonable doubt. A doubt that has reason to it, not a ridiculous doubt, not a mere possible doubt. Because we all have a possible doubt whether we will be here tomorrow. That's certainly a possibility. We could be run over tonight. God, that would be a horrible thing, but it's a possibility. It's not reasonable for us to think that we will because we plan our lives around the prospect of being alive. We take vacations; we get on airplanes. We do all these things because we have a belief beyond a reasonable doubt that we will be here tomorrow or we will be here in June, in my case, to go to Hawaii on a vacation. But we wouldn't plan our lives ahead if we had a reasonable doubt that we would, in fact, be alive. (*People v. Johnson I*, *supra*, 115 Cal.App.4th at p. 1171.)

In its analysis, *Johnson I* considered the reasoning in *People v. Nguyen* (1995) 40 Cal.App.4th 28, in which the reviewing court considered the prosecutor's argument that the reasonable doubt standard was analogous to events in people's everyday lives, including decisions to marry or change lanes when driving.

Nguyen said:

> The prosecutor's argument that people apply a reasonable doubt standard 'every day' and that it is the same standard people customarily use in deciding whether to change lanes trivializes the reasonable doubt standard. It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce. [Citations.] (*People v. Nguyen, supra*, 40 Cal.App.4th at p. 36.)

Appellant's case presents a different circumstance from that in *Nguyen* in that the trial court here refrained from including specific analogies within its elaborations. However, the differences do not amount to a difference in kind. The court's references in appellant's case to "people's interactions," "how people interact," "what people do in everyday life," and to "how they – people treat each other and do things in society" were equally misleading because these references directed the jurors' minds to speculate in the same inappropriate way about the various standards people apply in their interactions in everyday life and apply those standards to the reasonable doubt standard.

Johnson I looked at the specifics of the prosecutor's argument in *Nguyen* and at the challenged instructions before analogizing to decisions involving taking vacations and getting on airplanes. *Johnson I* said:

> . . . We can all describe situations where people make serious decisions in spite of grave reservations about the outcome. For example, a couple may overextend themselves financially to buy a home in spite of significant and reasonable doubts about whether it will prove to be a wise investment. Such situations cannot be equated to the level of conviction necessary for finding guilt in a criminal case.
>
> We are not prepared to say that people planning vacations or scheduling flights engage in a deliberative process to the depth required of jurors or that such people finalize their plans only after persuading themselves that they have an abiding conviction of the wisdom of the endeavor. Nor can we say that people make such decisions while aware of the concept of "beyond a reasonable doubt." . . . (*People v. Johnson I, supra*, 115 Cal.App.4th at p. 1169.)

Soon after *Johnson I* was decided, the Court of Appeal in *People v. Johnson II, supra*, considered another judicially amplified reasonable doubt instruction in which the trial court also equated proof beyond a reasonable doubt to everyday decision-making in a juror's life.

In a colloquy with a potential juror, the trial court in *Johnson II* likened proof beyond a reasonable doubt to the juror's decision to have lunch at an unfamiliar restaurant close to the courthouse where the juror risked food poisoning rather than go to a familiar but more distant restaurant as an example of a reasonable decision made because the juror did not want to be late for court. (*People v. Johnson II, supra*, 119 Cal.App.4th at p. 980.)

The court also analogized the various driving decisions made while approaching and leaving a traffic-controlled intersection to the reasonable doubt standard. (*Id.*, at p. 981.) The court then finished up with the following instruction:

> Everything you do, you can look at what's reasonable and possible, and I tell you every decision you make along in your life are [sic] based on – that human beings – power of reason – something animals don't have. [¶] So we have that power of reason, and with that we can make these decisions along the way. [¶] So that's – that's not a definition of reasonable doubt, but that's what we want you to bring to court with you, the same thing you use every day in making your decision[s]. [¶] . . . [¶] We found out now what you have to do. Go back to the jury room and figure out what happened beyond a reasonable doubt, not beyond all possible doubt. [¶] But the first thing you have to decide as jurors is: Is what happened beyond a reasonable doubt, because you are never going to know what really happened beyond all possible doubt, nor am I. We weren't there. (*People v. Johnson II*, *supra*, 119 Cal.App.4th at p. 982.)

Johnson II noted that in *Brannon*, *supra*, our Supreme Court reversed the judgment on the ground that equating proof beyond a reasonable doubt to everyday decision-making in a juror's life lowers the burden of proof to beyond a preponderance of the evidence and that *Johnson I* confirmed the vitality of that reasoning. (*People v. Johnson II*, *supra*, 119 Cal.App.4th at p. 984.) Relying on *Brannon*, *Johnson II* concluded that "the court's tinkering with the statutory definition of reasonable doubt, no matter how well intentioned, lowered the prosecution's burden of proof below the due process requirement of proof

beyond a reasonable doubt" and reversed. (*People v. Johnson II*, *supra*, 119 Cal.App.4th at pp. 985-986.)

In appellant's case, the trial court's attempt to explain reasonable doubt by directing the jury to view it in the context of "how people interact," "what people do in everyday life," and "how they – people treat each other and do things in society" lowered the prosecution's burden of proof beyond the due process requirement of proof beyond a reasonable doubt (*People v. Brannon*, *supra*, 47 Cal. at p. 97; *In re Winship*, *supra*, 397 U.S. at pp. 363-364) and constituted error requiring reversal of the judgment (*People v. Johnson I*, *supra*, 115 Cal.App.4th at p. 1169; *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282).

F. THE COURT'S REASONABLE DOUBT INSTRUCTIONS DILUTED THE BURDEN OF PROOF; THE ERROR IS A STRUCTURAL ONE THAT IS REVERSIBLE PER SE

Appellant has explained above that the trial court's reasonable doubt instructions were incomplete because they failed to inform the jurors of the requirement that they have an "abiding conviction" of the truth of the charges before voting to convict appellant.

The instructions were also deficient because the trial court's attempt to analogize the prosecution's burden of proof to a "substantial" tipping in favor of the truth of the charges and to characterize the burden as being "fairly substantial" failed to convey the "near certainty" of evidentiary proof required by the reasonable doubt standard. As such, the instructions resulted in a dilution of the burden of proof.

The court's further instruction that the jurors apply common sense in addition to reason in evaluating the evidence erroneously invited

the jurors to judge the evidence according to their own individual sense of things.

In addition, the trial court's instruction that the reasonable doubt standard is analogous to decision-making standards applied in everyday life diluted the burden of proof because how people interact in everyday life cannot be equated to the level of conviction necessary for finding guilt in a criminal case.

In addition, the instructions to apply the standards of everyday life and to apply individual common sense coincided in that both instructions incorrectly invited jurors to apply subjectivity in their decision-making.

Taken together, the court's incorrect instructions affected all necessary aspects of the reasonable doubt instruction in ways that diluted the burden of proof. The error is a structural one that is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; see also *People v. Johnson I*, *supra*, 115 Cal.App.4th at p. 1172.) "[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." (*Sullivan*, *supra*, 508 U.S. at p. 281, italics omitted.)

Appellant respectfully submits her conviction must be reversed.

II.

THE TRIAL COURT VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHT TO A JURY TRIAL WHEN IT ERRONEOUSLY INSTRUCTED THAT A PERSON WHO AIDS AND ABETS IS EQUALLY GUILTY OF THE CRIME COMMITTED BY A PERPETRATOR. THE LAW CLEARLY RECOGNIZES THAT AN AIDER AND ABETTOR'S MENS REA IS PERSONAL TO THE AIDER AND ABETTOR AND, A FORTIORI, THAT AN AIDER AND ABETTOR MAY THEREFORE BE GUILTY OF A LESSER-INCLUDED CRIME THAN THAT COMMITTED BY THE ACTUAL KILLER

A. BACKGROUND

The prosecutor argued that Daveggio and appellant were guilty of the first degree murder of Vanessa Samson based upon three alternative theories of culpability – premeditated express malice murder and felony murder based on the underlying felonies of simple kidnapping and rape by instrument. (33RT 7104.)

There were no eyewitnesses to the actual killing and therefore no evidence as to which person was the actual killer. The prosecutor argued that appellant was criminally liable for the murder either because she actually killed or because she aided and abetted the actual killer, *viz.*, Daveggio. (33RT 7094-7099.)

At both guilt and penalty phases of the trial, the trial court instructed the jury on the general principles of aiding and abetting in accordance with CALJIC No. 3.00, as follows:

> Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. *Each principal, regardless of the extent or manner of participation*[,] *is equally guilty.* Principals include: [¶] 1.

> Those who directly and actively commit or attempt to commit the act constituting the crime, or [¶] Those who aid and abet the commission or attempted commission of the crime. (138CT 36382; 139CT 36505; 34RT 7347; italics added.)

Thus, appellant's court expressly instructed the jury in language that is the counterpart of the following language taken from CALCRIM No. 400 – a "person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."[32]

As appellant will show below, the instruction given appellant's jury incorrectly stated that the actual killer and the aider and abettor are equally guilty of the crime. An aider and abettor's mens rea is personal to the aider and abettor; a fortiori, an aider and abettor of first degree murder is not always as guilty as the actual killer and may, instead, be guilty of a lesser-included crime. (*People v. McCoy* (2001) 25 Cal.4th 1111.)

Defense counsel objected to the "principals are equally guilty" language with citation to *McCoy* with regard to CALJIC No. 3.00 and in the context of a discussion concerning the charged special circumstances. (33RT 7059, 7063.) In addition, because a trial court has an independent duty to correctly instruct the jury regarding applicable legal principles, any arguable lapses in defense counsel's objections have no

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[32] CALCRIM No. 400 states: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

legal consequence. Furthermore, because the facts of this case demonstrate an instance in which the liability of the actual killer or killers may have been greater than the liability of appellant, the instructional error may not be said to have been harmless beyond a reasonable doubt.

B. AN AIDER AND ABETTOR'S MENS REA IS PERSONAL TO THE AIDER AND ABETTOR; A FORTIORI, AN AIDER AND ABETTOR MAY THEREFORE BE GUILTY OF A LESSER-INCLUDED CRIME THAN THAT COMMITTED BY THE ACTUAL KILLER

In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, the Court of Appeal (Second Appellate District, Division Two) concluded that CALCRIM No. 400's direction that "[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it," was "generally correct," but misleading under the "exceptional" factual circumstances present in its case.[33]

The "exceptional" factual circumstances to which *Samaniego* referred are the very factual circumstances present here – specifically, the absence of any evidence as to the identity of the actual killer.

In *People v. Nero* (2010) 181 Cal.App.4th 504, which appellant discusses below, the Court of Appeal (Second Appellate District,

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[33] The Court of Appeal stated: "Consequently, CALCRIM No. 400's direction that "[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it" (CALCRIM No. 400, italics added), while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*People v. Samaniego*, *supra*, 172 Cal. App. 4th at p. 1165.)

Division Three) reached the same conclusion and held that the analogous "equally guilty" language in CALJIC No. 3.00 incorrectly stated the law.

Thus, to the extent it incorrectly informed the jury that each principal in a crime is "equally guilty," the pattern instruction given the jury in appellant's case (CALJIC No. 3.00) was defective for the same reason the pattern instructions given the jury in *Nero* (CALJIC No. 3.00) and *Samaniego* (CALCRIM No. 400) were defective.

In appellant's case, the prosecutor argued the actual killer committed first degree murder in one of three ways – either premeditated express malice murder or felony murder based on either kidnapping or rape by instrument. If the actual killer committed first degree murder, CALJIC No. 3.00, as given, required the jury to convict appellant of first degree murder as an aider and abettor without regard for her individual mental state. Under the instruction the jury would have not had to make factual determinations regarding appellant's intent, willfulness, deliberation and premeditation.

In addition, where Count 3 (Daveggio's oral copulation of his daughter April) is concerned, the prosecution presented evidence establishing that Daveggio had sexually assaulted April, but no evidence that appellant had engaged in similar conduct. The prosecution's evidence therefore raised questions as to appellant's mens rea.

This instruction is clearly wrong, as *Samaniego* and *Nero* recognized. An aider and abettor may be convicted of a lesser offense than the perpetrator. In unusual circumstances, an aider and abettor may be convicted of a greater offense. The overriding rule is that an aider and abettor's liability is dependent on his or her own individual mental state. If

the aider and abettor's mental state is not the same as the perpetrator's mental state, then the aider and abettor is not, as incorrectly stated in the instructional language given to appellant's jury, "equally guilty."

In cases not involving a natural and probable consequence theory, a theory of liability that was not pursued in appellant's case,[34] an aider and abettor may actually be convicted of a more serious offense than the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111.)

In *People v. McCoy*, this Court stated:

> Resolution of this question requires a close examination of the nature of aiding and abetting liability. "All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (Pen. Code, § 31; see *People v. Mendoza* (1998) 18 Cal. 4th 1114, 1122-1123; *People v. Prettyman* (1996) 14 Cal. 4th 248, 259-260.) Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts. (*Ibid.*) Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as "vicarious." (E.g., *People v. Croy* (1985) 41 Cal. 3d 1, 12, fn. 5.) This description is accurate as far as it goes. But, as we explain, the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's own acts and own mental state.
>
> It is important to bear in mind that an aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty

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[34] The prosecutor asked that the court *not* instruct on the natural and probable consequences theory. (33RT 7002-7003.)

> not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." (*People v. Prettyman*, *supra*, 14 Cal. 4th at p. 260.) Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. (*Id.*, at p. 267.) In this case, however, the trial court did not instruct the jury on the natural and probable consequences doctrine. It instructed only on an aider and abettor's guilt of the intended crimes. Accordingly, only an aider and abettor's guilt of the intended crime is relevant here. Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequences doctrine. (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1116-1117.)

McCoy went on to explain that in a prosecution not involving a theory of natural and probable consequence liability, the aider and abettor may not necessarily be guilty of the same crime as the perpetrator but, instead, may be guilty of crimes either more serious or less serious than the perpetrator's crime.[35] This Court explained:

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[35] Recently, in *People v. Hart* (2009) 176 Cal.App.4th 662, the Court of Appeal held that if the evidence raises a question whether the offense charged against an aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability. *Hart*'s distinction as to the separate culpabilities of the actual killer and the aider and abettor rested on *McCoy*'s recognition that the aider and abettor is liable for the acts of the actual perpetrator, but that he or she is liable for his or her own mental state.

> Aider and abettor's liability is thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person "chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts. . . .'" (Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, quoted in *People v. Prettyman*, *supra*, 14 Cal. 4th at p. 259.) But that person's own acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's. (*People v. McCoy*, *supra*, 25 Cal. 4th at p. 1118.)

Just as *Samaniego* recognized that the foregoing language cannot be reconciled with the "equally guilty" language of CALCRIM No. 400, *McCoy*'s expressions set forth above cannot be reconciled with the "equally guilty" language in CALJIC No. 3.00.

In *People v. Nero*, *supra*, the Court of Appeal agreed with *Samaniego*'s reasoning and held that the "equally guilty" language of CALJIC No. 3.00 cannot be reconciled with *McCoy*'s recognition that the aider and abettor's mens rea was personal to him or her.

In *Nero*, the defendant and his codefendant sister were charged with murder. The evidence at trial showed the defendant stabbed the victim. The prosecution theorized that the codefendant sister aided and abetted him by handing him the knife. (*People v. Nero*, *supra*, 181 Cal.App.4th at p. 510.)

The trial court instructed the jury with CALJIC No. 3.00, which, like CALCRIM No. 400, provides: "Persons who are involved in committing or attempting to commit a crime are referred to as principals in

that crime. *Each principal, regardless of the extent or manner of participation, is equally guilty.* Principals include those who directly and actively commit or attempt to commit the acts constituting the crime, or, two, those who aid and abet the commission or attempted commission of a crime." (*People v. Nero*, *supra*, 181 Cal. App. 4th at p. 510, emphasis in the original.) During deliberations, the jury asked if they could convict the codefendant sister of a lesser homicide-related offense. The trial court responded by rereading CALJIC Nos. 3.00 and 3.01, including the language in CALJIC No. 3.00 that each principal is equally guilty. The jury convicted both defendants of second degree murder.

Nero held the trial court misinstructed the jury. The court relied in particular on *McCoy*'s recognition that the aider and abettor's mens rea might be different than the direct perpetrator's men's rea, that the aider and abettor's mens rea was personal to the aider and abettor. (*Nero*, *supra*, 181 Cal.App.4th at p. 514.)

It is also noteworthy that where *Samaniego* confined its conclusion (i.e., that the "equally guilty" language of CALCRIM No. 400 was incorrect to "exceptional" factual circumstances), *Nero* found CALJIC No. 3.00 to be confusing "even in unexceptional circumstances." The court noted that even though the jury had received other instructions suggesting that the codefendant's mental state was not tied to the defendant's (e.g., CALJIC Nos. 3.31.5, 2.02, 17.00), the deliberating jury still asked whether they could find the codefendant guilty of a greater or lesser offense than the defendant. (See *Nero*, *supra*, 181 Cal.App.4th at p. 518.)

Thus, *Samaniego* and *Nero* are in agreement that the "equally guilty" language set forth in CAJIC No. 3.00 and CALCRIM No. 400 is

legally incorrect. Accordingly, the trial court erred in instructing appellant's jury that "each principal, regardless of the extent or manner of participation[,] is equally guilty."

C. A TRIAL COURT IS OBLIGATED TO CORRECTLY INSTRUCT THE JURY ON THE APPLICABLE LAW

As appellant has indicated above, defense counsel did object to the "principals are equally guilty" language, but did so in the context of CALJIC No. 3.00 and a discussion concerning special circumstance instructions. (33RT 7059, 7063.) Any remaining lapses in counsel's objection, however, do not bar appellant's claim.

A trial court has an independent duty to correctly instruct the jury regarding applicable legal principles. Penal Code section 1259 provides:

> Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.

In *People v. Graham* (1969) 71 Cal.2d 303, the trial court erred in failing to instruct on manslaughter due to diminished capacity. Not only was no defense request for such instruction made, but all three defense counsel acquiesced in the court's statement that "'everyone agrees that

there is no evidence from which involuntary manslaughter could be found; the only type of manslaughter that could be found here would be voluntary.'" (*Id.*, at p. 317.) Despite that circumstance, this Court concluded in *Graham* that there is placed upon the trial court an "affirmative duty to instruct the jury on its own motion on the general principles of law relevant to the issues of the case [which] can [not] be nullified by waiver of defense counsel." (*Id.*, at pp. 317-318.) An exception exists where "defense counsel deliberately and expressly, as a matter of trial tactics, objected to the rendition of a [correct] instruction." (*Id.*, at p. 318; *People v. Wickersham* (1982) 32 Cal.3d 307, 331.) In all other cases, instructions which misstate the elements of a crime or theory of criminal liability may be reviewed on appeal without need for an objection in the trial court.

Here, the record establishes that there was no valid tactical reason for any failure of defense counsel to object to the incorrect instruction. One effect of the incorrect instruction was to expand liability for the aider and abettor in a circumstance where none existed. Counsel's objections to the "principals are equally guilty" language were intended to reduce appellant's liability as an aider and abettor. (See 33RT 7059, 7063.) There are multiple plausible inferences to be drawn from the little that is known about the events regarding Vanessa Samson's death. In closing argument, defense counsel pointed to evidence showing that appellant's relationship with Daveggio was marked by appellant's submissiveness to him. (34RT 7262-7265.) Counsel noted that appellant had not wanted Aleda Doe killed and so would not have wanted Vanessa killed. (34RT 7266-7267.) Counsel asked the jury to determine appellant's individual

liability in determining appellant's culpability for Vanessa's death (34RT 7271). With regard to Count 3 and April, counsel argued the evidence showed appellant was not guilty of the charge. (34RT 7270.)

Under these circumstances, it is unreasonable to conclude that defense counsel, for tactical reasons, deliberately and expressly acquiesced in the giving of an incorrect instruction that expanded the liability of an aider and abettor.

Accordingly, the instruction given here which misstated the elements of the theory of criminal liability may be reviewed on appeal without need for an objection in the trial court.

D. THE FAILURE TO INSTRUCT CORRECTLY ON THE ELEMENTS OF AIDING AND ABETTING WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Failure to instruct correctly on the elements of aiding and abetting is assessed under the harmless beyond a reasonable doubt standard. (*People v. Hardy* (1992) 2 Cal.4th 86, 185-186; *People v. Dyer* (1988) 45 Cal.3d 26, 64.) Misinstruction on elements of a crime is federal constitutional error. *(Neder v. United States* (1999) 527 U.S. 1,144 L. Ed. 2d 35, 119 S. Ct. 1827; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324.)

Because there were no eyewitnesses to the actual killing of Vanessa Samson and no evidence as to whether appellant was the actual killer, there are multiple plausible inferences that can be drawn from the little that is known about the separate killings.

The prosecutor's argument to the jury embraced a series of plausible inferences. The prosecutor argued that Daveggio and appellant

were a mixture of an aider and abettor and the actual perpetrator where conduct was concerned. (33RT 7098.) The prosecutor argued Daveggio and appellant acted with express malice in their stated intention to go "hunting," i.e., to "stalk someone and kill them," on the "biggest shopping day of the year," the day after Thanksgiving. (33RT 7104.) The prosecutor further argued that Daveggio and appellant intended to kidnap Vanessa and intended to commit the crime of rape by instrument upon her. (33RT 7109-7113.)

However, even if it were reasonably inferred that Daveggio and appellant planned to go "hunting," it is equally reasonable to infer that the actual killer made an individual decision to kill Vanessa in acts that were neither discussed with nor conveyed to the other. Under these circumstances, the jury could have found unpremeditated or implied malice second degree murder as to the aider and abettor.

Furthermore, in the absence of evidence that both Daveggio and appellant were both present at the time Vanessa was killed, it is plausible to infer they were not together at the time the actual killer made an individual decision to kill that he neither discussed with nor conveyed to the other. Again, under these circumstances, the jury could have found unpremeditated or implied malice second degree murder as to the aider and abettor.

The case for first degree murder committed with express malice, premeditation, and deliberation or by means of lying in wait may have been strong, but it should and must be distinguished from the determination of appellant's involvement in the case. The case for first degree murder was strong for any person identified as the actual killer, but

the evidence did not allow that identification. As to the other perpetrator, there is an inherent reasonable doubt whether Vanessa's killing was previously planned or represented instead an individual decision by the actual killer.

Appellant's theory of defense was that Daveggio dominated and controlled appellant. Counsel argued that appellant was submissive to Daveggio and did not voluntarily act in concert with him. (34RT 7262-7265.) Accordingly, but for the misdirection contained in the instruction, the jurors reasonably could have concluded that appellant lacked the requisite mental state to be guilty of first degree premeditated murder. Although it is well established that duress does not constitute a defense to murder and does not reduce murder to manslaughter, duress may negate the deliberation or premeditation required for first degree murder. (*People v. Anderson* (2002) 28 Cal.4th 767, 781-784; see also *People v. Burney* (2009) 47 Cal.4th 203, 249.) The jury in appellant's case may well have found that appellant lacked the required mental state to be guilty of first degree murder, but nonetheless believed they were compelled to find her "equally guilty" and convict her on that basis.

For these reasons, the first degree murder conviction must be reversed.

In addition, where the charge involving April (Count 3) is concerned, the record shows that the jury struggled with the issue of appellant's liability. The jury asked for a readback of April's testimony and whether a defendant had to have actual physical contact with the victim. The trial court referred the jury to CALJIC Nos. 3.00, 3.01, 10.45, and an unnumbered instruction dealing with the effect of voluntary

intoxication on mental state. (7CT 1820; 8CT 1825-1826; 34RT 7391.) The jury then asked specifically with regard to appellant and Count 3 whether physical contact was necessary or "can she be found to be a principal and by this aid and abet." (8CT 1822.) The trial court delivered an instruction, given over objection of defense counsel, that began with the instructional language challenged here, to wit, "Each principal, regardless of the extent or manner of participation, is equally guilty." (8CT 1822, 1823; 34RT 7392-7394.)

Under these circumstances, the instructional error was not harmless beyond a reasonable doubt and appellant's conviction in count 3 must be reversed.

III.

THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF HER FEDERAL DUE PROCESS RIGHTS BY INSTRUCTING WITH CALJIC NO. 2.60 OVER COUNSEL'S OBJECTION THAT THE INSTRUCTION WOULD IMPROPERLY CALL THE JURY'S ATTENTION TO APPELLANT'S FAILURE TO TESTIFY IN HER OWN BEHALF DURING THE GUILT PHASE OF THE TRIAL

A. BACKGROUND

Appellant did not testify in her own behalf during the guilt phase of the trial.

During the court's discussion with counsel over the guilt phase instructions to be given to the jury, counsel for appellant asked that the court not instruct the jury in the language of CALJIC No. 2.60.[36] Counsel explained: "[T]he whole purpose of my asking it not be given is I don't want to call the jury's attention to the fact that my client did not testify, which – ." (33RT 6698-6699.)

Counsel for codefendant Daveggio, on the other hand, requested that CALJIC Nos. 2.60 and 2.61[37] be given. (33RT 6998.)

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[36] CALJIC No. 2.60 states: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." (138CT 36368.)

[37] CALJIC No. 2.61 states: "In deciding whether or not to testify, a defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge against him or her. No lack of

The trial court proposed modifying CALJIC No. 2.60 in a way that would personalize the instruction to Daveggio: "I can fashion it: Defendant Daveggio has a constitutional right not to be compelled to testify." (33RT 6999:4-5.)

Appellant's counsel demurred, explaining that the court's proposed language did not "cure" the problem since the modified instruction would still have the effect of highlighting appellant's failure to testify. The prosecutor agreed. (33RT 6999.)

The court then ruled it would instruct in the language of CALJIC No. 2.60, which it subsequently did. (138CT 36368; 33RT 7340.)

B. THE APPLICABLE LAW AND ANALYSIS

CALJIC No. 2.60 tells the jury to draw no inference from and not to discuss a defendant's failure to testify.

The policy underlying the instruction has its constitutional roots in the Fifth Amendment's commandment that no person "shall be compelled in any criminal case to be a witness against himself," and the application of that guarantee to the states through the Fourteenth Amendment. (*Malloy v. Hogan* (1964) 378 U.S. 1, 11.)

In *Griffin v. California* (1965) 380 U.S. 609, the United States Supreme Court held that the self-incrimination guarantee of the Fifth Amendment, as it bears on the states by reason of the Fourteenth

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testimony on a defendant's part will make up for a failure of proof by the People so as to support a finding against him or her on any such essential element." (138CT 36369.)

Amendment, forbids either comment by the prosecution on an accused's silence or instructions by the court that such silence is evidence of guilt.

Thereafter, in *People v. Molano* (1967) 253 Cal.App.2d 841, the California Court of Appeal considered a defendant's claim that the trial court improperly commented on his failure to testify when it instructed the jury in language analogous to that of CALJIC No. 2.60. *Molano* relied on *Griffin*, *supra*, in holding that the instruction, which had been given over the defendant's strenuous objection, was tantamount to commenting on the accused's silence. (*Id.*, at pp. 846-847.)

Subsequently, in *Lakeside v. Oregon* (1978) 435 U.S. 333, the United States Supreme Court held that the giving of a cautionary instruction that the jury was not to draw any adverse inference from the defendant's not testifying, though given over the defendant's objection, did not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments and did not deprive the defendant of his right to counsel by interfering with his attorney's trial strategy. (*Id.*, at pp. 340-342.)

Thereafter, in *People v. Roberts* (1992) 2 Cal.4th 271, this Court, under compulsion of *Lakeside v. Oregon*, concluded that *Molano*, *supra*, was no longer good law insofar as it concluded that the giving of CALJIC No. 2.60 over a defendant's objection constituted a comment proscribed by *Griffin*. (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 314-315.)

The *Roberts* court expressly stated, however, that the trial court should refrain from giving CALJIC No. 2.60 when a defendant so requests. "Nevertheless, the purpose of the instruction is to protect the defendant, and if the defendant does not want it given the trial court should

accede to that request, notwithstanding the lack of a constitutional requirement to do so. (*Id.*, at p. 314.)

Implicit in *Roberts*' deference to a defendant's request in this regard is the recognition that a defendant has the right to be judged on the evidence and not on other extraneous circumstances, such as the defendant's failure to testify. The United States Supreme Court "has declared that one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." (*Taylor v. Kentucky* (1978) 436 U.S. 478, 485, holding that the trial court's refusal to instruct on the presumption of innocence resulted in a violation of the defendant's right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.)

Here, trial counsel objected to the instruction for a specific reason – to avoid drawing the jury's attention to appellant's failure to take the stand. The clear inference to be drawn from counsel's objection is that in counsel's view the instruction would not have performed its recognized function of protecting appellant (*People v. Roberts*, *supra*, 2 Cal.4th at p. 314), but instead would have improperly focused the jury's attention "on circumstances not adduced as proof at trial," i.e., appellant's failure to testify in her own behalf.

Accordingly, in instructing the jury in the language of CALJIC No. 2.60 over appellant's objection, the trial court violated appellant's right to a fair trial as guaranteed by the Due Process Clause of

the Fourteenth Amendment. (*Taylor v. Kentucky*, *supra*, 436 U.S. at p. 485.)

Roberts, as appellant has noted above, held that the trial court should not instruct with CALJIC No. 2.60 if the defendant objects to the giving of the instruction. (*People v. Roberts*, *supra*, 2 Cal.4th at p. 314.) The Court, however, declined to find prejudice in giving the admonition over the defendant's objection. "We must assume that the jury followed the admonition not to take into account defendant's failure to testify. Under that view, it is inconceivable that the giving of the instruction led to a less favorable outcome for the defendant. Therefore, under any standard of review the error was not prejudicial." (*Id.*, at pp. 314-315.)

But here, trial counsel assessed the evidence against appellant, assessed the jury, and assessed the pros and cons of instructing this jury with CALJIC No. 2.60 (including the admonition not to take into account appellant's failure to testify), and made a strategic decision that the protective admonitions contained within the instruction were inadequate to the task they were intended to accomplish. It is axiomatic that a defendant has the right to present her defense of choice. (*U.S. Const. amends VI, XIV*; *Faretta v. California* (1975) 422 U.S. 806, 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.").)

Accordingly, in this case, because it cannot be said that the error did not contribute to the verdict, the error in instructing the jury with CALJIC No. 2.60 was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499

U.S. 279, 306-312.) Reversal of the judgment of conviction is therefore warranted.

IV.

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S WRONGFUL CONDUCT WITH CHRISTINA, RACHEL, AMY, AND ALEDA UNDER EVIDENCE CODE SECTION 1101. THE INCORRECT ADMISSION OF THIS PREJUDICIAL EVIDENCE DEPRIVED APPELLANT OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

A. INTRODUCTION

Evidence of a defendant's commission of a crime other than one for which she is then being tried is not admissible to show bad character or predisposition to criminality, but it may be admitted to prove some material fact at issue, such as motive, intent, or identity. (Evid. Code, § 1101.[38])

Following a hearing on the subject, the trial court in this case exercised its discretion (Evid. Code, § 352) and admitted evidence of the defendants' uncharged conduct involving Christina, Rachel, Amy, and Aleda to show motive, intent, and a characteristic common plan and design

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[38] Evidence Code section 1101, subdivision (b), states: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

pursuant to Evidence Code section 1101, subdivision (b). In addition, the trial court also admitted evidence involving Aleda to prove identity. (5CT 1203-1207; 3RT 653-656.[39])

The trial court instructed the jury in the language of the pattern instruction (CALJIC No. 2.50)[40] that it could consider the evidence to prove the following aspects of the crimes charged and the special circumstances alleged: (1) a motive for the commission of the crimes; (2) the existence of the necessary intent, (3) a characteristic method, plan, or scheme; and (4) whether the defendants believed in good faith in the victims' consent to the sexual acts.[41] (138CT 36343-36344.)

However, as appellant will explain below, evidence of certain uncharged offenses committed by the defendants had no tendency in reason to establish the factors for which they were admitted. The evidence was therefore incorrectly admitted and deprived appellant of a fair trial under the Fifth and Fourteenth Amendments and also violated appellant's right to a reliable determination in a capital case guaranteed by the Eighth Amendment to the Constitution.

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[39] The trial court issued its decision in a written Statement of Decision on Evidence Code Section 1101(b) and 1108 Issues (5CT 1203-1207) and further stated the decision on the record (3RT 653-656).

[40] In a related argument, which follows, appellant explains why the instruction regarding the jury's use of evidence of uncharged misconduct (CALJIC No. 2.50) was incorrect and misleading.

[41] The instructional language that the other crimes evidence could also be considered to determine whether the defendants had a good-faith belief in the victims' consent appears to have been added at some point after the hearing and the court's ruling set forth above without objection on the record by the defense.

B. THE TRIAL COURT'S RULING REGARDING THE ADMISSION OF OTHER CRIMES EVIDENCE AND THE OTHER CRIMES EVIDENCE RECEIVED AT TRIAL

The trial court found that uncharged acts involving Christina, Aleda, Rachel, and Amy were admissible under Evidence Code section 1101, subdivision (b), as to all four counts of the indictment, and issued its findings and ruling in a written statement.[42] (5CT 1206; 3RT 655.)

The court ruled that the acts involving Aleda met "the criteria for the highest degree of similarity" and that it was, "in fact, a signature crime when compared with count four of the indictment." (5CT 1206: 11-12; 3RT 655.) The court admitted evidence involving Aleda to prove "intent, motive, common plan and design and identity." (5CT 1206: 13-14; 3RT 655.)

The court found the acts involving Christina, Rachel, and Amy "contain sufficient common features to demonstrate the existence of a plan rather than spontaneous acts. Thus, these uncharged acts are

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[42] The court noted in its Statement of Decision that the prosecution had proffered evidence of 15 uncharged acts (5CT 1203:17-18) and that the court, in an exercise of its discretion pursuant to Evidence Code section 352 (5CT 1204:28), had concluded that only the uncharged acts "involving both defendants acting in concert, jointly as principals and/or aiders and abettors, would be admissible" (5CT 1204:1-2). The court also declined to bifurcate the trial of the sex counts (counts 1-3) from the murder count (count 4) because, in the court's analysis, the evidence was cross-admissible, the relative strengths of the prosecution's case as to each count indicated there was no danger of a strong case bolstering a weaker case, and, with count 4 already charged as a capital offense, there was no danger that the joinder of counts 1-3 would elevate count 4 into a capital offense. (5CT 1206:20-1207:17; 3RT 655.)

admissible as relating to intent, motive, and common plan and design." (5CT 1206: 16-19; 3RT 655.)

Appellant summarizes below the testimonies of Christina, Rachel, Amy, and Aleda, which in their salient aspects conformed with the prosecution's proffer during the hearing as to what the requested evidence would show. (See, e.g., 4CT 945-954; 3RT 627-631, 632-636, 637-640.)

Christina testified that she was 13 years old and a friend of appellant's daughter Rachel when appellant invited her for a ride that ended at a house off the 65 Expressway.[43] Daveggio was inside watching television. Daveggio, appellant, and Christine each snorted a line of methamphetamine prepared by appellant. After that, appellant grabbed Christina by the arms and took her into the bathroom. Appellant locked the door and said she wanted to party with Christina. Appellant took a handgun from her pants and placed it on the counter. She told Christina to remove her clothing. When Christina refused, appellant removed Christina's shirt and bra and licked Christina's breasts. Appellant told Christina to remove the rest of her clothing. Christina refused again. Appellant unbuttoned and removed Christina's pants and underwear and opened the bathroom door.

Appellant took Christina by her arms and walked her into the living room. Appellant called out to Daveggio, "Here is your present."

Daveggio kissed Christina. Appellant removed Daveggio's pants and licked his anus. Daveggio licked Christina's genital area and penetrated her vagina with his fingers. Appellant sat on the bed near

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[43] See also "B. Uncharged Offenses Involving Christina Doe," in the Statement of Facts, *supra*.

Daveggio and masturbated. Appellant then orally copulated Daveggio's penis and attempted to have Christina do the same by pushing down on Christina's head twice. Daveggio then raped Christina while appellant licked his anus.

Appellant drove Christina home. On the way she told Christina she would find out if Christina told anyone.

Rachel testified that she was appellant's daughter and 12 years old when appellant invited her to drive to Oregon with appellant and Daveggio.[44] During the drive, Rachel fell asleep on the rear bench seat. She awoke to find Daveggio massaging her thigh. Rachel moved to the front seat next to appellant, who was driving. Daveggio moved to a position behind Rachel and began to massage her shoulder. When appellant stopped near Lake Shasta, Rachel described Daveggio's actions to appellant and asked her to talk to Daveggio. Rachel later saw appellant talking with Daveggio.

During the next leg of the drive, appellant told Rachel that she had had sex with everyone Rachel knew, including Rachel's brother, grandfather, grandmother, Aunt Misty, and friend Christina. Appellant said Rachel was her fantasy and "secret lust." When it was dark, appellant pulled over to the side of the road. Daveggio pulled Rachel's seat back and pinned her arms while appellant inserted her fingers in Rachel's vagina. Daveggio then pulled Rachel into the back of the van and orally copulated her vagina. During this time, appellant faced Rachel and masturbated. Appellant then, in Rachel's words, licked Daveggio's butt.

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[44] See also "C. Uncharged Offenses Involving Rachel Doe," in the Statement of Facts, *supra*.

Later that evening, the group stopped at a motel. The next morning, appellant, nude and lying on Rachel's bed, asked, "Is it okay if James fucks you?" When Rachel said no, appellant pulled the bed covers away from Rachel. Either appellant or Daveggio covered Rachel's mouth with duct tape while the other held her down and taped her hands behind her back. Daveggio orally copulated Rachel's vagina while appellant masturbated. At a point, appellant told Daveggio to stop and he did. Appellant and Daveggio moved to the other bed and appellant orally copulated Daveggio's penis and licked his butt.

Amy testified that she was 29 years old when appellant invited her for a drive.[45] During the drive, appellant stopped at Motel 6, ostensibly to wait for Daveggio's phone call. Amy accompanied appellant inside and sat on the bed with her back to the bathroom. As Amy talked with appellant, she was struck by a hard blow to the back of her head. Amy thought she had been struck with a gun. Someone cuffed her left hand. Amy struck back. Daveggio punched her in the mouth with his fist, causing her bottom lip to split open and bleed. Daveggio told her to shut up or die. Appellant told her to shut up and listen. Appellant placed a bandana over Amy's eyes. Amy's hands were cuffed behind her back. Appellant cut off her sweatshirt, shirt, and bra. Someone covered her mouth with duct tape. At some point, Amy felt the gun behind her left ear and heard a click.

Amy lay on her stomach on the bed. Appellant straddled her from behind and pulled her head back. Daveggio stood in front of Amy

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[45] See also "E. Uncharged Offenses Involving Amy Doe," in the Statement of Facts, *supra*.

and moved the duct tape to the side and attempted to place his penis in Amy's mouth without success. Amy was rolled onto her back. Appellant put her mouth on Amy's breasts. Amy heard Daveggio masturbating. Daveggio raped Amy. They rolled Amy over once more and appellant separated Amy's buttocks while Daveggio sodomized her. Daveggio got off Amy. Amy heard appellant and Daveggio moving on the bed and then heard Daveggio groan.

Afterward, appellant gathered up all of the bloody things in the room and left. She returned later with the items washed and folded. Before they dropped her off, both appellant and Daveggio warned Amy not to tell anyone about the incident.

Aleda testified that she was 20 years old and walking home from school one night around 10:30 p.m. in Reno, Nevada, when Daveggio grabbed her by her hair and backpack and threw her into a van.[46] The van was driven by a woman who had a long pale face and wore clear glasses. Daveggio gave the woman directions on where to drive and then began touching Aleda's breasts. He put his hands in her pants and penetrated her vagina with his fingers.

Daveggio told Aleda to undress. He kissed and touched her entire body and tried to bite her cheeks and lips. He pushed his fingers into her vagina once more and forced her to orally copulate him twice. He penetrated her vagina with his penis. He made her insert two of her fingers into his rectum and inserted his fingers into her rectum. He forced her to hold his testicles and scratched her back and breast.

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[46] See also "C. Uncharged Offenses Involving Aleda Doe," in the Statement of Facts, *supra*.

After they drove into California, Daveggio made Aleda orally copulate his penis before he masturbated and ejaculated in her mouth and onto her face and hair.

Daveggio called the driver Mickey. Daveggio told Aleda he could not take her back to Reno because he had kidnapped her and did not want to go to jail. He talked with the driver about what to do and said it was up to the driver. The driver took the next freeway exit and told Aleda to get out of the van.

C. THE RELEVANT LAW REGARDING ADMISSION OF OTHER CRIMES EVIDENCE

Generally, the prosecution may not use a defendant's prior criminal act as evidence of a disposition to commit a charged criminal act. (Evid. Code, § 1101, subd. (a).[47]) But such evidence is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) (*People v. Davis* (2009) 46 Cal. 4th 539, 602.)

Here, the trial court admitted evidence of the defendants' conduct toward Christina, Rachel, Amy, and Aleda as to all four counts charged against appellant, specifically, two counts of oral copulation, in concert with force, of Sharona; one count of oral copulation, in concert with

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[47] Evidence Code section 1101, subdivision (a), states: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

force, of April; and the murder of Vanessa Samson and related special circumstances. The trial court ruled the evidence was relevant and admissible to prove that appellant had the requisite motive and intent to commit each of the charged crimes and special circumstances and that the separate charged crimes were committed as part of a common plan or scheme. The court further ruled that the evidence pertaining to Aleda was relevant and admissible to prove appellant's identity as a perpetrator of Vanessa Samson's murder.

In *People v. Ewoldt* (1994) 7 Cal.4th 380,[48] the leading case on the admission of the evidence in issue, this Court held that in the trial of a defendant charged with committing lewd acts upon a child (his stepdaughter) evidence tending to establish that the defendant had committed a prior, uncharged lewd act upon the same stepdaughter and also had committed prior uncharged lewd acts upon her older sister was admissible to establish a common design or plan. *Ewoldt* held such evidence was admissible to establish a common design or plan if the uncharged misconduct shared sufficient common features with the charged

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[48] In ruling on the Evidence Code section 1101 motion, the trial court identified *Ewoldt* as the case it considered to be controlling. (3RT 653, 654.) This Court has relied upon *Ewoldt* and thus affirmed its continuing viability in its recent decisions involving the use of other crimes evidence. See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Hovarter* (2008) 44 Cal.4th 983, 1002; *People v. Kraft* (2000) 23 Cal.4th 978, 1031.

offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan.[49]

Ewoldt held that uncharged conduct may be relevant to demonstrate the existence of a common design or plan, motive, knowledge, intent, and identity. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402 fn. 6.)

Ewoldt explained that the nature and degree of similarity between the uncharged conduct and the charged offense required to prove the existence of a common design or plan differed from the degree of similarity necessary to prove intent or identity.

> The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . ." [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbor[ed] the same intent in each instance.' [Citations.]" [Citation.]
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> A greater degree of similarity is required in order to prove the existence of a common design or plan. As noted above, in establishing a common design or plan, evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [Citation.] "[T]he difference between

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[49] In so holding, this Court disapproved its contrary rulings in *People v. Tassell* (1984) 36 Cal.3d 77 and *People v. Ogunmola* (1985) 39 Cal.3d 120.)

requiring similarity, for acts negativing innocent intent, and requiring common features indicating common design, for acts showing design, is a difference of degree rather than of kind; for to be similar involves having common features, and to have common features is merely to have a high degree of similarity." [Citations.]

To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. [Citation.]

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." [Citation.] (*People v. Ewoldt*, *supra*, 7 Cal. 4th at pp. 402-403.)

In *People v. Balcom* (1994) 7 Cal.4th 414, this Court held that evidence tending to establish that soon after the commission of the charged

rape and robbery the defendant committed a rape and robbery in a manner quite similar to the charged offenses was admissible to demonstrate the existence of a common design or plan. In turn, the existence of the common design or plan was relevant to demonstrate that the defendant either employed or developed the plan in committing the rape and robbery with which he was charged. (*Id.*, at p. 418.)

In both *Ewoldt* and *Balcom*, this Court took note of the prejudice associated with evidence of uncharged misconduct: " 'Evidence of uncharged offenses "is so prejudicial that its admission requires extremely careful analysis. [Citations.]" . . . "Since 'substantial prejudicial effect [is] inherent in [such] evidence,' uncharged offenses are admissible only if they have substantial probative value." [Citation.]' (*People v. Ewoldt*, *supra*, *ante*, p. 404, italics in original.)" (*People v. Balcom*, *supra*, 7 Cal.4th at p. 423.)

This Court has more recently echoed the concern it earlier expressed in *Ewoldt* and *Balcom* about the care with which evidence of uncharged misconduct is determined to be admissible. This Court has said, for example, that evidence of other crimes may be highly inflammatory and has stated that as a result of its volatility the admission of such evidence """must not contravene other policies limiting admission, such as those contained in Evidence Code section 352."""" (*People v. Lewis* (2001) 25 Cal.4th 610, 637, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing

the issues, or of misleading the jury. (*People v. Ewoldt*, *supra*, at p. 404; Evid. Code, § 352.)

In *People v. Thompson* (1980) 27 Cal.3d 303, this Court set forth a method by which a trial court might evaluate the probative value of evidence of uncharged crimes that gives meaning to the standard articulated in *Ewoldt* as "extremely careful analysis." (See *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) *Thompson* explained:

> In ascertaining whether evidence of other crimes has a tendency to prove the material fact, the court must first determine whether or not the uncharged offense serves "'logically, naturally, and by reasonable inference'" to establish that fact. [Citations.] The court "must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." [Citation.] If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded. [Citations.] (*People v. Thompson*, *supra*, 27 Cal. 3d at p. 316.)

In *Ewoldt*, this Court applied the "extremely careful analysis" standard and explained that in ruling upon the admissibility of uncharged acts, the trial court must evaluate the probative value of the evidence of uncharged acts in light of the disputed fact the proffered evidence is intended to prove.

> Our holding does not mean that evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan will be admissible in all (or even most) criminal prosecutions. In many cases the

> prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute. [Citation.] This is so because evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense. [Citation.]
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> For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value. In ruling upon the admissibility of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose. (*People v. Ewoldt*, *supra*, 7 Cal. 4th at p. 406.)

The *Ewoldt* court then applied these principles in concluding that the evidence of uncharged acts before it was not admissible to prove the defendant's intent because the evidence of the defendant's intent was such that it could not reasonably be disputed. The court said:

> For this same reason, the evidence of defendant's uncharged misconduct in the present case is inadmissible for the purpose of proving defendant's intent as to the charges of committing lewd acts. Evidence of intent is relevant to establish that, assuming the defendant committed the alleged conduct, he or she harbored the requisite intent. In testifying regarding the charges of lewd conduct, Jennifer stated that defendant repeatedly molested her, fondling her breasts and genitals and forcing her to touch his penis. If defendant engaged in this conduct, his intent in doing so could not reasonably be disputed. [Citations.] As to these charges, the prejudicial effect of admitting evidence of similar uncharged acts, therefore, would outweigh the probative value of such evidence to prove intent. (*People v. Ewoldt*, *supra*, 7 Cal. 4th at p. 406.)

In another example in which uncharged conduct was assayed for admissibility to prove a disputed issue (*People v. Valentine* (1988) 207 Cal.App.3d 697), the trial court admitted evidence of the defendant's intravenous drug use (needles, syringes, and tracks on his arms) to prove the defendant was cultivating marijuana on the theory that someone involved in one type of narcotics activity would also be involved in smoking marijuana. The trial court reasoned: "[The] People are entitled to establish and to make the argument that the people may use controlled substances, and marijuana is a controlled substance. And it's reasonable for them [the jury] to believe that if . . . Mr. Valentine was using hypodermic needles for the administration of controlled substances, that they can use that as a matter of circumstantial evidence to infer that he is the owner or person in control of the marijuana plants. That's what they can do. That's what I'm finding." (*People v. Valentine*, *supra*, 207 Cal. App. 3d at p. 704.)

The Court of Appeal characterized this thinking as an "invitation to specious reasoning" that should be excluded from "criminal trials with greater force and reasoning" and concluded the uncharged acts evidence functioned as impermissible propensity evidence and reversed the conviction. (*Ibid.*)

Accordingly, the erroneous admission of evidence of uncharged misconduct implicates the Due Process Clause, because due process, as interpreted by the United States Supreme Court, demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred. (*County Court of Ulster County v. Allen* (1979) 442 U. S. 140, 156; *Leary v. United States* (1969) 395 U.S. 6, 46.)

A reviewing court reviews for abuse of discretion a trial court's rulings on relevance and admission or exclusion of evidence under Evidence Code sections 1101 and 352. (*People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.) "Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113." (*People v. Hovarter* (2008) 44 Cal. 4th 983, 1004.)

D. THE OTHER CRIMES EVIDENCE INVOLVING CHRISTINA, RACHEL, AMY, AND ALEDA WAS NOT RELEVANT TO PROVE THE EXISTENCE OF A COMMON PLAN OR SCHEME, INTENT, MOTIVE, OR IDENTITY

Evidence of other crimes evidence involving Christina, Rachel, Amy, and Aleda was admitted to prove the existence of a common plan or scheme, intent, and motive in connection with the charged counts involving Sharona, April, and Vanessa, and to prove identity in connection with Vanessa. Accordingly, as she did earlier with evidence regarding Christina, Rachel, Amy, and Aleda, *supra*, appellant synopsizes for purposes of this discussion the pertinent evidence regarding Sharona, April, and Vanessa.

Sharona testified that she was 17 years old and a friend of Daveggio's daughters April and Jamie when appellant and Daveggio came to her place of work and offered her some methamphetamine.[50] When Sharona got into the van, appellant pushed her to the floor. Daveggio hit her, cuffed her hands, and bound her legs. Appellant drove the van out of the parking lot and onto the highway at Daveggio's instructions. Daveggio forced Sharona to orally copulate his penis. Appellant parked and orally copulated Sharona's vagina while Daveggio faced them and masturbated. Daveggio photographed Sharona's nude body below the waist. Daveggio got behind the wheel and he and appellant talked about what to do with Sharona before stopping at a gas station to let Sharona out. Daveggio showed Sharona a gun before he let her out of the van.

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[50] See also "F. Sharona Doe (Counts 1 and 2)," in the Statement of Facts, *supra*.

April testified that she is Daveggio's daughter and was 16 years old when she spent the night at the Candlewood Suites Motel with appellant and Daveggio because Daveggio had promised to take her to get her driver's license the next morning.[51] Earlier in the day, Daveggio showed April a gun. In the motel room, Daveggio sat with April and talked to her about going "hunting," which he described as stalking "someone to kill," and about serial killers. Daveggio talked about serial killer Henry Lee Lucas and how Lucas and his girlfriend together killed a lot of people. Daveggio talked about the adrenaline rush received from seeing fear in the eyes of people being tortured. Daveggio then turned his conversation with April to the topic of sex. Appellant did not participate in the conversation, but was awake during it.

When Daveggio went to take a shower, appellant told April that Daveggio intended to have oral sex with April. After his shower, Daveggio told April to sit next to him on the bed. He told her he loved her and began to touch her. When April said no, appellant went into the bathroom and closed the door.

Daveggio removed April's clothes and orally copulated her vagina. At a point, April was on her back on the bed and Daveggio on his knees with his head between April's legs. Appellant came out of the bathroom and, in April's words, gave Daveggio "head." Daveggio ejaculated in appellant's mouth. Daveggio kissed April's stomach and neck and said he loved her. April timed Daveggio's oral copulation of her vagina, which lasted from 12:07 p.m. to 1:09 a.m.

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[51] See also "H. April Doe (Count 3)," in the Statement of Facts, *supra*.

The next day, appellant invited April to go "hunting" with them. Appellant said the Friday after Thanksgiving was the best day to go on a hunt.

Vanessa Samson was 22 years old on the morning of December 2, 1997, when she unexpectedly disappeared while walking to work.[52] She wore blue jeans, a sweatshirt, a black jacket, wore her hair down, and carried a backpack and a lunchbag. Witnesses heard a scream and saw a green van driven by a woman with long hair.

Later that morning, a park employee saw a green minivan at Sly Park recreation area near the route linking Sacramento and Lake Tahoe. The front passenger seat was occupied by a white female with long brown hair. A white male of Daveggio's approximate height and weight stood outside the van.

That same morning, Daveggio rented room 5 for two people at the Tahoe Sundowner Motel in South Lake Tahoe. A little later, a white woman with black hair drove the green van in which Daveggio had arrived out of the parking lot. The green van returned 25 minutes later.

That night, the motel manager noticed that the windows to room 5 were fogged, the drapes were closed, the van was gone. At checkout time the next day the manager entered room 5 and found it clean. The contents of the trash can, including the liner, had been removed. The manager removed and washed the bedspread, which had a coffee-colored stain.

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[52] See also "I. Vanessa Samson (Count 4)," in the Statement of Facts, *supra*.

That night, Daveggio and a dark-haired woman registered for a room at the Lakeside Inn & Casino in Stateline, Nevada. Daveggio was arrested pursuant to warrant on December 3, 1997. Agents took appellant into custody from her room and arrested her pursuant to warrant. Appellant had a 2 ½-to-3-foot length of yellow nylon rope in her pants pocket. Drugs, drug paraphernalia, a torn pay envelope for Sly Park parking, and a .25 semi-automatic firearm were seized from the motel room.

The next day, John Schoettgen happened across Vanessa Samson's body along Highway 88 near Lake Tahoe. Investigators observed a ligature-type mark on her neck. Vanessa's clothes were in disarray. Her jeans were buttoned, but not zipped.

An autopsy showed that Vanessa had sustained scalp injuries caused by blunt force injury either through blows to the head or blows by the head against something else.[53] There was no injury to the bone or membranes around the brain or to the brain itself. There was a ligature furrow around the neck and areas of weaving present in the ligature furrow. Petechial hemorrhages, consistent with strangulation, were found in and around the eyes. Although Dr. Rollins assigned ligature strangulation as the mechanism of death, extensive and deep bleeding in and around the larynx, trachea, and esophagus led Dr. Peterson to conclude that both ligature and manual strangulation had been applied, either at separate times

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[53] The actual autopsy of Vanessa Samson was performed by Dr. Curtis Rollins, who testified to its results as a prosecution rebuttal witness. Dr. Brian Peterson testified to Rollins' autopsy results in the prosecution's case-in-chief; Dr. Gregory Reiber testified to the autopsy results for the defense.

or simultaneously. The diagnosis of asphyxial death was also supported by findings of petechial hemorrhages of the pericardium and the pleura.

Rollins' autopsy described bruising and scraping on the right front chest wall and the left front armpit, which Peterson said could have been caused when Vanessa was thrown from the van. Injuries on Vanessa's left and right buttocks were determined to have been caused by a blunt object.

There were no injuries to Vanessa's vaginal, anal, or rectal areas. There was fecal matter exuding from the anus and on Vanessa's underwear. There were no drugs or alcohol in Vanessa's system; no evidence of defensive wounds; no visible indications that Vanessa's extremities were restrained.

There were no body fluids, including blood or semen stains, on Vanessa's underwear, no signs of bleeding on the body, no broken fingernails.

A search of the green van yielded a roll of duct tape, stained napkins, two Revlon curling irons modified with duct tape purchased by Daveggio and appellant from K-Mart on November 30, 1997, and a ball gag and a cassette tape entitled Submissive Young Girls purchased by Daveggio and appellant from Not Too Naughty on December 1, 1997, as well as an AM-PM drinking cup.

Each of the modified curling irons had brown stains and each contained a brown pellet that had the appearance and characteristics of fecal material. Both brown pellets tested positive for blood.

Three sets of bite marks made by a small mouth and small set of teeth were visible on the green ball gag.

The stains on the paper napkins recovered from the van bore a distinctive U-shaped appearance that appeared to indicate the napkins had been used to wipe the curling iron. The stains on all three napkins tested positive for blood.

DNA testing on the biological materials from the ball gag, curling irons, brown pellets, and stained napkins excluded Daveggio and appellant as donors, but included Vanessa as a possible donor. Appellant's fingerprints were found on the duct tape used to modify both curling irons. Fingerprints matched to Daveggio, appellant, and Vanessa were found on the AM/PM cup.

1. The Other Crimes as Evidence of the Existence of a Common Plan or Scheme

Ewoldt tells us that "'[t]he presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done.' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal. 4th 380, 393.) Further, *Ewoldt* instructs that "in establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'" (*Id.*, at p. 402.) *Ewoldt* also instructs that "to establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [I]t need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Id.*, at p. 403.)

People v. Balcom, *supra*, is illustrative of the shared common features needed to support an inference of a common plan or scheme. In *Balcom*, the defendant went to an apartment complex at 1 a.m. He was wearing a cap. He knocked at an apartment, and when the single female occupant opened a patio area to see who it was, the defendant jumped a fence, pointed a rifle at her, and ordered her back inside. There, he immediately demanded money, her "ATM" card and "PIN" number, jewelry, and the keys to her car. He fondled her while she responded. He demanded more, and when she failed to provide more, he said he would have to rape her. He then tied her up, removed her clothes, raped her, and thereafter left with her property and car. (*People v. Balcom*, *supra*, at p. 419.)

At trial, evidence of a rape that occurred six weeks earlier was admitted. In that incident, a single woman was in her car driving out of the parking area of her apartment complex. The defendant, who was wearing a cap, stopped her for directions, and then put a gun to her head, opened the door, and entered. He said he only wanted money, but when she looked for it, he jumped on top of her, removed her clothes, and raped her. Thereafter, he took her "ATM" card, demanded the "PIN" number, and left in her car. (*Id.*, at p. 421.)

Although the two incidents were distinguishable by marked dissimilarities, the Court found that they nevertheless shared sufficient common features to support an inference that both were manifestations of a common design. (*Id.*, at p. 424.) In particular, the court noted that the incidents occurred six weeks apart and in both the assailant wore a cap, went to an apartment complex early in the morning, selected a lone female

unknown to him, gained control at gunpoint, initially demanded only money, forcibly removed clothing, committed a single act of intercourse, stole an "ATM" card and obtained the "PIN" number, and left in the victim's car. (*Ibid.*)

a. Aleda

Here, in contrast, the only features that might be said to be common to Aleda's circumstance and that of Vanessa are that both women were in their early 20s, wore their hair down to their shoulders, and were carrying backpacks; and both were pulled into a van driven by a woman with shoulder-length brown hair.

However, there was no direct evidence that any of the sexual acts described by Aleda were shared by Vanessa. Moreover, nothing in the forensic evidence associated with Vanessa supports the conclusion that any of the sexual acts described by Aleda had occurred with Vanessa. More specifically, Aleda testified that Daveggio sexually assaulted her by touching and kissing her breasts and body; by digitally penetrating her vagina multiple times; by forcing her to orally copulate him multiple times; by raping her; by forcing her to hold his testicles and to insert two of her fingers into his rectum; by inserting his fingers into her rectum; by scratching her breast and back; by biting her cheeks and lips; by masturbating and by ejaculating in her mouth and onto her face and hair.

With Vanessa, there was no evidence, as there was with Aleda, of scratches to her breast and back that might be linked to Daveggio's fingernails; no bite marks on her cheeks and lips; no evidence of ejaculate in her mouth or on her face and hair; no evidence that she had

inserted her fingers into his rectum; no evidence that she had been raped or her vagina digitally penetrated.

With Aleda, on the other hand, there was evidence Daveggio told her to be quiet, but no evidence that a gag, much less a ball gag, had been used to silence her. There was evidence that Daveggio digitally penetrated Aleda's rectum, but no evidence he used an appliance, such as a curling iron, to penetrate her rectum.

In addition, Aleda's circumstance and that of Vanessa diverged at the outcome. Aleda was released on a side street with no suggestion that murder was a serious alternative consideration and no suggestion that if it were the murder would be accomplished by strangulation. Vanessa, on the other hand, was murdered by manual or ligature strangulation, or both.

And, while there may have been certain common features in the stranger-on-stranger abduction described above, there were also significant differences. Aleda was abducted at night in the dark. Vanessa was abducted in the morning in daylight. Daveggio's sexual assault upon Aleda began immediately after she was pulled into the van and continued while appellant drove from Reno into California. A kidnapping for sexual purposes might be inferred from this quickly instigated and continuous sexual assault. In contrast, the prosecution presented evidence that after Vanessa was taken, appellant stopped at the welfare office for her AFDC check and food stamps and then made a second stop and cashed the AFDC check. The prosecution produced no evidence, forensic or otherwise, that showed Vanessa was sexually assaulted when she was alive, and certainly

no evidence that Vanessa was sexually assaulted immediately after she was pulled into the van.

When measured against the standard articulated in *Ewoldt* and applied in *Balcom*, the evidence regarding Aleda and Vanessa did not share sufficient common features to support an inference that both were manifestations of a common design, from which a further inference might be drawn that Vanessa was abducted in pursuit of that plan. In *Balcom*, for example, the common features identified and relied upon by this Court included evidence spanning the crimes from inception to completion – that the incidents occurred six weeks apart and in both the assailant wore a cap, went to an apartment complex early in the morning, selected a lone female unknown to him, gained control at gunpoint, initially demanded only money, forcibly removed clothing, committed a single act of intercourse, stole an "ATM" card and obtained the "PIN" number, and left in the victim's car. (*People v. Balcom*, *supra*, at p. 424.)

In *Ewoldt*, this Court found the following common features in the charged and uncharged misconduct supported the inference that both were manifestations of a common design or plan, which was relevant to establish that the defendant committed the charged offenses in accordance with that plan: "In the present case, the victims of both the uncharged misconduct and the charged offenses were defendant's stepdaughters, who were residing in defendant's home, and the acts occurred when the victims were of a similar age. On three occasions, defendant molested Natalie at night while she was asleep in her bed. When discovered, defendant asserted he was only 'straightening up the covers.' In two of the charged offenses, defendant molested Jennifer in an almost identical fashion and,

when discovered, proffered a similar excuse. On one occasion prior to the commission of the charged offenses, defendant touched either Jennifer's breasts or her vaginal area. This marked the beginning of an ongoing pattern of molesting Jennifer. We conclude, therefore, that evidence of defendant's uncharged misconduct shares sufficient common features with the charged offenses to support the inference that both the uncharged misconduct and the charged offenses are manifestations of a common design or plan. Such evidence is relevant to establish that defendant committed the charged offenses in accordance with that plan." (*People v. Ewoldt*, *supra*, 7 Cal. 4th at p. 403.)

Ewoldt explained that the probative value of uncharged offenses should be assessed in the following way. "The principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of a common design or plan. That tendency is strong. Defendant's uncharged misconduct with Natalie was committed in a manner nearly identical to that of two of the charged offenses, and the charged and uncharged acts together suggested a planned course of action rather than a series of spontaneous events. Natalie testified that the defendant molested her on three occasions, and Jennifer testified that defendant's uncharged misconduct with her was the beginning of an ongoing pattern of frequent molestations. Together, this constitutes convincing evidence that defendant was acting pursuant to a common design or plan." (*People v. Ewoldt*, *supra*, 7 Cal. 4th 380 at p. 404.)

In *People v. Davis* (2009) 46 Cal.4th 539, the Court found the defendant's prior crimes against Frances M. and Frost sufficiently similar

to provide evidence of a common scheme or plan based on the following analysis that encompassed features common to more than just an abduction. "In those offenses, as in this case, defendant abducted a stranger, a female; used a weapon; assured the victim that he would not harm her; took her to a remote location; and carried bindings with him, indicating that the behavior was planned. The sexual nature of the prior crimes against Frances M. and Frost was obvious from his attempt to force Frances M. to sexually gratify him and his statements to court-referred psychiatrists that he assumed he 'would have some fun' with Frost, and that he masturbated twice daily thinking about these victims and tying them up." (*People v. Davis*, *supra*, 46 Cal. 4th at p. 603.)

In *People v. Kraft* (2000) 23 Cal.4th 978, this Court found the following facts established the existence of a common design or plan within the meaning of *Ewoldt*. "The victims shared certain characteristics, all being White males between the ages of 18 and 25, all but one being single, and most being, at the time of the offense, vulnerable by virtue of lack of transportation. The method of obtaining control over the victims was similar in most of the charged offenses: Defendant generally supplied the victims with alcohol and drugs, often diazepam, to the point they could no longer resist, whereupon defendant generally bound their wrists with ligatures, frequently using shoelaces. After gaining control over the victims in such a manner, unless they were already succumbing from the effects of the drugs, defendant killed them, often by ligature strangulation. After the victims' deaths, defendant disposed of the bodies generally by dumping them from his car, usually on or near a freeway or other roadway. And each murder involved some type of arguably sexual activity or aberration,

whether taking the form of sodomy, mutilation or stripping the victim of clothing. (*Id.*, at p. 1031.)

In *People v. Dancer* (1996) 45 Cal.App.4th 1677, overruled on other grounds in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123, the Court of Appeal found common features supporting the inference that each incident was a manifestation of a common design or plan rather than two unrelated spontaneous acts in the following evidence: "Defendant resided near the victims and was acquainted with their parents. He selected very young girls as victims; he had a history of unsupervised access to the victims and played or babysat with them. The victims knew and trusted him. In committing the molestations, he selected locations out of public view, where mattresses were located. He exposed his penis through his clothing, the victims had contact with it, and he tried to have both orally copulate him. Finally, when confronted by Janet about being alone with Emily and by Christine about molesting Tuolumne, defendant responded calmly." (*People v. Dancer*, *supra*, 45 Cal. App. 4th at pp. 1689-1690.)

Notably, the numerous common features identified by this Court in *Kraft* and *Davis* and the Court of Appeal in *Dancer*, tended to span the transaction of the crimes – e.g., abduction, rape, murder – as appellant noted above was true of the common features with *Ewoldt* and *Balcom.* There is a logic to such a pattern because it is only when a court can identify salient features that span the acts comprising a particular criminal conduct that a court may find that the uncharged and charged conduct were committed as part of a common plan and to infer from the existence of the common plan that the charged crime was committed in accordance with

that plan. Absent such evidence, as occurred here, evidence of the uncharged conduct is likely to function as prohibited disposition evidence.

For example, here there was evidence of stranger-on-stranger abduction involving both Aleda and Vanessa and evidence of a sexual assault upon Aleda and very limited forensic evidence of a sexual assault of a different nature upon Vanessa. In short, Aleda's evidence included within the criminal transaction the crimes of abduction, multiple acts of sexual assault, and release. Vanessa's evidence included abduction, sexual assault different in kind from Aleda's evidence, and murder. There was, in addition, no evidence as to whether the sexual assault upon Vanessa occurred pre- or post-mortem, an attempted pre-mortem rape by instrument being the minimum necessary to prove the rape by instrument special circumstance. Evidence that Daveggio and appellant abducted Aleda, a stranger, was, however, not admitted only to prove the existence of a common plan to abduct Vanessa, a stranger, but to further prove that Vanessa was abducted for a sexual purpose, just as Aleda was, even though there was no evidence of shared common features in the sexual assault upon Aleda and Vanessa. Under those circumstances, the sexual assault evidence involving Aleda functioned as forbidden disposition or propensity evidence of sexual assault upon Vanessa.

For the reasons explained above, the similarities between the evidence pertaining to Aleda and the charged murder, as described above, do not reasonably support an inference that each incident was a manifestation of a common design or plan rather than two unrelated spontaneous acts.

Nor does the evidence regarding Aleda share common features with the charged crimes involving Sharona and April. As noted above, Aleda involved a stranger-on-stranger abduction in Reno, Nevada. Unlike Aleda, Sharona and April were minors and they were also well known to Daveggio and to appellant. Sharona was 17 years old and the best friend of Daveggio's daughters April and Jamie. Other dissimilarities included evidence that appellant physically attacked Sharona, though not Aleda. Daveggio physically restrained Sharona with handcuffs, though not Aleda. Appellant sexually assaulted Sharona, though not Aleda. Daveggio photographed Sharona's body below the waist, though not Aleda. Daveggio displayed a gun to Sharona, though not to Aleda. Sharona was driven around in an area geographically close to the area where she entered the van and was released at a gas station where she had access to a telephone; Aleda was driven from Nevada into California and released at the end of a remote and darkened highway. Thus, although Aleda and Sharona were sexually assaulted in the green van, there were significant differences in the events indicating the incidents were unrelated spontaneous acts – e.g., the use of physical force was different; the nature of the sexual assaults was different; the perpetrators of the actual sexual assaults were different.

Significant dissimilarities between the Aleda and April incidents also show these acts to be unrelated. Again, Aleda involved a stranger-on-stranger abduction. April was Daveggio's 16-year-old daughter and the acts against her did not involve an abduction. Before Daveggio sexually assaulted April, appellant warned April that Daveggio intended to have oral sex with her. Appellant gave no such warning to

Aleda and no such warning to Vanessa. Daveggio orally copulated April for an hour, but did not digitally penetrate her vagina or rectum, as he did Aleda. Nor did he ejaculate in April's mouth and on her face and hair as he did Aleda. Appellant did not orally copulate Daveggio during the incident with Aleda, as she did during Daveggio's oral copulation of April.

The salient features of the acts against Aleda and the acts against April differ – e.g., known versus unknown victim; no abduction versus abduction; differences in the sexual acts involved; difference in the parties to the sexual misconduct. The evidence does not establish the existence of a common plan or scheme.

b. Amy

Nor are the uncharged crimes involving Amy sufficiently similar to the charged crimes to show the existence of a common plan or scheme.

Amy was known to both appellant and Daveggio and so did not involve a stranger-on-stranger abduction as occurred with Vanessa. Amy testified that she was beaten badly, handcuffed, blindfolded, and her mouth covered with duct tape and that both Daveggio and appellant participated in the physical assault. The prosecution presented no evidence, including forensic evidence, that Vanessa was beaten badly, handcuffed, blindfolded, or that her mouth was covered with duct tape. Amy said appellant cut her clothing off. There was no evidence that Vanessa's clothing had been cut or torn or otherwise forcibly removed from her. Amy testified that Daveggio attempted to have her orally copulate him and that he raped her, that appellant orally copulated her, that Daveggio sodomized

her with appellant's help, and that appellant and Daveggio engaged in sexual conduct with each other. There was no evidence of equivalent conduct involving Vanessa. Amy testified that Daveggio sodomized her with his penis. In contrast, with Vanessa, the prosecution presented no evidence of penile penetration of Vanessa's rectum. Instead, the prosecution presented evidence of fecal matter and blood evidence matching Vanessa's DNA profile upon modified curling irons, from which it might be inferred that these appliances were inserted into Vanessa's rectum at some point.

Thus, the evidence involving Amy and Vanessa did not share any common features pertaining to an abduction, to a known versus unknown victim, to the physical beating inflicted upon the victim, to the use of visual and physical restraints, to the nature of the sexual acts, or to the participants in the sexual assaults. The evidence did not support the finding of a common plan sufficient to support an inference the murder of Vanessa was committed in accordance with the same plan that culminated in the sexual assault upon Amy.

Nor did the evidence involving Amy, when compared with the charged crimes against Sharona and April, support the conclusion they were related. Sharona and April and Amy were all known to Daveggio and appellant and so shared that feature in common, but at the time of the assault Sharona and April were teen-aged minors and Amy was a much older 29 year old. Sharona and Amy shared the feature of having their hands restrained by handcuffs, but Sharona was not blindfolded and her mouth was not covered with duct tape, as was done to Amy. Neither Sharona nor April had their clothes cut from their bodies, as was done to

Amy. Neither Sharona nor April was physically beaten, as Amy was. Sharona and Amy shared common features involving a variety of sexual assaults by both Daveggio and appellant, but appellant committed no sexual assault upon April and Daveggio's sexual assault upon April was limited to oral copulation and so there were no shared common features. And, Amy testified that she was struck on the back of her head by a gun and that before she was raped she felt a gun behind her left ear and heard a click, from which it might be inferred the gun was used as a means of accomplishing the sexual assaults. In contrast, Sharona testified that Daveggio flashed a gun at her after the sexual assault was completed and just before she was released, from which it might be inferred the gun was used to obtain Sharona's silence about Daveggio's part in the assault upon her. Unlike Amy's experience, the gun was never used to physically harm Sharona.

Thus, Amy's experience shared virtually no common features with April's and the separate incidents appear not to be related. Amy's experience shared some common features with Sharona in the use of handcuffs and a gun and Daveggio's and appellant's participation in the sexual assaults. But the differences attending these common features, which appellant has set forth in the preceding paragraph, are so significant as to render the commonality in these features a difference in kind. With Amy there was more than a display of a gun, there was a heavy blow to the back of the head and an apparent actual intended or unintended attempt at discharge. With Amy, the restraints were not limited to handcuffs, but included a blindfold and duct tape over the mouth. There was also a difference in the acts alleged to appellant. Appellant orally copulated

Sharona, but Amy testified appellant pulled her head back by the hair so Daveggio could attempt to have Amy orally copulate him and appellant straddled Amy's back and separated Amy's buttocks while Daveggio sodomized Amy. None of these features were shared with Sharona's experience.

The evidence pertaining to Amy, when compared with evidence regarding Sharona and April, did not support the finding of a common plan sufficient to support an inference the charged sexual assaults upon Sharona and April and Amy were committed in accordance with the plan.

c. Rachel

Rachel is appellant's daughter and was 12 years old when Daveggio and appellant overpowered her and sexually assaulted her on the drive to Oregon. Rachel testified that appellant digitally penetrated her vagina and that Daveggio orally copulated her while they were in the van. Rachel also said that in the motel room the next morning either appellant or Daveggio duct-taped her mouth and hands behind her back. Daveggio orally copulated Rachel once more, while appellant masturbated on the other bed. Appellant then orally copulated Daveggio and licked his butt.

This evidence contains few, if any, shared features, when compared with evidence regarding Vanessa. Unlike Vanessa, Rachel was known to both Daveggio and appellant. She was, in fact, appellant's daughter and lived in that capacity in the same household with Daveggio. Unlike Vanessa, Rachel was not kidnapped off the streets. Unlike Vanessa, who was 22 years old when she was kidnapped, Rachel was a child of

twelve. Rachel testified that appellant digitally penetrated her vagina and that Daveggio orally copulated her. The prosecution presented no evidence of vaginal penetration or oral copulation with Vanessa and no evidence that the sexual assaults were perpetrated by both Daveggio and appellant. Rachel's mouth and hands were duct-taped. The prosecution presented no evidence that Vanessa was restrained in any way. The only evidence of sexual assault upon Vanessa presented by the prosecution is that curling irons were introduced into her rectum either pre- or post-mortem. Rachel described acts of oral copulation and digital penetration of the vagina, but no acts involving penetration of the anus or rectum and no acts involving the use of an appliance such as a curling iron.

Evidence that appellant and Daveggio sexually assaulted appellant's own daughter, when compared with evidence pertaining to Vanessa, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan.

d. Christina

Christina was 13 years old and a friend of appellant's daughter Rachel when Daveggio and appellant had her snort a line of methamphetamine in the Williams' house before sexually assaulting her. In the bathroom, appellant displayed a handgun and removed Christina's clothing and licked her breasts. Daveggio orally copulated and digitally penetrated Christina's vagina and raped her.

As is true of evidence concerning Rachel, no shared common features linked evidence pertaining to Christina with Vanessa Samson. Christina was a minor child; Vanessa an adult. Christina was known to

appellant and to Daveggio; Vanessa was a stranger. Vanessa was abducted off the streets; Christina was not. The prosecution presented no evidence of controlled substances in connection with Vanessa; Christina was given methamphetamine. No appliance was used in sexually assaulting Christina and the sexual assaults upon Christina focused on her vagina. The prosecution's evidence of sexual assault upon Vanessa was limited to the use of an appliance and its application to her rectum. Christina said appellant displayed a handgun. The prosecution presented evidence that a handgun was recovered during the search of the defendants' room incident to the arrest, but no evidence the handgun was used in any fashion with Vanessa.

Evidence that appellant and Daveggio sexually assaulted Christina, when compared with evidence pertaining to Vanessa, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan.

For the reasons set forth herein, the trial court erred in admitting the challenged evidence.

2. The Other Crimes as Evidence of Identity

The trial court ruled that evidence pertaining to Aleda constituted a "signature" crime with regard to the murder of Vanessa Samson (Count 4) and that Aleda's evidence was therefore admissible to prove the identity of the murderers.

This Court explained in *Ewoldt* that "[t]he greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct

and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" [Citation.] (*People v. Ewoldt*, *supra*, 7 Cal. 4th at p. 403.) In *Balcom*, this Court elaborated: "The highly unusual and distinctive nature of both the charged and [prior] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." (*People v. Balcom*, *supra*, 7 Cal.4th at p. 425.)

Thus, "when the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity." (*People v. Lindberg* (2008) 45 Cal. 4th 1, 23.)

In *People v. Gray* (2005) 37 Cal.4th 168, this Court found the charged and uncharged crimes shared the following distinctive common features that raised an inference of identity. The "defendant's 1983 crimes against J.S. and S.B. were eerily similar to the present crimes against Ruby Reed. In both crimes (1) the victim was attacked in her home, (2) the crime occurred in the late evening or early morning, (3) the victims included older women, (4) the assailant tied the victim's hands behind her back, (5) the assailant tied the victim's ankles together, (6) the assailant wrapped a towel around the victim's head, (7) the assailant pulled up the victim's nightgown, (8) the assailant beat the victim severely, (9) the assailant engaged in criminal sexual conduct, (10) the assailant left candy wrappers

at the crime scene, (11) the assailant left personal property at the crime scene, (12) the assailant ransacked the bedroom, (13) the assailant took money, and (14) the assailant 'made himself at home.'"

Gray also included the following: "In both the 1983 crimes (against J.S. and S.B.) and the 1987 crimes (against Ruby Reed), the assailant smoked cigarettes and left ashes at the crime scene. On both occasions, the assailant also left candy wrappers around the premises. In the 1983 crimes, the victim heard her assailant using her telephone; in the 1987 crimes, cigarette ashes left by the telephone suggested the perpetrator had used the telephone. In the 1983 crimes, the assailant watched television while the victim lay on the floor, bound and helpless; in the 1987 crime, candy wrappers and ashes found near the chair in which one would sit to watch television suggested the perpetrator had watched television. In both crimes, shoe boxes were removed from a bedroom closet, opened, and then thrown on the floor. In 1983, the assailant pulled victim J.S. by her mouth; in 1987, the victim's false teeth were found near her body. We might add that in both crimes the assailant bound the victim with materials procured at the scene; in neither did he bring rope with him. In light of the distinctiveness and similarity of the characteristics the two sets of crimes shared, the trial court did not abuse its discretion in ruling the jury could legitimately infer from evidence of the 1983 crimes that the same person had committed the 1987 crimes." (*People v. Gray*, *supra*, 37 Cal. 4th at p 203.)

In *People v. Hovarter* (2008) 44 Cal. 4th 983, this Court found the following constituted sufficient distinctive facts common to both the uncharged and charged misconduct to admit the uncharged misconduct

for identity: "[B]oth involved abduction, rape, and murder (or attempted murder); both involved teenage girls (Walsh was 16 years old, A.L. was 15); both occurred along Highway 101 under circumstances suggesting the young women were taken from along the highway; both occurred in roughly the same timeframe (Walsh was raped and killed in August 1984, the crimes against A.L. occurred in December of the same year); and both victims were moved a substantial distance [110 miles for Walsh, 169 miles for A.L.] The perpetrator of both crimes sought to dispose of the victim's body in a running body of water: Walsh was dropped off the Scotia/Rio Dell Bridge near the Eel River; A.L. was rolled into the Russian River." (*People v. Hovarter*, *supra*, 44 Cal. 4th at p.1004.)

In addition to the illumination it provided in defining a distinctive common fact, this Court's acknowledgment in *Hovarter* that some other facts relied upon by the trial court were *not* distinctive also inform the present discussion. As to this point, this Court stated: "This is not to say the trial court's ruling was unassailable." (*People v. Hovarter*, *supra*, 44 Cal.4th at p. 1004.) The trial court, for example, relied on the fact that both young women were sexually assaulted in the sleeping compartment of the defendant's truck. This Court noted that although the evidence was strong A.L. was assaulted there, there was only speculation that Walsh was raped there. By analogy, in appellant's case, the evidence Aleda was sexually assaulted was strong, but only speculation suggested that the sexual assault upon Vanessa was pre-mortem, that is, that Vanessa was raped. This Court also noted in *Hovarter* that a distinguishing, non-distinctive, feature is that Walsh was strangled, but A.L. was shot. In the present case, Vanessa was strangled; Aleda on the other hand was released.

In the preceding discussion on the use of Aleda's evidence to prove the existence of a common plan or scheme, appellant explained that Aleda's evidence and Vanessa's evidence may arguably share common features in that both involved a stranger-on-stranger abduction, both women were of similar age, both were abducted into a van driven by a woman with shoulder-length hair, but also that the differences were significant in that Aleda's evidence comprised abduction, rape, release, while rape and release was contraindicated by Vanessa's evidence.

In *People v. Nottingham* (1985) 172 Cal.App.3d 484, the court explained: "The inference of identity arises when the marks common to the charged and uncharged offenses logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offense. [Citation.] It is the distinctiveness between any such common marks which gives logical force to the inference of identity; and, if the inference is weak, the probative value is weak, and the court's discretion should be exercised in favor of exclusion. [Citation.] (*People v. Nottingham*, *supra*, 172 Cal. App. 3d at p. 499.) The *Nottingham* court found similarities in that both women were relatively casual acquaintances of the defendant, that both women resided in the same general neighborhood as the defendant, that each of the victims had force applied to the neck area and had their clothing ripped, but the use of force was substantially different in the two offenses in that one woman was startled but not hurt while the other was strangled to death. (*Id.*, at p. 500.)

Nottingham noted there were some similarities between the charged and uncharged misconduct, but further noted the common marks were not distinctive to the point they gave logical force to an inference of identity. As a result, the trial court's exercise of discretion should have led to an exclusion of the uncharged misconduct. (*Ibid.*)

The analogy is self-evident. Here, the common facts between Aleda's abduction and Vanessa's abduction were not particularly distinctive. The remainder of the separate criminal transactions shared few common features. No appliance was used in the sexual assault upon Aleda; the only evidence of a sexual assault upon Vanessa involved the use of an appliance. Aleda was released; Vanessa was strangled to death.

For the same reasons that compelled the result in *Nottingham*, the trial court's exercise of discretion should have excluded the use of Aleda's evidence to prove appellant's identity as Vanessa's murderer.

3. The Other Crimes as Evidence of Intent

The trial court admitted evidence pertaining to Aleda, Amy, Rachel, and Christina as evidence of intent.

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to

support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt*, *supra*, 7 Cal. 4th at p. 402.)

In *People v. Davis*, *supra*, 46 Cal.4th 539, the trial court admitted evidence of prior crimes against Frances M. and Frost to prove, inter alia, the defendant's intent to commit a sexual assault. This Court found sufficient similarities for admission of the evidence in the following: "In those offenses, as in this case, defendant abducted a stranger, a female; used a weapon; assured the victim that he would not harm her; took her to a remote location; and carried bindings with him, indicating that the behavior was planned. The sexual nature of the prior crimes against Frances M. and Frost was obvious from his attempt to force Frances M. to sexually gratify him and his statements to court-referred psychiatrists that he assumed he "would have some fun" with Frost, and that he masturbated twice daily thinking about these victims and tying them up." (*Id.*, at p. 603.)

In *People v. Brandon* (1995) 32 Cal.App.4th 1033, the Court of Appeal found that sufficient similarity between the prior and charged crimes allowed the admission of prior crimes evidence to prove intent: "Each occurred in a parking lot where the victim was approached by Brandon with a weapon near or in her car, and the victim was told to move into the passenger seat and later was asked about or for money. The prior incidents were relevant to prove Brandon's intent to rob, since his actions while in Gonzales's car were ambiguous, with him asking if she had any money but not requesting it and then also licking his lips while looking her up and down. The other crimes evidence was thus very probative in finding

Brandon had the intent to rob Gonzales and kidnapped her with the intent to do so." (*Id.*, at p. 1049.)

Appellant has discussed above (in the section "The Other Crimes as Evidence of the Existence of a Common Plan or Scheme") both the similarities and dissimilarities attending the various uncharged and charged crimes. Appellant incorporates that discussion here. Evidence that Daveggio and appellant engaged in acts of pedophilia by sexually assaulting minors Rachel and Christina is not relevant to prove they had the intent to rape Vanessa with modified curling irons, i.e., to engage in acts of paraphilia. As appellant observed above, the dissimilarities in the nature of sexual conduct amounted to a difference in kind. Evidence related to Amy and Aleda suffer from the same infirmity – neither Amy nor Aleda reported sexual acts that were paraphilic in nature that would be relevant to proving an intent to rape Vanessa with modified curling irons.[54]

Evidence pertaining to Rachel, Christina, Amy, and Aleda was not relevant to prove an intent to murder Vanessa. First, none of the four were killed. Second, although Rachel, Christina, Amy, and Aleda all reported that they were threatened not to tell about the assaults, none of

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[54] In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, this Court acknowledged that the intersection between relevance and sexual orientation rested in part on the latter: "A particular sexual orientation might be dangerous in one profession and irrelevant to another. Necrophilism and necrosadism might be objectionable in a funeral director or embalmer, urolagnia in a laboratory technician, zooerastism in a veterinarian or trainer of guide dogs, prolagnia in a fireman, undinism in a sailor, or dendrophilia in an arborist, yet none of these unusual tastes would seem to warrant disciplinary action against a geologist or shorthand reporter." (*Id.*, at p. 228.)

them reported an actual attempt to kill. Third, although Rachel, Christina, and Amy reported that the threats were accompanied by some form of gun use, Vanessa Samson did not die from a gunshot wound, but from strangulation. More specifically, Rachel and Christina were told to keep silent about the sexual assaults in threats involving the use of a gun, but neither was threatened at gunpoint. Christina also reported that appellant placed a gun on the bathroom counter and told her to disrobe. Amy reported that she was struck from behind with a gun and that at some point during the sexual assault she heard a gun click behind her ear, but the gun did not discharge and there was no evidence the gun was loaded at the time, suggesting that as with Christina the gun was used to induce Amy's participation in the sexual assault and not for purposes of killing. Aleda made no report regarding a gun.

For these reasons, the trial court's exercise of discretion should have led to an exclusion of the uncharged misconduct as evidence of intent.

4. The Other Crimes as Evidence of Motive

The trial court admitted evidence pertaining to Aleda, Amy, Rachel, and Christina as evidence of motive.

"Motive is not a matter whose existence the People must prove or whose nonexistence the defense must establish. (See CALJIC No. 2.51.) Nonetheless, '[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence.' (*People v. Beyea* (1974) 38 Cal. App. 3d 176, 194-195.) A 'motive' is defined as a '[c]ause or reason that moves the will and induces the

action[,]' '[a]n inducement, or that which leads or tempts the mind to indulge a criminal act.' (Black's Law Dict. (rev. 4th ed. 1968) p. 1164, col. 2.) Motive is an intermediate fact which may be probative of such ultimate issues as intent (see, e.g., *People v. Thompson* (1980) 27 Cal. 3d 303, 319, fn. 23 [intent and state of mind]), identity (see, e.g., *People v. Linkenauger* (1995) 32 Cal. App. 4th 1603, 1610-1611), or commission of the criminal act itself (see, e.g., *People v. De La Plane* (1979) 88 Cal. App. 3d 223, 246). (*People v. Scheer* (1998) 68 Cal. App. 4th 1009, 1017-1018.)

"'[T]he intermediate fact of motive' may be established by evidence of 'prior dissimilar crimes. (*People v. Thompson*, *supra*, 27 Cal. 3d 303, 319, fn. 23.) 'Similarity of offenses [is] not necessary to establish this theory of relevance' for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense. (*Ibid.*) The existence of a motive requires a nexus between the prior crime and the current one, but such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes. (See, e.g., *People v. Daniels* (1991) 52 Cal. 3d 815, 857 [direct relationship between prior robbery where defendant rendered paraplegic by police and murder of officers in retribution]; *People v. De La Plane*, supra, 88 Cal. App. 3d 223, 245-246 [prior robberies evidence admissible to show motive to murder witnesses].)" (*People v. Scheer*, *supra*, 68 Cal. App. 4th at p.1018.)

In *Scheer*, the defendant was charged with felony hit and run and vehicular manslaughter. The appellate court held that evidence that the defendant had previously been convicted of fleeing police officers was inadmissible to show intent because intent was not an element of the

charged crime of felony hit and run (a general intent crime), and the evidence of the prior conviction was inadmissible to show motive because there was no "nexus or direct link between the commission of the prior misconduct and the charged crime." (*People v. Scheer*, *supra*, 68 Cal. App. 4th at pp.1019-1020.)

In appellant's case, as in *Scheer*, there was no nexus or direct link between the sexual assaults upon Amy, Aleda, and upon minors Rachel and Christina, all of whom were released, and the charged murder of Vanessa Samson.

Accordingly, the uncharged misconduct evidence should not have been admitted to prove appellant was motivated to commit the charged crimes.

5. The Other Crimes Evidence Was More Prejudicial Than Probative

In order to be admissible, the probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury. (*People v. Ewoldt*, *supra*, 7 Cal. 4th at pp. 404-405; Evid. Code, § 352.) On appeal, a trial court's resolution of these issues is reviewed for abuse of discretion. (*Id.*, at p. 405.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. Kipp* (1998) 18 Cal. 4th 349, 371; *People v. De Santis* (1992) 2 Cal. 4th 1198, 1226.)

Because the evidence of misconduct involving Aleda, Rachel, Amy, and Christina did not display the same highly distinctive features so that evidence of that series of uncharged misconduct had substantial

probative value on the issues of common plan or design, intent, motive, and in the case of Aleda's evidence on the issue of identity, the evidence posed a substantial danger to appellant because the jury would be inclined to view evidence that appellant, with Daveggio, had sexually assaulted her own daughter Rachel, had sexually assaulted Christina and Amy, and had driven the van while Daveggio abducted and sexually assaulted Aleda as evidence of appellant's criminal propensities. A jury might well have viewed appellant as deserving of punishment for these crimes regardless of her guilt of Vanessa's murder.

Evidence that appellant had engaged in acts of pedophilia with Rachel and Christina (i.e., with her own young daughter and her daughter's young friend); had done nothing to assist Aleda; and had assisted in Daveggio's bloody sexual assault upon Amy was inflammatory. The prejudice is obvious. Moreover, the evidence to which each of the four testified was compelling. Considering these factors, the trial court abused its discretion in concluding the probative value of the uncharged misconduct evidence was not substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

E. THE ERRONEOUS ADMISSION OF THE OTHER CRIMES EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND THE RIGHT TO A RELIABLE DETERMINATION IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

The due process clause of the Fifth and Fourteenth Amendments guarantees a defendant's right to a fundamentally fair trial. Due process prohibits the use of state procedures that offend the principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105) and procedures which undermine "the ultimate integrity of the fact finding process." (*Ohio v. Roberts* (1980) 448 U.S. 56, 64.) Thus, the Due Process Clause precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) Propensity evidence has long been considered suspect on this count because of its tendency to over-persuade. (*Old Chief v. United States* (1997) 519 U.S. 172, 181; *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Falsetta* (1999) 21 Cal.4th 903, 913-915.) Once jurors learn the defendant has committed other, similar crimes, they are likely to turn the presumption of innocence on its head. "[O]ur decisions exercising supervisory power over criminal trials . . . suggest that evidence of prior crimes, introduced for no purpose other than to show criminal disposition, would violate the Due Process

Clause." (*Spencer v. Texas* (1967) 385 U.S. 554, 574-575, conc. and dis. opn. of Warren, C.J.) For example, the Ninth Circuit has recognized that improperly admitted "propensity" evidence violates the due process rights of the accused. Thus, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, evidence of the defendant's possession of a weapon that could not have been the murder weapon was irrelevant to the charged crime and was therefore improperly admitted to prove his character as a person who had the propensity to own knives. The Ninth Circuit held that the prohibition of "other acts evidence" is so firmly established in the principles of Anglo-American jurisprudence that it is a component of "fundamental fairness" for due process purposes. (*Id.*, at p. 1380.)

In addition, the erroneous admission of propensity evidence that would create substantial danger of undue prejudice, of confusing the issues, and of misleading the jury, such as the evidence of uncharged misconduct in issue here, undermines the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Because these errors allowed the jury to decide the case on the basis of illogical reasoning and improper inferences, it violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.)

For the reasons explained above, the erroneous admission of evidence of uncharged misconduct deprived appellant of the right to due

process and a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination in a capital case guaranteed by the Eighth Amendment.

F. PREJUDICE

It cannot be gainsaid that evidence of a defendant's uncharged misconduct is inherently prejudicial. In *People v. Thompson* (1980) 27 Cal.3d 303, this Court acknowledged that "substantial prejudicial effect [is] inherent in [such] evidence." (*Id.*, at p. 318; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Balcom*, *supra*, 7 Cal.4th 422; *People v. Hovarter*, *supra*, 44 Cal.4th at p. 1002.)

The U.S. Supreme Court has described the prejudice attached to character evidence in the following manner.

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. [Fn. omitted.] The inquiry is not rejected because character is irrelevant [fn. omitted]; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. [Fn. omitted.] (*Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

The obvious danger associated with the admission of uncharged misconduct evidence is that the jury will be swayed to punish the defendant for the uncharged misconduct. In *People v. Guerrero* (1948)

16 Cal.3d 719, evidence the defendant had committed the uncharged crime of rape against Ms. Lopez was erroneously admitted in the defendant's murder trial to prove the defendant intended to rape and murder Ms. Santana. Of the prejudice attending the incorrect admission, this Court said: "[T]he admission of evidence of the sexual offense is prejudicial beyond a shadow of a doubt. The Lopez rape was particularly brutal and abhorrent. No limiting instruction, however thoughtfully phrased or often repeated, could erase from the jurors' minds the picture of defendant's role in raping a 17-year-old girl and forcing her to commit oral copulation. 'The net effect to the jury was to paint a sign on [defendant] which said " 'rapist.'" [Citation.] Defendant had a right to be tried solely for the murder of Miss Santana. Instead, he found himself charged also with the rape of Miss Lopez. He deserves a new trial on relevant, nonprejudicial evidence." (*Id.*, at p. 730.)

In appellant's case, the evidence of uncharged misconduct against Christina, Rachel, Amy, and Aleda was undeniably prejudicial. The defendants' alleged misconduct was predatory and oftentimes brutal; the victims were vulnerable. Christina and Rachel were especially vulnerable because of their minority and even more vulnerable because Rachel was appellant's daughter and Christina was Rachel's friend. As was said of the rape in *Guerrero*, the sexual assaults here were "brutal and abhorrent." (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 730.) And, as was true of the defendant in *Guerrero* who found himself charged in the jury's view with the rape of Ms. Lopez as well as the murder of Ms. Santana, appellant found herself charged by the admission of this evidence with the crimes against Aleda, Amy, Christina, and Rachel.

And, significantly where prejudice is concerned, the prosecutor substantially relied upon the improperly admitted other crimes evidence in arguing for appellant's conviction of the charged crimes. The prosecutor argued, for example, that appellant was guilty of the first degree murder of Vanessa Samson because the defendants kidnapped Vanessa just as they kidnapped Aleda (33RT 7108-7109); because the defendants raped Vanessa by instrument just as they raped Aleda by instrument and were sexually gratified in the course of that conduct (33RT 7113-7114, 7118-7119). The prosecutor argued the abduction of Vanessa and the abduction of Aleda constituted identification evidence because both Vaness and Aleda were walking alone, both had long hair worn loose, both carried backpacks, and both were abducted into a van driven by a woman. (33RT 7152.)

The prosecutor's argument to the jury recounted in detail the conduct of the defendants in the multiple sexual assaults upon Christina (33RT 7154-7159); the multiple sexual assaults upon Aleda (33RT 7162-7167); the multiple sexual assaults upon Rachel (33RT 7168-7177); and the multiple sexual assaults upon Amy (33RT 7182-7193). The prosecutor argued that the uncharged crimes involving Rachel, Amy, Christina, and Aleda and the charged crimes involving Sharona, April, and Vanessa were carried out by the defendants in their pursuit of a common plan. (33RT 7194-7198.)

In *People v. Minifie* (1996) 13 Cal.4th 1055, this Court recognized the powerful impact a prosecutor's argument regarding the evidence may have upon the jury. "The jury argument of the district attorney tips the scale in favor of finding prejudice. . . ." (*Id.*, at p. 1071; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341.) In appellant's

case, the prosecutor exploited the erroneously admitted evidence of uncharged misconduct by devoting a substantial amount of her argument to the facts of the assaults against appellant's daughter Rachel and her friend Christina, against Amy, and against Aleda. Under the sway of this argument, it is likely the jury's decision to convict was affected by a desire to punish the defendants for the actions they undertook in the uncharged misconduct.

Appellant deserves a new trial based on relevant, nonprejudicial evidence.

V.

THE TRIAL COURT ERRED IN THE INSTRUCTIONS GIVEN TO THE JURY REGARDING EVIDENCE OF WRONGFUL CONDUCT ADMITTED UNDER EVIDENCE CODE SECTION 1101. THE IMPROPER INSTRUCTIONS DEPRIVED APPELLANT OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

A. INTRODUCTION

The trial court admitted evidence of the defendants' uncharged conduct involving Christina, Rachel, Amy, and Aleda to show motive, intent, and a characteristic common plan and design pursuant to Evidence Code section 1101, subdivision (b). In addition, the trial court also admitted evidence involving Aleda to prove identity. (5CT 1203-1207; 3RT 653-656.[55])

In the preceding argument, appellant identified specific instances of uncharged misconduct evidence and explained why the trial court erred in admitting them under Evidence Code section 1101.

Appellant presents here the related contention that the trial court did not correctly instruct the jury on its use of evidence of uncharged misconduct.[56]

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[55] The trial court issued its decision in a written Statement of Decision on Evidence Code Section 1101(b) and 1108 Issues (5CT 1203-1207) and further stated the decision on the record (3RT 653-656).

[56] Appellant incorporates by reference into this argument the following sections of the previous argument concerning the erroneous admission of other misconduct evidence: "B. The Trial Court's Ruling

The trial court instructed the jury in the language of the pattern instruction (CALJIC No. 2.50) that it could consider the evidence to prove the following aspects of the crimes charged and the special circumstances alleged: (1) a motive for the commission of the crimes; (2) the existence of the necessary intent, (3) a characteristic method, plan, or scheme; and (4) and whether the defendants had a good-faith belief in the victims' consent to the sexual act.[57] (138CT 36343-36344.)

Here, although the court gave an instruction that correctly stated a principle of law, the law had no application to the facts of the case because, as appellant explains below, the evidence was neither relevant nor admissible. The incorrect instruction, which created a substantial risk of misleading the jury, was prejudicial to appellant.

B. THE TRIAL COURT'S INSTRUCTIONAL OBLIGATION REGARDING EVIDENCE OF OTHER CRIMES

As appellant will explain below, the law is both settled and clear that when a trial court instructs a jury regarding its use of other crimes evidence, the evidence must first be relevant and admissible to the issues and the court must tell the jurors the precise issues to which the other

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Regarding the Admission of Other Crimes Evidence and the Other Crimes Evidence Received at Trial"; "C. The Relevant Law Regarding Admission of Other Crimes Evidence"; "D. The Other Crimes Evidence Involving Christina, Rachel, Amy, and Aleda Was Not Relevant to Prove the Existence of a Common Plan or Scheme, Intent, Motive, or Identity."

[57] The instructional language that the other crimes evidence could also be considered to determine whether the defendants had a good-faith belief in the victims' consent appears to have been added at some point after the hearing and the court's ruling set forth above without objection on the record by the defense.

crimes evidence relates and must limit their consideration of such evidence appropriately.

The law is settled that it is error to give an instruction that correctly states a principle of law, but which has no application to the facts of the case. (*People v. Rollo* (1977) 20 Cal. 3d 109, 123[58] (superseded by statute on other grounds); *People v. Sanchez* (1947) 30 Cal.2d 560, 572.[59]) It is the court's duty to identify the precise evidence to which the other crimes testimony relates. (*People v. Rollo*, *supra*, 20 Cal.3d at pp. 122-123 and fn. 6[60].)

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[58] On this point, *Rollo* held the trial court erred in giving an ambiguous instruction (modified version of CALJIC No. 2.50) that allowed the jury to use evidence of a prior felony conviction admitted for impeachment purposes to prove intent and knowledge of the charged crime where it was insufficiently supported by the evidence. (*People v. Rollo*, *supra*, 20 Cal.3d at pp. 122-123.)

[59] On this point, the *Sanchez* court stated, "The charge to the jury in a homicide case should comprise instructions on the law applicable to issues raised by the evidence, not a dissertation on all the classes of homicide known to the law. It is error to give an instruction which correctly states a principle of law which has no application to the facts of the case. [Citations.]" (*People v. Sanchez*, *supra*, 30 Cal. 2d at p. 573.)

[60] This Court further stated in *Rollo*: "In the future, however, in any case in which the court has properly admitted both a prior felony conviction of the defendant for the purpose of impeachment and 'other crimes' evidence on a substantive issue, the cautionary instruction on the latter point should identify the evidence to which it relates. CALJIC instructions are properly neutral and objective, but in certain circumstances clarity requires that they be made to refer specifically to the facts of the case before the court." (*People v. Rollo*, *supra*, 20 Cal. 3d at p. 123 fn. 6.)

In *People v. Swearington* (1977) 71 Cal.App.3d 935, 947, the Court of Appeal applied these instructional principles to an instruction on the jury's consideration of other crimes evidence.

In *Swearington*, the prosecution argued that evidence of other acts committed by the defendant was admissible on issues of (1) identity, (2) intent, and (3) a characteristic method, plan, or scheme. At trial, the defendant never disputed the issue of his identity. The trial court instructed the jury in the language of CALJIC No. 2.50, including language the evidence could be used for the purpose of determining the identity of the person who committed the crime.

The Court of Appeal reasoned that because the defendant never contested the issue of his identity, the evidence of other acts committed by him to prove his identity was not relevant evidence, and the instruction was incorrect. "[I]t is error for a trial judge to give CALJIC instruction No. 2.50 and list four separate issues upon which the evidence is being received and which the jury may consider unless the evidence is relevant and admissible with respect to each of such four issues." (*People v. Swearington*, *supra*, 71 Cal. App. 3d at p. 947.) The court explained: "It is a well-settled rule of evidence that evidence is irrelevant and, hence, inadmissible, when it is offered to prove an undisputed issue of fact. This rule of evidence follows from Evidence Code sections 210 and 350. Evidence Code section 350[[61]] provides that no evidence is admissible

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[61] Evidence Code section 350 states: "No evidence is admissible except relevant evidence."

except relevant evidence, and Evidence Code section 210[62] defines 'relevant evidence' in terms of evidence having a tendency in reason to prove or disprove a disputed fact." (*Id.*, at p. 948.) Accordingly, *Swearington* concluded it was error for the court to instruct the jury that such evidence could be received on the issue of identity.[63] (*Ibid.*)

Thereafter, in *People v. Nottingham* (1985) 172 Cal. App. 3d 484, the Court of Appeal relied upon *Swearington* in stating: "It is error for a trial judge to instruct as to separate issues in regard to which the evidence may be considered unless the evidence is relevant and admissible with respect to each of the issues. (*People v. Swearington* (1977) 71 Cal.App.3d 935, 947.)" (*People v. Nottingham*, *supra*, 172 Cal. App. 3d at p. 497.) In *Nottingham*, the trial court instructed the jury that other crimes evidence could be considered to prove motive although no such issue was raised during the trial and the prosecution had never made the equivalent claim.

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62 Evidence Code section 210 states: " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearing declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

63 To the extent *Swearington* may be read to suggest that an element of the offense becomes an undisputed fact because the defense has not contested it at trial, this Court has subsequently held that such is not the case. In *People v. Daniels* (1991) 52 Cal.3d 815, this Court held that a defendant's not guilty plea places the elements of the crime in issue for the purpose of deciding the admissibility of evidence of uncharged misconduct, unless the defendant has taken some action to narrow the prosecution's burden of proof. (*Id.*, at pp. 857-858; see also *People v. Balcom* (1994) 7 Cal.4th 414, 422; *People v. Catlin* (2008) 26 Cal.4th 81, 146.) That same year, the United States Supreme Court noted that the prosecution's burden of proving every element of the charged crime is not relieved by a defendant's tactical decision to not contest an element of the crime. (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.)

The court also instructed the jury that a particular uncharged crime could be used to prove identity when the court had earlier determined to the contrary. *Nottingham* concluded the instruction was incorrect because the other crimes evidence was neither relevant nor admissible regarding the undisputed facts of motive or identity.

Nottingham also relied upon *People v. Key* (1984) 153 Cal.App.3d 888, 899, in pointing out that the trial court has a duty to assist jurors by telling them the precise issues to which the other-crimes evidence relates and to limit their consideration of such evidence accordingly. (*People v. Nottingham*, *supra*, 172 Cal. App. 3d at p. 497; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1110.)

Key stated that when a trial court instructs on the significance of other crimes evidence, which the court described as "this substantially prejudicial evidence," it should do so accurately. (*People v. Key*, *supra*, 153 Cal. App. 3d at p. 899.)

Accordingly, the trial court is charged with instructing the jury in language tailored to inform the jury of the precise issues to which the other crimes evidence relates and with appropriately limiting the jury's consideration of the other crimes evidence.

C. THE TRIAL COURT'S INSTRUCTION FAILED TO CORRECTLY LIMIT THE JURY'S USE OF OTHER CRIMES EVIDENCE TO THE RELEVANT DISPUTED ISSUES

At the conclusion of the evidence in the guilt phase of the trial, the trial court instructed the jury in the following modified language of CALJIC No. 2.50:

Evidence has been introduced for the purpose of showing that the defendants committed crimes other than that for which he or she is on trial in this case.

Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that either of the defendants is a person of bad character or that he or she has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

A motive for the commission of the crimes charged, or the special circumstances alleged;

The existence of the intent which is a necessary element of the crimes charged, or the special circumstances alleged;

A characteristic method, plan or scheme in the commission of the criminal acts similar to the method, plan or scheme used in the commission of the offenses in this case which would further tend to show the existence of the intent which is a necessary element of the crimes charged, or the special circumstances alleged;

The defendants did not reasonably and in good faith believe that the person or persons with whom he or she engaged in a sexual act consented to such act.

As to the Aleda Doe incident only, this evidence, if believed, may also be considered by you only for the limited purpose of determining if it tends to show:

The identity of the person or persons who committed the crime and special circumstances of which the defendants are accused in Count 4.

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

> Except as otherwise instructed, you are not permitted to consider such evidence for any other purpose. (138CT 36343-36344.)[64]

As may readily be seen, with the exception of the statement that evidence of the Aleda Doe incident might also be used to prove identity, the court's final charge to the jury on the use of other crimes evidence was so broadly worded that it failed to identify the other crimes evidence specifically, i.e., failed to identify the other crimes evidence as coming from Christina, Rachel, Amy, and Aleda (on non-identity issues) by name. In addition, the broad language of the instruction allowed the jury to use Aleda's, Christina's, Rachel's, and Amy's evidence to prove motive, intent, characteristic common plan or scheme, and absence of consent, although not all of the evidence was relevant to prove all of those matters as appellant has explained in the preceding argument.

Moreover, the trial court's pre-instruction on the matter, which appellant has described in the preceding footnote, with the exception

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[64] Just before Aleda testified during the prosecution's case-in-chief, the trial court informed the jury that it was about to hear evidence of other crimes. The court then instructed in the language of CALJIC No. 2.50 (modified) and further instructed on the use of evidence of other sexual offenses as disposition evidence (CALJIC No. 2.50.1) and defined the reasonable doubt burden of proof for the jury (CALJIC No. 2.90). The trial court did not repeat these instructions before the testimonies of Christina, Rachel, and Amy. (17RT 3989-3991.) In addition, prior to Aleda's testimony, the trial court instructed the jury that it had taken judicial notice of Daveggio's conviction of conspiracy to commit a kidnapping, kidnapping, and aiding and abetting a kidnapping and of appellant's conviction of kidnapping and aiding and abetting the kidnapping of Aleda Doe in the U.S. District Court, Nevada District (CR-N-97-00125 DWH (PHA)), on September 30, 1997. (17RT 3991-3992.)

of mention of Aleda's evidence on identity, did not correct the instructional omissions identified here.

Appellant has explained in the preceding argument that Aleda's evidence of kidnap, sexual assault, and release lacked sufficient common features with Vanessa's kidnap, entirely different sexually assaultive conduct, and murder from which to infer the existence of a common plan or scheme, from which, in turn, it might be inferred that Vanessa was kidnapped, sexually assaulted, and murdered in accordance with that plan.

Accordingly, for the reasons set forth in the preceding argument and synopsized here, the instruction incorrectly allowed Aleda's evidence to be used to prove appellant's liability for either the charged murder or the special circumstances.

Appellant also explained in the preceding argument that Aleda's evidence of stranger-on-stranger kidnap, sexual assault, and release lacked sufficient common features with the prosecution's evidence concerning the charged sexual assaults upon Sharona and April as to the force used, the nature of the sexual assaults, Sharona's and April's ages, and the fact of the abduction itself to establish the existence of a common plan or scheme and the further inference that the assaults upon Sharona and April were carried out in implementation of that plan.

Accordingly, for the reasons set forth in the preceding argument and synopsized here, the instruction incorrectly allowed Aleda's evidence to be used to prove appellant' guilt of the charges related to Sharona and April.

Where Amy's evidence was concerned, appellant explained in the preceding argument that Amy's evidence, when compared with Vanessa's, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan. In sharp contrast with Vanessa's evidence, Amy's evidence revealed a sexual assault brutally perpetrated upon a friend, who was then released.

Appellant also explained in the preceding argument that Amy's experience shared virtually no common features with April's and only a limited few with Sharona's.

Amy's evidence did not support the finding of a common plan sufficient to support an inference that the abduction and murder of Vanessa and the charged sexual assaults upon Sharona and April were committed in accordance with that plan.

Accordingly, for the reasons set forth in the preceding argument, the instruction was incorrect to the extent it allowed Amy's evidence to be used to prove appellant' guilt of the charges related to Vanessa, Sharona, and April.

Appellant explained in the preceding argument that both Christina's and Rachel's evidence, when compared with Vanessa's evidence, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan.

Accordingly, for the reasons set forth in the preceding argument the instruction incorrectly allowed the jury to use Christina's and Rachel's evidence to prove the existence of a common plan and to further prove that Vanessa was murdered in accordance with that plan.

Appellant also explained in the preceding argument that Aleda's evidence, when compared with Vanessa's evidence, contained some similarities but the common marks were not sufficiently distinctive to give logical force to an inference of identity.

Accordingly, for the reasons set forth in the preceding argument the instruction incorrectly allowed the jury to use Aleda's evidence to prove that appellant was guilty of the murder of Vanessa and its associated special circumstances.

In the preceding argument, appellant asserted that the trial court erred in admitting evidence that appellant and Daveggio had the requisite intent to commit pedophilia to prove they had the intent to engage in acts of paraphilia with Vanessa. Similarly, evidence of the defendants' sexual misconduct, but not misconduct paraphilic in nature, with Amy and Aleda was not relevant to prove the defendants had an intent to rape Vanessa with modified curling irons. And, as explained in the preceding argument, evidence pertaining to Rachel, Christina, Amy, and Aleda was not relevant to prove the defendants intended to kill Vanessa.

Accordingly, for the reasons set forth in the preceding argument, the instruction incorrectly allowed the jury to use the evidence described above to prove the defendants had the requisite intent to sexually assault and to murder Vanessa.

Finally, the absence of a nexus between the sexual assaults upon Amy, Aleda, and upon minors Rachel and Christina, all of whom were released alive, and the charged murder of Vanessa Samson showed that the uncharged misconduct evidence should not have been admitted to prove appellant was motivated to commit the charged crimes.

Accordingly, for the reasons set forth in the preceding argument, the instruction incorrectly allowed the jury to use the evidence described above to prove the defendants were motivated to murder Vanessa.

D. THE INCORRECT INSTRUCTION ON THE USE OF OTHER CRIMES EVIDENCE DEPRIVED APPELLANT OF THE RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND APPELLANT'S RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

The due process clause of the Fifth and Fourteenth Amendments guarantees a defendant's right to a fundamentally fair trial. Due process prohibits the use of state procedures that offend the principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105) and procedures which undermine "the ultimate integrity of the fact finding process." (*Ohio v. Roberts* (1980) 448 U.S. 56, 64.) Thus, the Due Process Clause precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) Propensity evidence has long been considered suspect on this count because of its tendency to over-persuade. (*Old Chief v. United States* (1997) 519 U.S. 172, 181; *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Falsetta* (1999)

21 Cal.4th 903, 913-915.) Once jurors learn the defendant has committed other, similar crimes, they are likely to turn the presumption of innocence on its head. "[O]ur decisions exercising supervisory power over criminal trials . . . suggest that evidence of prior crimes, introduced for no purpose other than to show criminal disposition, would violate the Due Process Clause." (*Spencer v. Texas* (1967) 385 U.S. 554, 574-575, conc. and dis. opn. of Warren, C.J.) For example, the Ninth Circuit has recognized that improperly admitted "propensity" evidence violates the due process rights of the accused. Thus, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, evidence of the defendant's possession of a weapon that could not have been the murder weapon was irrelevant to the charged crime and was therefore improperly admitted to prove his character as a person who had the propensity to own knives. The Ninth Circuit held that the prohibition of "other acts evidence" is so firmly established in the principles of Anglo-American jurisprudence that it is a component of "fundamental fairness" for due process purposes. (*Id.*, at p. 1380.)

A related due process principle is the requirement that, in criminal cases, the state prove every factual and legal element of the offense charged beyond a reasonable doubt. (S*ullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Roder* (1983) 33 Cal.3d 491, 497.) Jury instructions relieving prosecutors of this burden violate a defendant's due process rights, subvert the presumption of innocence and invade the truth-finding task assigned solely to juries in criminal cases. (*Francis v. Franklin* (1985) 471 U.S. 307; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Kobrin* (1995) 11 Cal.4th 416; *People v.*

Roder (1983) 33 Cal.3d 491.) Jury instructions concerning prior crimes evidence must not abrogate the requirement of proof beyond a reasonable doubt of all of the elements of the charged offenses. Due process still requires that the jury be convinced beyond a reasonable doubt of the "ultimate fact" of the defendant's guilt of the crime for which he is currently on trial. (*People v. Medina* (1995) 11 Cal.4th 694, 763-764; see also *People v. Lisenba* (1939) 14 Cal.2d 403, 430.)

In addition, the erroneous admission of propensity evidence that would create substantial danger of undue prejudice, of confusing the issues, and of misleading the jury, such as the evidence of uncharged misconduct in issue here, undermines the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584-85; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

Because these errors allowed the jury to decide the case on the basis of illogical reasoning and improper inferences, it violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.)

For the reasons explained above, the incorrect instruction erroneously allowing use of evidence of uncharged misconduct to prove elements of the charged offenses deprived appellant of the right to a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination in a capital case guaranteed by the Eighth Amendment.

E. PREJUDICE

Appellant incorporates by reference as though fully set forth here her discussion of prejudice set forth in section "F. Prejudice" in the preceding argument.

VI.

APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT WERE VIOLATED BY THE TRIAL COURT'S INSTRUCTION THAT ALLOWED THE JURY TO FIND SHE HAD A PROPENSITY FOR COMMITTING SEX OFFENSES BASED ON THE EVIDENCE OF SOME OFFENSES WITH WHICH SHE WAS CHARGED

"Evidence Code section 1108[65] authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352."[66] (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 796-797.)

Before trial in appellant's case began, the trial court, in an exercise of its discretion, ruled, pursuant to Evidence Code section 1108, that the jury would be allowed to consider the defendants' conduct in uncharged sex offenses involving Aleda, Christina, Rachel, and Amy as

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[65] Evidence Code section 1108, subdivision (a) states: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

[66] Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

evidence the defendants were disposed to commit the charged crimes. The court also ruled the evidence involving these four women admissible for purposes of Evidence Code section 1101.[67] (5CT 1205.)

The jury was instructed in a manner, however, that incorrectly allowed it to draw an inference of criminal propensity from evidence pertaining to charged offenses that had not been subjected to the trial court's exercise of discretion under Evidence Code section 352 as required by Evidence Code section 1108. That error deprived appellant of the right to due process of law and a fair trial under the Fifth and Fourteenth Amendments and to a reliable determination of the facts in a capital case under the Eighth Amendment.

A. THE RELEVANT CIRCUMSTANCES AND INSTRUCTIONS

Aleda was the first to be called to testify to other crimes evidence. Prior to her testimony, the trial court instructed the jurors regarding the limitations on their use of the evidence they were about to hear. The court specifically told the jury the instruction applied to "the next witness." The court said: "Good morning, ladies and gentlemen. Before we start with testimony, I am going to preinstruct you on some areas of the law that may become applicable *with the next witness*." (17RT 3989:1-4; emphasis added.)

The court then instructed in the language of CALJIC No. 2.50,[68] followed immediately by CALJIC No. 2.50.01, as follows:

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[67] Appellant discusses issues pertaining to Evidence Code section 1101 in Arguments IV, V, and X of this brief.

[68] The court instructed with CALJIC No. 2.50 as follows:

Evidence will be introduced for the purpose of showing that the defendants committed crimes other than those for which he or she is on trial in this case.

Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that the defendants are people of bad character or that he or she had a disposition to commit crimes. This evidence, if believed, may be considered by you only for the limited purpose of determining if it tends to show:

A motive for the commission of the crimes charged; or

The existence of the intent which is a necessary element of the crimes charged; or

A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crimes charged; or

The defendants did not reasonably and in good faith believe that the person with whom he or she engaged in a sexual act consented to such act.

As to the Aleda Doe incident only, this evidence, if believed, may be considered by you only for the limited purpose of determining if it tends to show:

A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crimes charged in Count 4, or the identity of the person or persons who committed the – committed the crimes of which the defendants are accused in Count 4.

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

Except as otherwise instructed, you are not permitted to consider such evidence for any other purpose. (17RT 3989-3990.)

Evidence will be introduced for the purpose of showing that the defendants engaged in a sexual offense on one or more occasions other than that charged in this case.

Sexual offense means a crime under the laws of a state or of the United States that involves any of the following:

Contact, without consent, between any part of a defendant's body or an object and the genitals or anus of another person;

Contact, without consent, between the genitals or anus of a defendant and any part of another's body;

Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person.

If you find that a defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had this disposition to commit sexual offenses. If you find that a defendant had this disposition you may, but are not required to, infer that he or she was likely to commit and did commit the crimes of which he or she is accused.

However, if you find beyond a reasonable doubt that the defendant committed the prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose. (17RT 3990-3991.)[69]

The court reinstructed the jury in virtually the same language, without significant differences, when the court instructed in full prior to

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[69] The trial court also instructed the jury with the definitions of reasonable doubt and judicial notice and further informed the jury of the particulars regarding the convictions and sentences arising from the Aleda incident in federal district court (Nevada) of Daveggio and appellant. (17RT 3991-3992.)

guilt-phase deliberations. (See 34RT 7323-7324, 7326-7327; 138 CT 36343-36344, 36347-36348.)

Thus, as can be seen, the court informed the jury that the limiting instructions applied to the "next witness," i.e., to Aleda's testimony. The court did not repeat the limiting instructions, or otherwise refer to them, prior to the testimonies of Christina, Rachel, and Amy. (18RT 4157; 19RT 4271, 4248.) Nor did the trial court instruct the jury regarding limitations of its use of evidence involving Sharona (counts 1 and 2) and April (count 3). These circumstances and the instructional language incorrectly allowed the jury to consider evidence of the charged crimes as disposition or propensity evidence to prove other charged crimes.

B. THE RELEVANT LAW

As noted above, subject to Evidence Code section 352, Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense. (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1286.) "By removing the restriction on character evidence in section 1101, section 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352." (*People v. Britt* (2002) 104 Cal.App.4th 500, 505.)

The due process clause of the Fifth and Fourteenth Amendments guarantees a defendant's right to a fundamentally fair trial. Due process prohibits the use of state procedures that offend the principle of justice so rooted in the traditions and conscience of our people as to be

ranked as fundamental (*Snyder v. Massachusetts* (1934) 291 U.S. 97, 105) and procedures which undermine "the ultimate 'integrity of the fact finding process.'" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295, quoting *Berger v. California* (1969) 393 U.S. 314, 315.) Thus, the Due Process Clause precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825.)

"A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is." (*People v. Harris* (1998) 60 Cal.App.4th 727, 737.) Propensity evidence has long been considered suspect on this count because of its tendency to over-persuade. (*Old Chief v. United States* (1997) 519 U.S. 172, 181; *Michelson v. United States* (1948) 335 U.S. 469, 475-476; *People v. Falsetta* (1999) 21 Cal.4th 903, 913-915.) Once jurors learn the defendant has committed other, similar crimes, they are likely to turn the presumption of innocence on its head. "[O]ur decisions exercising supervisory power over criminal trials . . . suggest that evidence of prior crimes, introduced for no purpose other than to show criminal disposition, would violate the Due Process Clause." (*Spencer v. Texas* (1967) 385 U.S. 554, 574-575, conc. and dis. opn. of Warren, C.J.) The Ninth Circuit has recognized that improperly admitted "propensity" evidence violates the due process rights of the accused. Thus, in *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, evidence of the defendant's possession of a weapon that could not have been the murder weapon was determined to be irrelevant to the charged crime and therefore improperly admitted to prove his character as a person with knife-owning propensities. The Ninth Circuit held that the prohibition

of "other acts evidence" is so firmly established in the principles of Anglo-American jurisprudence that it is a component of "fundamental fairness" for due process purposes. (*Id.*, at p. 1380.)

A related due process principle is the requirement that, in criminal cases, the state prove every factual and legal element of the offense charged beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Roder* (1983) 33 Cal.3d 491, 497.) Jury instructions relieving prosecutors of this burden violate a defendant's due process rights, subvert the presumption of innocence and invade the truth-finding task assigned solely to juries in criminal cases. (*Francis v. Franklin* (1985) 471 U.S. 307; *Sandstrom v. Montana* (1979) 442 U.S. 510; *Carella v. California* (1989) 491 U.S. 263, 265; *People v. Kobrin* (1995) 11 Cal.4th 416; *People v. Roder, supra*, 33 Cal.3d 491.) Jury instructions concerning prior crimes evidence must not abrogate the reasonable doubt requirement essential to all of the elements of the charged offenses. Due process still requires that the jury be convinced beyond a reasonable doubt of the "ultimate fact" of the defendant's guilt of the crime for which he is currently on trial. (*People v. Medina* (1995) 11 Cal.4th 694, 763-764; see also *People v. Lisenba* (1939) 14 Cal.2d 403, 430.)

In addition, the United States Supreme Court has recognized that the improper use of character evidence has an impact on the reliability of the truth-seeking process in violation of the heightened reliability requirements of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508

U.S. 333, 334; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1982) 462 U.S. 862, 879.)

Evidence Code sections 1108 and 1109 create an exception to the general rule against propensity evidence in sex offense (Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109) cases. This Court has upheld Evidence Code section 1108 against a federal constitutional challenge (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 916-919) and has held CALJIC No. 2.50.01 to be a correct statement of the law (*People v. Reliford* (2003) 29 Cal.4th 1007).

However, the admission of evidence pursuant to section 1108 is, as noted, subject to the trial court's exercise of discretion under section 352. "[S]ection 1108 passes constitutional muster if and only if section 352 preserves the accused's right to be tried for the current offense." (*People v. Harris* (1998) 60 Cal.App.4th 727, 733.) In order to assure that "section 352 affords defendants a realistic safeguard in cases falling under section 1108," courts must engage in a careful weighing process, which, as appellant shows below, the trial court did not do with the evidence pertaining to each of the charged crimes before instructing in a manner that allowed its use to prove other charged crimes.

"Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its

outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917.)

Given such due process considerations, even if the federal constitution does not, as this Court has held, generally forbid sex offense propensity evidence, the instructions in this case violated appellant's due process and fair trial rights. The trial court did not engage in a weighing process where use of the charged crimes as propensity evidence was concerned; appellant never had an opportunity to object pursuant to Evidence Code section 352.

Moreover, the court's instructions – allowing evidence of one charged offense to be used to prove guilt on every other charged offense – were inconsistent with the instruction requiring the jury to consider each crime separately. This instruction is set forth in CALJIC No. 17.02, which was given in this case and which told the jurors: "you must decide each count separately." (138CT 36441.) As one Court of Appeal found, "[an instruction] to the effect that the jury must consider the evidence applicable to each alleged offense as though it were the only accusation, and must find as to each count uninfluenced by its verdict as to any other count . . . is a correct statement of the law." (*People v. Bias* (1959) 170 Cal.App.2d 502, 510.) Yet in this case, the jury was explicitly told to ignore this fundamental legal principle.

In *Falsetta,* this Court concluded that Evidence Code section 1108 met due process concerns because it contained a provision that allowed the trial court to exclude propensity evidence in an exercise of

discretion under Evidence Code section 352. (*People v. Falsetta, supra,* 21 Cal.4th at pp. 917-918.) *Falsetta* explained:

> [T]he trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge. As stated in [*People v.*] *Fitch* [(1997) 55 Cal.App.4th 172], "[S]ection 1108 has a safeguard against the use of uncharged sex offenses in cases where the admission of such evidence could result in a fundamentally unfair trial. Such evidence is still subject to exclusion under . . . section 352. (. . . § 1108, subd. (a).) By subjecting evidence of uncharged sexual misconduct to the weighing process of section 352, the Legislature has ensured that such evidence cannot be used in cases where its probative value is substantially outweighed by the possibility that it will consume an undue amount of time or create a substantial danger of undue prejudice, confusion of issues, or misleading the jury. (. . . § 352.) This determination is entrusted to the sound discretion of the trial judge who is in the best position to evaluate the evidence. [Citation.] *With this check upon the admission of evidence of uncharged sex offenses in prosecutions for sex crimes, we find that . . . section 1108 does not violate the due process clause.*" (*Fitch, supra,* 55 Cal.App.4th at p. 183, italics added.) (*People v. Falsetta, supra,* 21 Cal.4th at pp. 917-918.)

In the circumstances present at appellant's trial, the instructions in issue, pattern instructions though they may have been, amounted to an incorrect statement of the law. "[J]ury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. . . . At most, when they are accurate, [] they restate the law." (*People v. Morales* (2001) 25 Cal.4th 34, 48 fn. 7; see also *People v. Alvarez* (1996) 14 Cal.4th 155, 217 [pattern jury instruction is not the law but merely an attempt at a statement thereof.]

People v. Vargas (1988) 204 Cal.App.3d 1455 stated: "Although the CALJIC pattern instructions perform an invaluable service to the bench and bar, that those instructions are not sacrosanct is apparent from their treatment by the appellate courts." (*Id.*, at p. 1464.) The Judicial Council has no binding authority over the trial court with respect to jury instructions. Rather, the trial judge's instructional powers are derived from the due process and jury trial clauses in the Sixth and Fourteenth Amendments to the federal constitution. Their mandate of a fair jury trial supersedes recommendations in domestic court rules. (See, e.g., *Rock v. Arkansas* (1987) 483 U.S. 44.)

A trial court is obligated to instruct the jury with correct statements of the law.

> It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People* v. *St. Martin* (1970) 1 Cal.3d 524, 531; *People* v. *Sedeno* (1974) 10 Cal.3d 703; *People* v. *Breverman* (1998) 19 Cal.4th 142, 154.)

In an en banc decision, the Ninth Circuit indicated that incorrectly instructed juries are unable to fulfill their constitutionally mandated purpose, imposing upon trial judges the duty to instruct with correct statements of the law.

In *McDowell* v. *Calderon* (9th Cir. 1997) 130 F.3d 833, the court stated:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions. (*Id.*, at p.836.)

The Ninth Circuit also explained that standard instructions do not always sufficiently assure that a jury is correctly instructed:

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of 'standard' jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong. (*Id.*, at p. 841.)

When a judge fails in his or her duty to assure the jury's proper conduct and determination of questions of law involving "constitutional requirements," the due process clause of the Fourteenth Amendment is implicated. (*McDowell v. Calderon*, *supra*, 130 F.3d 833 at p. 839; *Estelle v. McGuire* (1991) 502 US 62 (jury instruction violates Due Process Clause if it affects an identifiable constitutional right.)

The failure to adequately or correctly instruct the jury lessens the prosecution's burden and allows the jury to draw impermissible inferences of guilt in violation of a defendant's state and federal constitutional right to trial by jury and due process. (Cal. Const., art. 1, §§

14, 15; U. S. Const., amends. VI, XIV; *Yates v. Evatt* (1991) 500 U.S. 391; *Carella v. California* (1989) 491 U.S. 263; *People v. Roder* (1983) 33 Cal.3d 491, 498-499; *People v. Wandick* (1991) 227 Cal.App.3d 918; *Smart v. Leeke* (4th Cir. 1988) 856 F.2d 609.)

As the foregoing discussion establishes, the Due Process clause prohibits the prosecution from using evidence of a charged offense as Evidence Code section 1108 evidence to prove another charged offense. That, is, however, what the instructions given appellant's jury incorrectly allowed.

C. APPLICATION OF THE LAW TO THE FACTS OF THIS CASE

The record of the trial below establishes that none of the charged crimes were subjected to the requisite balancing of probative value and prejudice associated with the admission of evidence pursuant to Evidence Code section 1108. "The record of a ruling based on Evidence Code section 352 '"must affirmatively show that the trial judge did in fact weigh prejudice against probative value. . . ." [Citations.]' [Citation.] (*People v. Zapien* [(1993)] 4 Cal.4th 929, 960; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1170; *People v. Green* (1980) 27 Cal.3d 1, 25, overruled on another ground in *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129.) (*People v. Hollie* (2010) 180 Cal. App. 4th 1262, 1274-1275.)

Recently, in *People v. Wilson* (2008) 166 Cal.App.4th 1034, the Court of Appeal held that it was proper to instruct the jury that it could use evidence of a charged offense to infer that the defendant was disposed to or inclined to have the requisite specific intent for other charged crimes.

In *Wilson*, the defendant was charged with committing separate sexual crimes against separate victims. The prosecution sought to use evidence of one charged crime to prove the requisite specific intent necessary for other charged crimes. The prosecutor proffered a modified version of CALCRIM No. 1191 and represented that "while the modified instruction was based on Evidence Code section 1108, it was not 'strictly beholden' to section 1108. . . ." The modified instruction also increased the prosecution's burden of proving the other crimes evidence from the customary preponderance of the evidence standard to the reasonable doubt standard required for proving the charged crimes. (*People v. Wilson*, *supra*, 166 Cal.App.4th at p. 1045.)

The trial court analyzed the admissibility of the propensity evidence under Evidence Code section 352 and held the evidence was "more probative than prejudicial" and "necessary." It also concluded the charged crimes could be used as circumstantial evidence to prove the other charged crimes. (*Ibid.*)

On appeal, the defendant argued that evidence of charged offenses cannot be used in the manner permitted by the court's instruction.[70] The Court of Appeal disagreed and gave the following explanation:

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[70] The defendant in *Wilson* relied on *People v. Quintanilla* (2005) 132 Cal.App.4th 572. Subsequently, the United States Supreme Court granted certiorari for *Quintanilla*, sub nom. *Quintanilla v. California* (2007) 549 U.S. 1191. Judgment was vacated and the case remanded to the Court of Appeal for further consideration in light of *Cunningham v. California* (2007) 549 U.S. 270. On remand, the Court of Appeal filed an unpublished opinion on July 31, 2007.

> We discern three reasons for permitting the jury to use evidence of charged sex offenses to show a propensity to commit another charged offense. First, the plain wording of Evidence Code section 1108 does not limit its application to cases involving uncharged sex offenses. The statute provides that when a "defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." The statute does not distinguish between charged and uncharged offenses. Second, in cases such as this, involving multiple sexual offenses against multiple victims, permitting the jury to use propensity evidence in this way serves the legislative purpose behind section 1108. Third, the policy concerns or factors that *Falsetta* described as "supporting the general rule against the admission of propensity evidence" are not implicated where multiple offenses are charged in the same case. (*Falsetta*, *supra*, 21 Cal.4th at p. 915.) The defendant does not face an "unfair burden of defending against both the charged offense and the other uncharged offenses" or "protracted 'mini-trials' to determine the truth or falsity of the prior charge" or "undue prejudice arising from the admission of the . . . other offenses" in cases such as this, since he is already required to defend against all of the charges. (*Id.* at pp. 915, 916.) Thus, the reasons for excluding propensity evidence set forth in *Falsetta* do not apply to cases involving propensity evidence based on charged offenses. (*People v. Wilson*, *supra*, 166 Cal. App. 4th 1034, 1052.)

What distinguishes *Wilson* from appellant's case is that the trial court in *Wilson* actually engaged in the Evidence Code section 352 weighing process that *Falsetta* credited with saving Evidence Code section 1108 from a due process challenge. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.) No such discretionary weighing regarding the use of charged crimes as disposition evidence occurred in appellant's case. A trial

court's failure to exercise discretion is "itself an abuse of discretion." (*Garcia v. Santana* (2009) 174 Cal.App.4th 464, 477; *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515; *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.)

Where as here, the trial court failed to engage in discretionary weighing regarding the use of charged crimes, reversal has been determined to be the appropriate remedy because an appellate court has no way to measure the prejudicial effect of the error. In *People v. Bigelow* (1984) 37 Cal.3d 731, the trial court mistakenly believed it had no authority to appoint advisory counsel in a capital case and thus failed to exercise its discretion to do so. This Court termed the trial court's failure to exercise its discretion "serious error," and concluded the rule of per se reversal applied fully in the circumstance, which it described as "the impossibility of assessing the effect of the absence of counsel upon the presentation of that case," and one "in which an appellate court has no way to measure the prejudicial effect of error." (*Id.*, at pp. 744-745.)

Moreover, the instructions here were ambiguous and were, as a result, confusing. For example, the jury was told in the first paragraph of CALJIC No. 2.50.01 that evidence would be introduced that would show the defendants committed other sexual offenses:

> Evidence will be introduced for the purpose of showing that the defendants engaged in a sexual offense on one or more occasions *other than that charged in this case.* (Italics added.)

However, the jury was then told later in the same instruction that it could use evidence of a *prior* sexual offense as evidence of a disposition to commit sexual offenses.

> If you find that a defendant committed a *prior* sexual offense, you may, but are not required to, infer that the defendant had this disposition to commit sexual offenses. If you find that a defendant had this disposition you may, but are not required to, infer that he or she was likely to commit and did commit the crimes of which he or she is accused. (Italics added.)

In the next paragraph of the same instruction, the jury was again instructed on the use of a *prior* sexual offense:

> However, if you find beyond a reasonable doubt that the defendant committed the *prior* sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he or she committed the charged crimes. The weight and significance of the evidence, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose. (17RT 3990-3991.)

The infirmities of the instructions are evident on their face. There is one reference to "other" sexual offenses and two references to "prior" sexual offenses and nothing in the instruction to inform the jury that "other" and "prior" are intended to be synonymous. "Prior" and "other" are not ordinarily synonymous as any English-language dictionary will show.[71]

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[71] "Prior" means "(1) earlier in time or order; (2) taking precedence (as in importance)." "Other" means "(1)(a) being the one (as of two or more) remaining or not included . . . (b) being the one or ones distinct from that or those first mentioned or implied . . . ; (c) second; (2)

But, of much more significance, is the fact that the instruction, as given, speaks of "other" sexual offenses in the context of informing the jury about a category of evidence the prosecution intends to produce and speaks of "prior" sexual offenses in the context of action to be taken by the jury. In carrying out its duties, the jury's focus would be on the paragraphs that govern its obligations, i.e., on the paragraphs that speak of "prior" sexual offenses. Accordingly, the jury, fulfilling its duty to uphold the letter of the law, could reasonably have believed it could have used a charged sexual offense that occurred earlier in time or that was in some manner more important than the charged crime upon which they were presently deliberating.

A review of the corresponding CALCRIM instruction, CALCRIM No. 1191, helps to illustrate the ambiguities created by the imprecise language of CALJIC No. 2.50.01. CALCRIM No. 1191 states:

> The People presented evidence that the defendant **committed the crime[s] of *<insert description of offense[s]>* that (was/were) not charged in this case.** (This/These) crime[s] (is/are) defined for you in these instructions.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed **the uncharged offense[s].** Proof by a preponderance of the evidence is a different burden of proof from beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> If the People have not met this burden of proof, you must disregard this evidence entirely.

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not the same; (3) additional." (http://www.merriam-webster.com/dictionary.)

> If you decide that the defendant committed **the uncharged offense[s]**, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] *<insert charged sex offense[s]>*, as charged here. If you conclude that the defendant committed **the uncharged offense[s]**, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of *<insert charged sex offense[s]>*. The People must still prove (the/each _____ (charge/[and] allegation) beyond a reasonable doubt. (Boldface emphasis added.)

Unlike its CALJIC counterpart, CALCRIM No. 1191 consistently refers to uncharged sexual offenses as what they are – uncharged offenses – without euphemisms such as "other" and "prior" that fail to inform that they must be read synonymously. The modified CALJIC instruction given to appellant's jury was an instruction flawed by ambiguity and confusion that permitted the jury to use a "prior" sexual offense as disposition evidence in proving the charge it is deliberating.[72]

Nothing in the instructions given the jury on the use of this evidence informed it that evidence pertaining to Sharona and April was not available to be used as disposition evidence. Moreover, because the trial court gave this instruction only before Aleda testified and not before testimony by Christina, Rachel, and Amy, there was nothing from which

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[72] Where the use of evidence of uncharged offenses under other statutory provisions, e.g., Evidence Code sections 1101, 1109, is concerned, the CALCRIM instructions uses more precise language such as "offenses not charged in this case" and "the uncharged domestic violence," when referring to the uncharged offenses. See, e.g., CALCRIM Nos. 375, 852.

the jury might have inferred that the evidence pertaining to these four women fell within the special class of evidence that should be treated differently than evidence pertaining to Sharona or April. Nothing in the various testimonies pertaining to these uncharged sexual offenses sufficiently differentiate those events from the evidence pertaining to the charged sexual offenses that might alert the jury to discern that the evidence should be used differently.

For the reasons stated, the instructions given appellant's jury incorrectly allowed the jury to use evidence pertaining to Sharona and April to prove all charged crimes. Because the trial court had not subjected the use of evidence pertaining to Sharona and April as Evidence Code section 1108 evidence to the weighing required by Evidence Code section 352, the incorrect instruction resulted in a violation of appellant's right to due process and a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination of the facts in a capital case under the Eighth Amendment.

D. CONCLUSION

Chapman v. California (1967) 386 U.S. 18 is the governing standard of review for constitutional error. *Chapman* requires this Court to declare its belief that the error was harmless beyond a reasonable doubt.

In *Neder v. United States* (1999) 527 U.S. 1, the United States Supreme Court considered the appropriate standard of review in circumstances when the errors "infringe upon the jury's factfinding role and affect the jury's deliberative process in way that are, strictly speaking, not readily calculable." (*Id.*, at p. 18.) Under *Neder*, an error is harmless if the

court finds beyond a reasonable doubt that the result "would have been the same absent the error." (*Id.*, at p. 19.) *Neder* explained that where the record contains "overwhelming" and "uncontroverted" evidence supporting an element of the crime, the error is harmless. (*Id.*, at pp. 17, 18.) Conversely, the error is not harmless if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." (*Id.*, at p. 19.)

At trial below, appellant contested her guilt by presenting evidence and by arguing that she suffered from Post-Traumatic Stress Disorder as the result of events and experiences in her life; that her life changed dramatically after she met Daveggio; that her relationship with Daveggio was characterized by her submissiveness; and that, as a result, she was not voluntarily acting in concert with Daveggio. (34RT 7262-7265.) With regard to Count 4 involving April, defense counsel pointed to evidence that appellant never touched April and, instead attempted to warn her about Daveggio's intended sexual assault. Counsel argued appellant lacked the necessary mental state to convict her of the sexual assault against April. (34RT 7260-7266.) Defense counsel also contested appellant's guilt of the murder of Vanessa Samson, pointing out that appellant was the van's driver in the signature crime involving Aleda who did not sexually assault Aleda and who did not want Aleda to be killed. (34RT 7266-7267.)

Given this evidentiary setting, the instructional error that resulted in allowing the jury to consider evidence of each of the charged crimes to prove other charged crimes was not harmless beyond a reasonable doubt.

VII.

APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT WERE VIOLATED BY THE TRIAL COURT'S INCORRECT ADMISSION OF PREJUDICIAL EVIDENCE OF OTHER SEXUAL OFFENSES TO PROVE APPELLANT'S PROPENSITY TO COMMIT THE CHARGED CRIMES

A. INTRODUCTION

The trial court committed prejudicial error in admitting evidence of other sexual offenses under Evidence Code section 1108[73] to prove propensity to commit the charged crimes, thereby depriving appellant of the right to due process of law and to a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination of the facts in a capital case under the Eighth Amendment to the United States Constitution.

The court admitted evidence relating to Aleda, Christina, Rachel, and Amy as propensity evidence pursuant to Evidence Code section 1108. In addition, as appellant explained in Argument VI, the instructions given the jury on the use of this evidence improperly allowed the jury to use evidence relating to Sharona and April, the named victims in

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[73] Evidence Code section 1108, subdivision (a) states: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

counts 1, 2, and 3, as propensity evidence to prove appellant committed the charged crimes.

Appellant has discussed the motions, hearings, and arguments related to the admission of evidence of other wrongful conduct, including the admission of evidence under Evidence Code section 1108 in Argument IV of this brief, and, in lieu of repeating it respectfully refers the reader to the discussion, which appellant incorporates by reference here.

B. THE RELEVANT LAW; ITS APPLICATION TO THIS CASE

The Fifth and Fourteenth Amendments to the United States Constitution guarantee defendants the right to a fair trial. Denial of due process in a criminal trial "is the failure to observe that fundamental fairness essential to the very concept of justice." (*Lisenba v. California* (1941) 314 U.S. 219, 236.) State law violates due process if "it offends some principle of justice so firmly rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Montana v. Egelhoff* (1996) 518 U.S. 37, 43.)

The Due Process Clause also requires that a criminal charge be proved beyond a reasonable doubt. (*In re Winship* (1970) 397 U.S. 358.) It does not permit a conviction unsupported by evidence, or based on unreliable or untrustworthy evidence. (*California v. Green* (1970) 399 U.S. 149, 186 fn. 20.) And it does not permit conviction based on evidence that is unnecessarily suggestive or conducive to irreparable mistake. (*Stovall v. Denno* (1967) 388 U.S. 293, 301-302.)

People v. Fitch (1997) 55 Cal.App.4th 172 observed that the due process clause has limited operation beyond the specific guarantees of the Bill of Rights. Nonetheless, due process draws a boundary beyond which state rules of evidence cannot stray. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 919.) Therefore, if appellant can demonstrate that allowing the jury to use character evidence to show a disposition to commit a charged offense violates a fundamental principle of justice, then she has established a valid due process claim. (*People v. Fitch*, *supra*, 55 Cal.App.4th at p. 180.)

The test of whether a due process violation has occurred is two-pronged: first, the inferences which a jury may draw from the evidence must be constitutionally impermissible and, second, the evidence must be of such a quality that it necessarily prevents a fair trial. (*Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920.)

Because it can easily lead a jury to convict out of distaste for the prior misconduct or the character of the accused, propensity evidence interferes with the court's obligation to ensure that the prosecution satisfies its burden of proof. In *Michelson v. United States* (1948) 335 U.S. 469, 475-476, Justice Jackson explained:

> Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish the probability of his guilt. . . . The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as

> to prejudge one with a bad general record and deny him opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. (*Michelson v. United States*, *supra*, 335 U.S. at pp. 475-476.)

Historical practice determines whether a procedural or evidentiary rule can be characterized as fundamental to due process and fair trial. (*Cooper v. Oklahoma* (1996) 517 U.S. 348, 356; *Medina v. California* (1992) 505 U.S. 437, 445-446.) Due process is violated by a state rule that "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (*Medina v. California*, *supra*, 505 U.S. at p. 445.)

The United States Supreme Court has recognized that courts tend to follow the common law tradition of disallowing the prosecution from using evidence of a defendant's evil character to establish a probability of his guilt. The Court has strongly suggested that introduction of prior crimes evidence solely for the purpose of showing a criminal disposition would violate due process. (*Michelson v. United States*, *supra*, 335 U.S. 469; *Spencer v. Texas* (1967) 385 U.S. 554, 572-574, conc. and dis. opn. of Warren, C.J.)

Traditionally, propensity evidence is excluded at trial in order to "force the jury, as much as possible, to put aside emotions and prejudices raised by [other acts evidence] . . . and decide if the prosecution has convinced them, beyond a reasonable doubt, that the defendant is guilty *of the crime charged.*" (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378,

1384 (emphasis added), cert. denied, 510 U.S. 1020 (1993).) The prohibition on other acts evidence is so rooted in established principles of Anglo-American jurisprudence that it is a component of fundamental fairness for purposes of due process. (*McKinney v. Rees*, *supra*, 993 F.2d at p. 1380.)

In *McKinney v. Rees*, *supra*, the court reviewed examples of past uses of character evidence and explained:

> The use of "other acts" evidence as character evidence is . . . contrary to firmly established principles of Anglo-American jurisprudence. In 1684, Justice Withins recalled a prior case in which the court excluded evidence of any forgeries, except the one for which defendant was standing trial. [Citation.] Similarly, in *Harrison's Trial*, the Lord Chief Justice excluded evidence of a prior wrongful act of a defendant who was on trial for murder, saying to the prosecution: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter," 12 How. St. Tr. 834 (Old Bailey 1692). (*McKinney v. Rees*, *supra*, 993 F2d at p. 1380.)

Based upon its historical review, *McKinney* concluded:

> The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia. (*Id.*, at p. 1381 [fn. omitted].)

The Supreme Court has not stated a bright-line rule prohibiting the use of propensity evidence, generally because it has not

deemed it necessary to reach the issue. (See, e.g., *Estelle v. McGuire* (1991) 502 U.S. 62, 75 fn 5 (need not reach issue, so no opinion on whether state law that allows use of "prior crimes" evidence to show propensity would violate Due Process Clause).) The Court has, however, clearly established the appropriate *analysis* for due process claims.

For nearly 150 years, the U.S. Supreme Court has advanced an historical test for ascertaining what rules are protected by due process. In *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856) 59 U.S. [18 How.] 272, the Court held that if the process at issue is not in conflict with any express constitutional provisions, the court must:

> look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. (*Murray's Lessee*, *supra*, 59 U.S. at p. 277.)

In *Hurtado v. California* (1884) 110 U.S. 516, 528, the United States Supreme Court elaborated upon the test of what constitutes due process of law set out in *Murray's Lessee* by explaining "that a process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and this country; but it by no means follows that nothing else can be due process of law." Over a century later, the Court affirmed this definition in *Dowling v. United States* (1990) 493 U.S. 342. The Court defined due process as "'those fundamental conceptions of justice which lie at the base of our civil and political institutions' [citation] and which define 'the community's sense of fair play and decency' [citation]." (*Id.*, at p. 352.)

Where the use of propensity evidence to prove a charged crime is concerned, the prohibition against such use is both long standing and durable. The rule is rooted in England, was adopted by the colonial courts, enforced as a common-law rule throughout the history of our nation's judiciary, and codified in state and federal rules of evidence.[74] Commentators agree that the propensity ban has received judicial sanction for three centuries.[75] This historical legacy amply demonstrates that propensity evidence "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 43, quoting *Patterson v. New York* (1977) 432 U.S. 197, 201-202.)

Moreover, the Supreme Court has repeatedly indicated that application of the historical test would result in this conclusion. (See, e.g., *Michelson v. United States*, *supra*, 335 U.S. 469, 475-476[76]; *Brinegar v.*

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[74] See, Louis M. Natali, Jr. & R. Stephen Stigall, "'Are You Going To Arraign His Whole Life?': How Sexual Propensity Evidence Violates the Due Process Clause," 28 Loyola U. Chi. L.J. 1, 13-15 & n. 85-101 (1996) (summarizing historical record and collecting cases).

[75] See, e.g., 1A Wigmore on Evidence, § 58.2, p. 1213 (rev. 1983).

[76] In *Michelson*, the Court discussed the common law rule barring propensity evidence. After recognizing the historical significance of the rule, the Court acknowledged its role in assuring essential fairness: "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise

United States (1949) 338 U.S. 160; *Spencer v. Texas* (1967) 385 U.S. 554[77].) Other Supreme Court cases have acknowledged the constitutional dimensions of the trial rights protected by the propensity ban. (See *Boyd v. United States* (1892) 142 U.S. 450 (prior crimes evidence impermissibly impressed upon jury the notion that defendants were "wretches" undeserving of prescribed trial protections); see also *Estelle v. McGuire*, *supra*, 502 U.S. at p. 78 (O'Connor, J., conc. and diss.) (suggesting that prohibition on propensity evidence protects proof beyond reasonable doubt standard).)[78] Accordingly, clearly established federal law compels the conclusion that the propensity ban is a requirement of due process.

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and undue prejudice." (*Michelson v. United States*, *supra*, 335 U.S. at pp. 475-476 fn. omitted.)

[77] In *Spencer v. Texas*, the United States Supreme Court upheld the use of other crimes evidence for purposes other than propensity, in light of limiting instructions which prohibited propensity inferences. (*Spencer v. Texas*, *supra*, 385 U.S. at pp. 563-564.) The majority opinion thus supports the argument that other crimes evidence comports with due process only where inferences based on propensity are expressly forbidden. (*Ibid.*) In his dissenting opinion, Chief Justice Warren stated that the use of prior convictions as propensity evidence is inconsistent with due process. He noted that the ban on propensity evidence is well-established historically and that it protects the presumption of innocence. He concluded that use of prior crimes evidence to show propensity would violate due process. (*Id.*, at pp. 572-575, Warren, C.J., dissenting.) No other justice expressed disagreement with these propositions.

[78] Justice O'Connor commented that the Due Process Clause requires proof beyond a reasonable doubt of every element of the offense, and prohibits the use of evidentiary presumptions that have the effect of relieving the prosecution of its burden of proof. This analysis suggests that propensity evidence creates an improper presumption that the accused has committed the charged crime because he or she previously committed prior similar offenses. This analysis would naturally lead to the conclusion that

Although the United States Supreme Court has not expressly so held, at least two federal courts of appeal have explicitly held that admission of character evidence to prove the disposition of the defendant to commit the current offense violates federal due process. (*Panzavecchia v. Wainwright* (5th Cir. 1981) 658 F.2d 337; *McKinney v. Rees*, *supra*, 993 F.2d 1378 (discussed above).)

In *Panzavecchia*, the defendant was tried in state court for murder and unlawful possession of a firearm by a convicted felon. (*Panzavecchia v. Wainwright*, *supra*, 658 F.2d at pp. 338-339.) Prior to trial, he unsuccessfully moved to sever the trial of the two counts. During the trial, the jury was allowed to hear evidence that the defendant had a prior conviction for counterfeiting, which was relevant to proving the weapons possession charge, but irrelevant to the murder count. The jury was instructed that both offenses should be considered separately, but was not given a specific limiting instruction stating that the prior counterfeiting conviction could not be considered in establishing guilt of the murder offense. The defendant was convicted of both murder and illegal firearm possession. His convictions were affirmed by the state courts. (*Ibid.*) *Panzavecchia* then filed a petition for writ of habeas corpus in federal district court, claiming that the denial of his severance motion resulted in the admission of irrelevant and prejudicial evidence in violation of his due process right. The federal district court granted his writ; the state then appealed. (*Ibid.*) The Fifth Circuit took note that the jury heard repeated

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the use of disposition evidence violates the fundamental fairness guarantee of the Due Process Clause by relieving the prosecution of its duty to prove beyond a reasonable doubt every element of the crime.

references to the defendant's criminal past without any limiting instruction to use the evidence only in connection with the firearm count and to disregard it entirely in considering the murder count. The court reasoned that because the evidence of the prior conviction was irrelevant to the murder charge, the only purpose it served was to show bad character and propensity to commit a crime. The court, citing *Spencer*, *supra*, observed that nearly all common law jurisdictions recognize the inadmissibility of evidence of prior convictions when its prejudicial effect outweighs its probative value. (*Panzavecchia v. Wainwright*, *supra*, 658 F.2d 341, 342 fn. 8, citing *Spencer v. Texas*, *supra*, 385 U.S. at pp. 560-561 fn. 7.) *Panzavecchia* determined that the prejudice resulting from the error rose to such a level as to make the trial fundamentally unfair and in violation of the Fifth and Fourteenth Amendments. (*Panzavecchia v. Wainwright*, *supra*, 658 F.2d at pp. 341-342.)

Numerous other courts have expressly reached this conclusion. (See, e.g., *McKinney v. Rees*, *supra*, 993 F.2d at p. 1380; *Tucker v. Makowski* (10th Cir. 1989) 883 F.2d 877, 881 (acknowledging in habeas case that admission of other crimes evidence presents due process claim and remanding for fundamental fairness analysis); *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044, cert. denied, 439 U.S. 847 (1978) (bar on propensity evidence is a concomitant of the presumption of innocence); *People v. Zackowitz* (N.Y. 1930) 172 N.E. 466, 468 (Cardozo, C.J.) (declaring prohibition on propensity evidence to be of "fundamental importance to the protection of the innocent").[79])

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[79] See also *United States v. Peden* (5th Cir. 1992) 961 F.2d 517, 520, cert. denied, 506 U.S. 945 (1992) (noting that when a jury feels unsure

Further, it is well established that state law evidentiary rulings and/or jury instructions will violate due process if they render a particular trial fundamentally unfair. (*Lisenba v. California*, *supra*, 314 U.S. at p. 236; see also *Cupp v. Naughten* (1973) 414 U.S. 141, 147; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642; *Jammal v. Van de Kamp*, *supra*, 926 F.2d at p. 920. This standard *independently* constitutes clearly established federal law, and the reasonableness of its application to various fact-patterns is susceptible to review under the AEDPA. In *Williams v. Taylor* (2000) 529 U.S. 362, the United States Supreme Court explained that the "rules of law may be sufficiently clear for habeas purposes even when they are expressed in terms of a generalized standard rather than as a bright-line rule." (*Id.*, at p. 382.) Accordingly, even in the absence of a bright-line rule that propensity evidence violates due process, the use of propensity evidence rendered appellant's trial fundamentally unfair.

In this case, during jury instructions prior to deliberations, the jury was instructed with modified versions of CALJIC Nos. 2.50 and 2.50.01. The latter instruction told the jury that it could "infer that the defendant had a disposition to commit sexual offenses" and further "infer that he or she was likely to commit and did commit the crimes of which he or she is accused." (138CT 36347; 34RT 7326-7327.) The jury was further instructed that it "must not consider this evidence for any other purpose." (138CT 36347; 34RT 7326-7327.)

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about the government's case, it may nevertheless convict on the belief that the accused is evil); *United States v. Foskey* (D.C. Cir. 1980) 636 F.2d 517, 523, quoting *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044 ("It is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is'").

Admission of this evidence therefore violated "the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not who he is." (*United States v. Hodges* (9th Cir. 1985) 770 F.2d 1475, 1479. *Hodges* elaborated:

> Under our system, an individual may be convicted only for the offense of which he is charged and not for other unrelated criminal acts which he may have committed. Therefore, the guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing. (*Id.*, at p. 1479.)

C. PREJUDICE

In appellant's case, the instructions allowed the jury to use the improperly admitted disposition evidence described above to prove that appellant committed the charged offenses. The use of propensity evidence to achieve convictions rendered the trial fundamentally unfair in multiple ways.

First, as the Supreme Court has recognized, propensity evidence effectively "overpersuades" jurors on the irrelevant question of character so as to prejudice their ability to evaluate the evidence of the charged crime. (See *Michelson v. United States*, *supra*, 335 U.S. at pp. 475-476.) Overpersuasion is particularly powerful where, as here, the evidence regarding the sexual offenses used to prove propensity is repugnant in multiple ways, including, for example, child molestation involving Christina and Rachel, forcible incest with April and Rachel, the use of physical restraints with Rachel and Amy, kidnap for sexual purposes with Aleda and Sharona, and controlled substance abuse by the defendants

and some of the victims. Evidence of this degree of moral depravity in the defendant is likely to evoke such feelings among the jurors of aversion and outrage toward the defendants that the jurors' dispassionate evaluation of the evidence and a fair trial cannot be guaranteed.

Second, the propensity evidence jeopardized the presumption of innocence. The jury was instructed, in effect, that between "presumed innocent" and "proved guilty," there was the category of "presumed guilty," for one *more likely* to be guilty of the crime charged than someone without such a predisposition. As a result, appellant was stripped of the presumption of innocence on the basis of a finding unrelated to the facts of the charged crime. (See, e.g., *Estelle v. McGuire*, *supra*, 502 U.S. at p. 78 (O'Connor, J., conc. and diss.) (Due Process Clause prohibits the use of evidentiary presumptions that have the effect of relieving the prosecution of its burden of proof).)

Third, the use of propensity evidence to prove appellant's guilt of the charged crimes relieved the prosecution of the burden of proving each element of each of the charged crimes beyond a reasonable doubt by allowing the jury to find guilt on the basis of appellant's prior sexual misconduct. (See, e.g., *Estelle v. McGuire*, *supra*, 502 U.S. at p. 78 (O'Connor, J., conc. and diss.) (suggesting that prohibition on propensity evidence protects proof beyond reasonable doubt standard).)

The wrongful admission of this evidence deprived appellant of the right to due process of law and thus rendered her trial fundamentally unfair. When an error at trial deprives a criminal defendant of federal constitutional rights, the error is presumed to be prejudicial, and a reversal is required, unless the beneficiary of the error can show the error to be

harmless. (*Chapman v. California* (1967) 386 U.S. 18.) In view of the incendiary prejudicial nature of this evidence of multiple sexual assaults involving child molestations, abductions, physical restraints, and kidnapping, it is not possible to conclude the admission of the evidence was harmless beyond a reasonable doubt.

Finally, the prejudicial effect of this inflammatory evidence upon the jury's deliberations cannot be denied. Accordingly, the admission of this evidence violated appellant's Eighth Amendment right to a reliable determination of guilt and penalty in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Hopper v. Evans* (1982) 456 U.S. 605, 611.)

Consequently, a reversal of the conviction and death penalty is required.

VIII.

THE PROSECUTOR COMMITTED MISCONDUCT IN STATEMENTS TO THE JURY BY IMPROPERLY APPEALING TO THE JURORS' PASSIONS AND SYMPATHIES AND ARGUING MATTERS NOT BASED ON THE EVIDENCE. THE PROSECUTOR'S MISCONDUCT DEPRIVED APPELLANT OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

Appellant here contends that various portions of the prosecutor's statements to the jury constituted misconduct.[80] These statements, some of which were unrelated to facts proven in the case, were calculated to engage the passions and sympathies of the jury for the victims and against appellant. The prosecutor's misconduct deprived appellant of her constitutional right to due process and a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination of the facts in a capital case guaranteed by the Eighth Amendment.

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[80] In *People v. Hill* (1998) 17 Cal.4th 800, this Court made clear that a showing of bad faith is not required to establish prosecutorial misconduct in argument to the jury. In so doing, this Court said of the type of error claimed here: "We observe that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*Id.*, at pp. 822-823 and 823 fn.1.)

As this Court recently explained, "The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process."' (*People v Hawthorne* (2009) 46 Cal. 4th 67, 90, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969.)'" (*People v. Parson* (2008) 44 Cal.4th 332, 359.)

"Although counsel have 'broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law. [*Citation.*]'" (*People v. Mendoza* (2007) 42 Cal.4th 686, 702, quoting *People v. Bell* (1989) 49 Cal.3d 502, 538.) In particular, it is misconduct for counsel to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215, superseded by statute on another point as stated in *In re Steele* (2004) 32 Cal.4th 682, 691. (*People v. Katzenberger* (2009) 178 Cal. App. 4th 1260, 1266.)

A. THE PROSECUTOR'S STATEMENTS IN ISSUE

From the outset of the trial process, the prosecutor sought to influence and control the jury's view of Daveggio and appellant by appealing to the jury's passions and prejudices.

During her opening statement to the jury, the prosecutor Ms. Backers chose by careful selection of descriptive words and incidents to color the jury's view of Daveggio and appellant as a couple who emulated the notorious serial killers Gerald and Charlene Gallego.[81] In statements that, frequently, impermissibly crossed the line into argument, the prosecutor described Daveggio and appellant as a partnership of predators intent on committing depravities upon the young and vulnerable.

A representative sampling, including introductory remarks calling the jury's attention to the presence of the family and friends of murder victim Vanessa Samson, illustrates appellant's claim that the prosecutor sought by her comments to invoke the passions and prejudices of the jury by painting the defendants as despicable and vile and by eliciting the jury's sympathy for their victims. These reported comments also demonstrate the prosecutor's willingness to argue the case in opening statement, the trial court's repeated admonitions notwithstanding, when such argument better served the purpose of invoking the jury's bias against the defendants:

> Your Honor, Ladies and Gentlemen of the Jury, the defendant James Daveggio, the defendant Ms. Michaud, counsel for the defendants, family and friends of Vanessa Samson, may it please the court:
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> October 29, 1996, was a dark day, a very dark day. It was the beginning of a partnership, a partnership that would be formed between equal partners. It was a partnership that

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[81] Gerald and Charlene Gallego were a husband and wife team who were convicted of multiple murders. See *People v. Gallego* (1990) 52 Cal.3d 115.)

would have a mission, not a mission statement. . . . (16RT 3597:21-28.)

[]

The mission of this partnership was to prey upon the young and vulnerable; to prey upon children, girls, and women. These two predators that sit before you today, the defendants, James Anthony Daveggio and Michelle Lyn Michaud, would select each of their victims carefully. They would select them in order to accomplish their goals that they had previously agreed upon, to ambush these young women and children by deceit, by a betrayal of trust or by sheerly overpowering them with brute force.

Their goals were to abduct them, to terrorize them, to subdue them either by monumental fear or physical restraints, to inflict their own depraved will upon each of these victims, and then to physically and emotionally assault them to the very core of their being; to humiliate them and degrade them, to sexually assault them, to physically inflict pain on them, and to take pleasure in their victims' pain, to rape them, to sodomize then, to force objects into their young bodies, to do vile acts upon them, and then to threaten to kill them if they ever told a soul, that is, if they let you live to tell. (16RT 3598:13-28 to 3599:1-3.)

The prosecutor told the jurors the defendants' activities spanned three states – California, Oregon, and Nevada – and that they would hear from Aleda who had been kidnapped and sexually assaulted in Nevada and brought into California; from appellant's 12-year-old daughter who was sexually assaulted near Lake Shasta and Klamath Falls, Oregon; then from Amy, from Christina, Sharona, and April. (16RT3599-3600.)

The prosecutor moved on to a description of the charged crimes and special circumstances, and set forth the law and the jurors'

obligations, as the following sample concerning the murder charge illustrates:

> As you know, count four is the murder charge. Count Four is a charge where each defendant is charged with murdering Vanessa Samson. Attached to that count are two separate and distinct special circumstances.
>
> The first special circumstance is kidnapping, that the victim was kidnapped while the defendant was engaged in or an accomplice in the commission of kidnapping, or that the murder was committed during the immediate flight thereafter [sic] the kidnapping, and that the murder was carried out in order to advance the kidnapping, or facilitate escape from the kidnapping, or avoid detection from the kidnapping.
>
> So that first special circumstance charges that the murder occurred during the kidnapping, during the immediate flight thereafter, or that it was done in order to facilitate the kidnapping or avoid detection.
>
> The court will instruct you that if you found that they had the intent to kidnap and the intent to kill that that special circumstance is true.
>
> The second special circumstance charged against each defendant is known as a special circumstance of rape by instrument; that the murder was committed while the defendant was engaged in or an accomplice in a rape by instrument, or the immediate flight thereafter, and that the murder was committed in order to carry out that rape by instrument, or facilitate it, or escape from it, or avoid detection.
>
> Again, if you find that the defendants had both the intent to kill and the intent to commit rape by instrument, that special circumstance is true. (16RT 3602:4-28 to 3603:1-3.)

The prosecutor described the charges against Daveggio and appellant to the jury and then told the jurors that in addition to testimony

from charged victims Sharona and April, they would also hear testimony from other victims of the defendants under "special laws." At this point, the trial court interrupted the prosecutor and expressly told her that she was impermissibly arguing the case.

> [The Prosecutor Ms. Backers]: Let me take a moment now to explain to you why you will be hearing from those victims even though they are not charged crimes.
>
> There are special laws that provide the court a means of allowing you to hear that evidence under 1101 and 1108. Normally there is a rule that you cannot consider character evidence.
>
> [The Court]: Excuse me, Ms. Backers, approach the side bar, please.
>
> [Whereupon, the following proceedings were held at side bar.]
>
> [The Court]: I think you are getting in the area of argument. You are not suppose [sic] to go over what the law is in opening statement.
>
> [Ms. Backers]: Okay. I am explaining to them –
>
> [The Court]: I know you are explaining, but that is for me to tell them and for argument as to why. I don't think you should go over that in opening. (16RT 3603:24-28 to 3604:1-13.)

The prosecutor responded to the court's admonition by telling the jurors that Daveggio and appellant "were completely obsessed with sexual depravity and serial murder." (16RT 3604:27-28.) The prosecutor continued:

> The defendants, Daveggio and Michaud, actually studied and discussed the planning, the preparation and the methods of famous serial killers. Both of them read books on

> serial murderers. In fact, the defendant, James Daveggio, would often brag about how he had studied and memorized the cases and the method of every documented serial killer, and not just studied them, but learned from their mistakes.
>
> The defendants collected trading cards, a collection of trading cards that glorified infamous serial killers. They discussed these infamous serial murderers and their tactics with many friends and relatives. And out of all of those murderers they heard of and studied, there was one pair of murderers that the defendants especially admired, it was a couple, a man and wife couple, an evil pair of serial murderers. It was the pair that became known as those who committed the sex slave murders.
>
> These two serial murderers were the defendants' personal heroes. They spoke of them often. The sex slave murders were committed by Gerald Gallego and Charlene Williams Gallego. When they met in the late '70's, it was Gerald Gallego and Charlene Williams. Soon they became crime partners and married one another, becoming the Gallegos. They committed 11 brutal murders that became known as the sex slave murders. They even called their victims disposable love slaves. The Gallegos would use their prey in every sexual perverted way, then throw them away like disposable love slaves. (16RT 36095:3-28.)

The prosecutor expanded on the defendants' individual attempts to emulate the Gallegos (see, e.g., 16RT 3606-3608) and then turned the jurors' attention to People's 12, on which she had affixed trading cards depicting serial killers and mass murderers. The prosecutor told the jury that the Gallegos' card was on top when the trading cards were found among the defendants' things and claimed that meant the Gallegos were the "personal heroes" of Daveggio and appellant. (16RT 3608.)

The trial court once more interrupted the prosecutor's opening statement to admonish the prosecutor that she was continuing to argue the case to the jury.

> [Ms. Backers]: And what was the information in each of the defendants' head [sic] that made these defendants [the Gallegos] their personal heroes, the card they had on top, card no. 65, the front of the card has a picture of the two Gallegos covered in blood.
>
> The card reads:
>
> "Charlene Williams, born in 1958, was a gifted violinist with an I.Q. of 160, and the adored child of an affluent Stockton, California, family. In 1978, she met Gerald Gallego, then 33 years old, on a blind date, and from that point on was virtually hypnotized by the cruel and hardened man. Gallego was the son of a convicted cop killer and often boasted that he was 'touched by the devil.'"
>
> [The Court]: Excuse me. Ms. Backers, can I see you and counsel at side bar.
>
> [Whereupon, the following proceedings were held at side bar.]
>
> [The Court]: This is closing argument. This is not opening statement.
>
> [Ms. Backers]: You made a finding that this goes to their state of mind.
>
> [The Court]: I understand that, but the way you are presenting it, it is an argument, okay. You are making – the way you are doing it, it is argumentative. This is not closing argument, okay. I am giving you as much leeway as I can, but you can't read everything that is on the board. You are arguing is what you are doing.
>
> [Ms. Backers]: I know, but you made a finding this particular card was relevant to their state of mind and that is the card they had.

[The Court]: I am not objecting to what it is. I am objecting on my own to the way it is being presented. It is in an argumentative form. So now you will have to –

[Ms. Backers]: Can I finish reading the card? You made a finding.

[The Court]: I know. I know I did. It goes beyond giving an outline of what you are going to show. It is argumentative.]

[Ms. Backers]: We are talking about a piece of evidence we recovered.

[The Court]: I know. But they can read the card themselves. The way you are doing it, it is argument. That is all I can tell you.

[Ms. Backers]: I am asking the court whether I am allowed to finish it.

[The Court]: I won't make you stop in the middle, but I will start interposing objections in open court if you keep presenting this like argument.

[Ms. Backers]: That is fine. (16RT 3608:16-28 to 3609:1-28 to 3610:1-7.)

The prosecutor resumed her remarks to the jury by reading from the Gallegos' trading card. Defense counsel thereupon objected that the remarks were argumentative, but the court overruled the objection. (16RT 3610:20-22.)

Thereafter, the prosecutor began a detailed description of the abduction and multiple sexual assaults involving Aleda, which the court had previously admitted as uncharged misconduct evidence probative of,

inter alia, the existence of a common plan and identity, and of appellant's disposition to commit the charged crimes.[82]

The prosecutor told the jury that Daveggio sexually "assaulted this little four-foot-ten girl for 93 miles."[83] (16RT 3617.) In a representative sampling, the prosecutor said of Daveggio's assault upon Aleda:

> Daveggio forced Aleda to touch his penis and to orally copulate his penis, to put her mouth on his penis. He forced his penis into her mouth. He forced this little girl to touch his testicles with her hands. He slapped her on the buttocks, hitting her on the buttocks. He scratched her on the back. He attempted to bite her face and neck and lips. He forcibly kissed her all over.
>
> Daveggio shoved his fingers into Aleda's vagina. He shoved them into Aleda's rectum. He raped Aleda by shoving his penis into Aleda's vagina. (16RT 3617:18-27.)

The prosecutor also said of the Aleda incident:

> Instead, Daveggio forced Aleda to touch his testicles. And then he took Aleda's hand and forced her fingers up into his rectum while at the same time he forced his penis into her mouth.
>
> He touched her buttocks with his hand. And while she was being forced to orally copulate him, he was

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[82] Appellant challenges the admission of aspects of Aleda's evidence as improperly admitted character and propensity evidence in Arguments IV, V, VI, and VII in the opening brief.

[83] Although the prosecutor made a point of referring to Aleda as "this little girl," Aleda testified at trial that she was 20 years old, had a boyfriend, and was working as a dental assistant, and attending college evening classes on the date Daveggio sexually assaulted her. (17RT 3993-3995, 4038.)

> simultaneously forcing his fingers into her rectum. While Daveggio forced Aleda to orally copulate his penis, he kissed her on the neck. He now took his penis out of her mouth and began masturbating. Daveggio ejaculated in Aleda's face. He ejaculated on her face and in her hair. (16RT 3619:5-15.)

The prosecutor told the jury that Daveggio and appellant had a long discussion about what to do with Aleda, about whether they were going to follow their "original plan," that Daveggio said he would leave it up to appellant, and that appellant said she needed some time to think about it. (16RT 3619:19-23.)

The prosecutor then said:

> While Michaud thought about whether Aleda would live or die, Daveggio allowed Aleda to get dressed. . . . (16RT 3620:14-15.)

At the next recess, defense counsel for both defendants objected that the prosecutor's remarks were intended to inflame the jury. Counsel specifically pointed out there was no evidence that Vanessa Samson had been subjected to the type of sexual assaults claimed by Aleda and no evidence that Vanessa had ejaculate anywhere on her person. The trial court, in turn, personally objected to the prosecutor's continued attempts to argue the case and specifically pointed to the prosecutor's statement that appellant had contemplated whether Aleda would live or die.

> [Defense Counsel Mr. Ciraolo]: Your Honor, I will object to some of Ms. Backers' opening comments. The detail that she is presenting on Aleda Doe is only calculated to inflame the jury. The court has allowed the Aleda Doe

testimony to come in for the purpose of similar [sic] and identity.

There is no evidence that I can recall that this kind of conduct occurred to the victim. There is no evidence of ejaculation on Samson, the 187 victim. The court said that it can come in because it is a similar for identity. None of this detail has been indicated to have occurred to the 187 victim. It is only calculated for the prosecution to try to have the jury be inflamed and speculate that this sort of thing might have happened to Ms. Samson.

So I know what the court's ruling is on the evidence, but I want to be clear that from its inception Ms. Backers is attempting to inflame this jury.

[The Court]: Mr. Karl?

[Defense Counsel Mr. Karl]: We agree.

[The Court]: I have a bigger problem with the way it is being presented. I mean, I have about reached the limit: As Michelle thought about whether she lives or dies? You have no damned idea of what Michelle was thinking about. That is argument. That is an inference as to what was going on as to what the initial plan was. I mean, you are arguing the case.

[Ms. Backers]: Excuse me. That is what the victim is going to testify to.

[The Court]: She doesn't know what Michelle Michaud was thinking about.

[Ms. Backers]: She knows that the defendant Daveggio said he was leaving it up to Michelle.

[The Court]: Leaving what up? That is an inference.

[Ms. Backers]: That was the conversation she heard.

[The Court]: That is an inference, Ms. Backers. I am putting you on notice that if this continues, I will start making objections while you are doing it. That is argument. What Michelle was thinking is argument. It is an inference that can be drawn from the facts. I will let you argue that, but you are

not going to do it in opening statement. This is an opening statement. This is not closing argument. And you are arguing the case and you know better. And I am trying to get everybody to get this thing started, but I am not a happy camper with the way this is going. So you are on notice that you better start presenting this stuff as an opening statement and not closing argument. (16RT 3622:1-28 to 3623:1-16.)

The trial court's next admonition to the prosecutor came at the point in her opening statement when Ms. Backers talked about Daveggio's Thanksgiving Day assault upon his daughter April. The prosecutor told the jurors that Daveggio and appellant and Daveggio's daughters had spent the Wednesday night before Thanksgiving at the Candlewood Motel. She contrasted that shared experience with that of Vanessa Samson's family on Thanksgiving Eve.

> That same Wednesday night, the night before Thanksgiving in the same town of Pleasanton, a different scene was taking place in the Samson home. Vanessa Samson's family was preparing for their Thanksgiving the next day.
>
> On Thanksgiving morning, Thanksgiving Day, Jamie and April Daveggio were going to celebrate Thanksgiving with their mother and father. So Anette Carpenter [Daveggio's ex-wife] invited James and Michelle to celebrate a family meal with them at her home in Dublin.
>
> When they were in her bedroom, before Thanksgiving dinner, April was standing there with her father. She was 16. And her father was playing with his gun, fondling it in a particular way, which she'll describe for you. And he asked her if she wanted to hold it. He handed it to her and right when he handed her the gun, her mother called her down for dinner. They went down and had Thanksgiving dinner together. (16RT 3677:5-20.)

At that point, defense counsel interrupted and asked to approach the bench. There, counsel said:

> [Mr. Ciraolo]: I can't see the district attorney's face, but from her tone of voice I don't know whether she's crying or not. I don't know if the court can observe it.
>
> [Ms. Backers]: No, I'm not.
>
> [Mr. Ciraolo]: She started breaking up.
>
> [Defense Counsel Mr. Strellis]: If we are going to start contrasting with what happened with Vanessa –
>
> [The Court]: I don't want to do that, Ms. Backers.
>
> [Ms. Backers]: No.
>
> [The Court]: I don't want anything about what's going on in the Samson home.
>
> [Ms. Backers]: I'm talking about what happened in the Daveggio household.
>
> [The Court]: You said something very different was going on in the Samson house and that's inappropriate, so stay away from that kind of stuff.
>
> [Ms. Backers]: Okay. I'm talking about the Dublin household.
>
> [Mr. Ciraolo]: You were breaking up.
>
> [Ms. Backers]: No, not at all.
>
> [Mr. Ciraolo]: Well, I couldn't tell. (16RT 3677:26-28 to 3678:1-18.)[84]

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[84] Appellant discusses below why the court's failure to inquire into the defense claim that the prosecutor was crying during this portion of her opening statement demonstrates that multiple defense objections would have been an exercise in futility.

Later, in her opening statement, the prosecutor told the jury that a carpet taken from appellant's van was found to have four cuts in it, that the district attorney's investigator created a template from the carpet which he then applied to the van floor, and on doing that the investigator learned the four carpets cuts coincided with four seat anchor bolts in the van.[85]

> We took the template and laid it down in the van and then examined where the holes in the carpet would be and what they were in relation to if you looked through the holes. And lo and behold, they matched eyebolts where you could actually put something through there and restrain someone if they were spread eagle [sic] in the van.
>
> So that [sic] what we did, is we took exemplar rope, this is actually blue electrical rope or wire, about two feet each, and we put them through the hole and through the matching bolt, the anchor bolt, to see if they lined up. And they did.
>
> And this is an illustration for you to understand where those slits are, that if there was an interpretation that someone could have put that carpet down, it could only be – it couldn't be to put the seats down, so it could only be to use those anchor bolts for some other purpose and that those slits were now in the carpet. (16RT 3698:23-28 to 3699:1-10.)

The prosecutor next spoke of the rope that was recovered in this case – including on a white towel in the van and in appellant's pants pocket when she was arrested – and about the empty plastic rope bag found

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[85] Appellant challenges the admission of the carpet cuts/restraints evidence in Argument X of this opening brief.

among the items Daveggio and appellant left with his daughter Jamie. (16RT 3699-3700.)

> I asked [district attorney's investigator] Inspector Painter to find out who this manufacturer [as indicated on empty plastic rope bag] was and order up the rope. It happens to be laying here on this board as "L." That is an exemplar rope that we packaged so you could see what originally came in the empty bag we recovered under Jaime's desk, in the defendants' belongings.
>
> When you take the length that comes in a normal package from the manufacturer, they give you extra footage. It is about 48 feet, little bit more. It is supposed to be 45, but they always give you extra. And when you take the length of what you purchase at the store, and you take the length of the rope that was recovered on the white towel in the right, front passenger floorboard, and you take the length of the rope that was recovered in Michaud's front pocket, there is eight feet missing. And that is why when we did the exemplar restraints we used approximately two feet for each of the restraints that were at the four slits. (16RT 3700:17-28 to 3701:1-5.)

Defense counsel objected, pointing out at sidebar that there was no evidence that restraints were ever used in the manner described by the prosecutor. The trial court agreed and admonished the jury to disregard the prosecutor's reference to restraints.

> [Mr. Ciraolo]: I am objecting to the use of restraints. There is no evidence that the van was used for restraints.
>
> [The Court]: Yeah. I was going to say you have to stay away from that until you argue. That is an inference. They are going to argue it is not, and you will argue it is.
>
> [Ms. Backers]: That is fine.

[The Court]: I will tell the jury to disregard the use of restraints. You want me to highlight that?

[Mr. Ciraolo]: Yeah. We are going too far afield

[Whereupon, the following proceedings were held in open court.]

[The Court]: All right. [¶] Ladies and Gentlemen, we are kind of going over the line into an area of argument at this time. So I will instruct you at this time to disregard Ms. Backers' choice of words in using the word "restraints" as relates to those ropes. There is no evidence of that at this point and that is an inference that may be argued later on, but opening statements are not for argument so you will disregard those terms. (16RT 3701:6-28.)

When the prosecutor began to speak of murder victim Vanessa Samson, she began by saying:

Vanessa Samson was the youngest daughter in the Samson family. She has an older brother Vincent and older sister Nicole. At this particular time, they were all living together on Siesta Court. And back in December of 1997 her mother was working days and her father was working graveyard. And Vanessa was 22 years old. She was taking a small break from Ohlone College. She had some classes she was taking, but she took a break and was going to go back to college in January.

And during this time, her old car just went kaput on her and she needed to earn money at her new job to earn the money to get a new car. She also had this job at SCJ Insurance Company where she would walk sometimes to work. It is about a mile away. Or she would get rides from her sister or brother.

The previous summer, 1996, she met a man named Rob Oxonian. (16RT 3703:13-28.)

Defense counsel objected to the "victim impact" aspect of the prosecutor's remarks and specifically pointed to the prosecutor's reference to boyfriend Rob Oxonian. The trial court noted it had earlier ruled that the prosecutor could state that when Vanessa disappeared she was wearing a San Diego State University sweatshirt that her boyfriend had given to her. The court also asked that the remarks be limited: "That is why she is wearing that sweatshirt. We talked about this. [¶] Try not to get into a whole lot. She has a boyfriend who has a sweatshirt." (16RT 3704:13-16.)

The prosecutor continued, as follows:

> So since the summer of 1996, Vanessa was with Rob. He was attending school at San Diego State University. He gave her a sweatshirt. And that sweatshirt said San Diego State University. Actually it said "SDSU" in big, bold red letters and she often wore that sweatshirt.
>
> On December 1st, 1997, I indicated to you that Vanessa's car she no longer had so she was in the process of working to earn that money to get a car. So many times she would walk to work. On this particular day, she walked to work, but she got a ride home from her sister Nicole.
>
> Sometimes when she walked to work she would play her Walkman and listen to her tapes that she would carry with her.
>
> When she got a ride home on Monday, December 1st, from her sister Nicole, she ended up going grocery shopping with her Mom. (16RT 3704:25-28 to 3705:1-11.)

At this point, the trial court interrupted the prosecutor and admonished her: "I don't care what happened December 1st. Go to December 2nd [the day Vanessa disappeared]." (16RT 3705:13-15.)

Later, in describing the autopsy of Vanessa Samson performed by Dr. Rollins, the prosecutor stated:

> Before I show you the findings of the autopsy, I wanted to tell you that the person who did the autopsy was a person by the name of Dr. Curtis Rollins, R-O-L-L-I-N-S. And since he performed the autopsy, which he documented and photographed, and there is an actual business record of the autopsy, since then, he has gotten into some trouble of his own with the law. He has a drug problem and ended up getting charged with some crimes involving his drug addiction.
>
> So what I had done is I had a separate, second, pathologist, completely independent of Dr. Rollins, review his work. I took all of the findings of the autopsy, all of the crime scene photos from Alpine County, all of the pictures from the autopsy, and had an expert, Dr. Brian Peterson review Dr. Rollins's work. And he will tell you – (16RT 3733:18-28 to 3734:1-3.)

After ruling on defense objections to these statements, the court told the prosecutor she had been testifying for the last three minutes of her statement. The court said: "You are kind of testifying, though. I am more concerned that you are sort of giving testimony: I did this, I did that. You are not a witness." (16RT 3736:6-8.) "The last three minutes was your testimony. . . ." (16RT 3736:10-11.)

When the prosecutor resumed her opening statement, she described Dr. Peterson's findings, which concluded with a description of Vanessa Samson's brother's experience at the Pleasanton Police Department:

> So Dr. Peterson will tell you that in his opinion Vanessa was strangled to death, that she was beat on the head

> with a very blunt, hard metal object, and that she was beat on the buttocks with some kind of an object and that she had cuts, scratches, and bruises.
>
> He will also tell you what his findings are, based on the amount of blood that he found in her neck, or that he read about in the report, and that he saw in photographs that you will see later.
>
> When Vincent Samson, on the afternoon of the 4th, was standing at the police department, he looked through the glass counter there at the Pleasanton Police Department and could see that everyone was staring at him. And then it became all too clear when Sergeant Joe Buckovic – (16RT 3741:11-24.)

The court sustained the defense objection to these statements, which were obviously calculated to evoke sympathy for Vanessa Samson and the members of the Samson family, and admonished the prosecutor: "Ms. Backers, that is not appropriate." (16RT 3741:26-27.)

The prosecutor brought an end to her opening statement by playing the videotape record made by the Alpine County Sheriff's Department of the recovery of Vanessa Samson's body. The prosecution described the desolation of the area; the position of the body; the array of personal belongings abandoned along with the body. (16RT 3742:4-19.) Then, the prosecutor said:

> The video will show you the black rope and it will show you both ends of the black rope. It will show you an end of the black rope that is in a twisted curved position. Then the video will take you to the other end of the black rope and you will see the clump of dark hair that is on the end of that black rope right next to Vanessa's body. And it will show you the condition of her socks, her shoes, her open zipper, and the position of her body.

[]

Ladies and Gentlemen, James Daveggio and Michelle Michaud left Vanessa on that snowy embankment. They made sure that she couldn't tell.

Thank you. (16RT 3742:20-28 to 3743:1-5.)

Defense counsel objected. The trial court agreed the prosecutor's remarks were objectionable. (16RT 3743:16-28 to 3744:1-4.) The court thereafter admonished the jury that "everything said in opening statements is not evidence. . . ." (16RT 3744:22-23.)

Later, at the conclusion of the guilt phase of the case, in remarks that prefaced her discussion of the evidence, the prosecutor told the jury in language calculated to appeal to the jury's feelings of prejudice and bias glossed with a rallying call to the avenging troops, that they were present in the courtroom for one reason. The reason described by the prosecutor was not the role assigned the jury by law, i.e., to determine the facts and follow the law as provided by the court. Rather, the prosecutor told the jurors they were there "for Vanessa Samson." The prosecutor elicited sympathy for the victims by characterizing Daveggio and appellant as "predators of the most vile nature," whose actions had "violate[d] the young bodies" of their victims and left their victims' "souls permanently scarred." The prosecutor finished these preliminary remarks by reminding the jurors again that they were there "for Vanessa Samson." The prosecutor said: "So what I ask you to do over the next several days is to remember why we are here. And this is why we are here; it is for Vanessa Samson. This is the murder case of Vanessa Samson."

We are gathered here for one reason, and that is for Vanessa Samson.

We are gathered here because the two people, who sit before you on trial at this counsel table, because they formed the darkest and most predatorial partnership you can have ever imagined, a partnership to prey on the young and vulnerable.

James Anthony Daveggio and Michelle Lyn Michaud are predators of the most vile nature. They formulated a plan to grab girls, to use those girls for their own sick and perverted pleasure. The defendants formulated a plan to lure young girls that trusted them into a web of horrifying dimensions; they would violate the young bodies of these girls and leave their souls permanently scarred. And then, when they longed for a different taste, a different brush, they would snatch innocent young girls off the street and violate them.

With all their victims they would ambush, young women and children, either by deceit, by betrayal of trust, or by overpowering them with sheer brute force.

They had several goals. Their goals were:

To abduct them;

To terrorize them;

To subdue them either by monumental fear or physical brute force;

To inflict their will on these young people;

To physically and emotionally assault the very core of these young people's beings;

To humiliate them;

To degrade them;

To sexually assault them;

To inflict pain on them; and

To take pleasure from the very infliction of pain on them;

To rape them;

To sodomize them;

To shove objects into their young bodies and to force these young girls and women to do vile acts to their captors, and then to threaten to kill them if they ever told a soul, that is, if they decided to let you live.

So what I ask you to do over the next several days is to remember why we are here. And this is why we are here; it is for Vanessa Samson. This is the murder case of Vanessa Samson.

James Daveggio and Michelle Michaud kidnapped, tormented, and murdered Vanessa Samson, and then dumped her body far, far away, at about the 7,000 foot elevation, like a piece of discarded trash.

They snatched this perfectly innocent young girl, they beat her, they gagged her, they sodomized her with two different curling irons, and then they strangled the very life out of her, Then they dumped her down an embankment where if there had been one heavy snowfall we would have never found her. (33RT 7080:3-28 to 7081:1-27.)

The other theme urged by the prosecutor during both opening and close statements concerned the cuts made into the carpet allowing access to the seat eyebolts and the creation and use of restraints using ropes and the eyebolts, although no evidence supported the inference the defendants restrained anyone in that fashion.

And then you have the van and the fact that all the seats are out of the back and they put this carpet down, for which there is no other explanation than to put these four little tiny razor-like one inch slits so they could tie somebody down. There is no other explanation for that piece of carpet.

> You can't put the seats down through it. It came up positive for P30. There's no other explanation.
>
> Then you have ropes. The van is full of ropes. She [appellant] has rope in her pocket. There is rope at the murder scene. There is eight feet of missing rope. If you take eight and divide it by four that makes four two-foot tiedowns. And the slits in the carpet aren't just slits in the carpet, ladies and gentlemen, they match the anchor bolts exactly. You take the slits and look at where those anchor bolts are and they match the four outer most anchor bolts exactly. You slip a piece of rope through there and you can tie *her* wrists and ankles. (33RT 7089:19-28 to 7090:1-6 (emphasis added); see also 33RT 7197:24-28.)

Although, as set forth above, the prosecutor argued that if "[y]ou slip a piece of rope through there[,] you can tie her wrists and ankles," the prosecution notably presented no evidence whatsoever that Vanessa Samson's wrists and ankles had been restrained.

B. THE PROSECUTOR COMMITTED MISCONDUCT BY APPEALING TO THE JURY'S SYMPATHY AND PASSIONS, BY ARGUING THE CASE DURING HER OPENING STATEMENT, AND BY ARGUING FACTS NOT IN EVIDENCE

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses

upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34; 44.)

"It is the duty of every member of the bar to 'maintain the respect due to the courts' and to 'abstain from all offensive personality.' [Citation.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the State. [Citation.] As the United States Supreme Court has explained, the prosecutor represents 'a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' (*Berger v. United States* (1935) 295 U.S. 78, 88.) Prosecutors who engage in . . . intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve. [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 819-820; see also *People v. Hill* (1998) 17 Cal.4th 800, 819-820; *People v. Zurinaga* (2007) 148 Cal. App. 4th 1248, 1258.)

"What is crucial to a claim of prosecutorial misconduct is not the good faith vel non of the prosecutor, but the potential injury to the defendant. (See *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror." (*People v. Benson* (1990) 52 Cal. 3d 754, 793.)

In some of the examples set forth above in which appellant claims the prosecutor engaged in misconduct, defense counsel did not object. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal. 4th 92, 159; *People v. Noguera* (1992) 4 Cal. 4th 599, 638.) In addition, failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal. 4th 1229, 1333, quoting *People v. Price* (1991) 1 Cal. 4th 324, 447.) The absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green* (1980) 27 Cal. 3d 1, 35 fn. 19; *People v. Pitts* (1990) 223 Cal. App. 3d 606, 692; *People v. Lindsey* (1988) 205 Cal. App. 3d 112, 116 fn. 1; see also *People v. Hill* (1998) 17 Cal. 4th 800, 820-821.)

The appellate record in appellant's case is replete with the trial court's repeated efforts to rein in the prosecutor's multiple attempts at arguing the case in opening statement. Despite the warnings and admonitions issued by the trial court, which appellant has set forth above, the prosecutor continued to *argue* the case during her opening statement. This constituted multiple examples of misconduct, as appellant will explain below, and multiple demonstrations as to why any defense objection, viewed in the context of the trial court's inability to restrict the prosecutor's conduct, would have been futile.

In addition to the trial court's demonstrated inability to stop the prosecutor from arguing her opening statement, another indicia that defense objections would have been futile may be found in the trial court's failure to make appropriate inquiry into defense allegations the prosecutor was crying during her opening statement.

Defense counsel's objection that the prosecutor was either crying or breaking up came at a point in time when the prosecutor was commenting upon Thanksgiving Eve events at Vanessa's home and April's home. The trial court admonished the prosecutor about discussing events in the Samson household, but made no effort to inquire into the defense claim that the prosecutor was either crying or breaking up. (See prosecutor's remarks reproduced above and also 16RT 3677:26-28 to 3678:1-18.)

It is the duty of the judge to control all proceedings during the trial and to limit the argument of counsel to relevant and material matters.[86] (§ 1044; see also *People v. Bell* (1989) 49 Cal.3d 502.) Here, defense counsel properly voiced a concern that the prosecutor was making an obvious emotional appeal to the jury's passions and prejudices by either crying or breaking up. The trial court summarily ignored the objection and made no attempt at inquiring as to the prosecutor's conduct. In *People v. Bain* (1971) 5 Cal.3d 839, this Court concluded that a trial court's failure to take control of the situation and reprimand counsel allowed the case to be "conducted at an emotional pitch which is destructive to a fair trial." (*Id.*,

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[86] Penal Code section 1044 states: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

at p. 849.) Here, defense counsel's claim alleged serious misconduct on the prosecutor's part and the court's failure to properly investigate this claim indicated the futility attending multiple defense objections to this experienced prosecutor's determined efforts to appeal to the passions and prejudices of the jury.[87]

Accordingly, appellant's claim should not be barred for want of a timely defense objection.

In addition, given the multiple instances in which the prosecutor *argued* the case during opening statement and given the prejudicial nature of that argument, the curative effect of any admonition is questionable. Consider, for example, the prosecutor's final, blatantly argumentative, words directed to the jury in her opening statement: "Ladies and Gentlemen, James Daveggio and Michelle Michaud left Vanessa on that snowy embankment. They made sure that she couldn't tell." (16RT 3743.)

The prosecutor's comments followed upon a law enforcement videotape depicting Vanessa Samson's abandoned body and belongings on a snowy highway embankment in an area the prosecutor termed "desolate."

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[87] The trial court's failure to make the proper inquiry into defendants' complaint that the prosecutor was either crying or breaking up created a silent record and thus impaired appellant's ability to pursue this claim as a further example of the prosecutor's attempts at improperly influencing the jury. Reviewing courts have found a trial court's failure to inquire into the basis of a defendant's motion for substitution of counsel made pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, results "in a silent record making intelligent appellate review of defendant's charges impossible." (*People v. Cruz* (1978) 83 Cal.App.3d 308, 318; *People v. Hill* (1983) 148 Cal.App.3d 744, 755.) The analogous circumstance is present here.

And, here, as set forth above, the trial court did admonish the jury that statements made in opening statement are not evidence. But the visual impact of the videotape's depiction of Vanessa Samson's body alongside her backpack and lunch bag and other belongings in combination with the prosecutor's argument make it likely the trial court's admonition did very little to mute the emotional impact of the moment upon the jurors who had been repeatedly told they were all gathered there "for Vanessa Samson."

Courts have held that a prosecutor's remarks which inflame the passions and prejudices of the jury constitute the sort of misconduct that is not curable by admonition, thus eliminating the need for defense objection in the first place to preserve the issue for appeal. (See, e.g. *People* v. *McGreen* (1980) 107 Cal. App. 3d 504, 517-518 (overruled on other grounds in *People v. Wolcott* (1983) 34 Cal.3d 92, 101) [prejudice from prosecutor's effort to discredit defense expert not cured by negative answer]; *People* v. *Wagner* (1975) 13 Cal. 3d 612, 621 [neither admonition nor form instruction sufficient to cure prejudicial effect of prosecutor's repeated insinuations regarding defendant's past conduct]; *People* v. *Un Dong* (1895) 106 Cal. 83, 88 [prejudice from prosecutor's examination intended to degrade defendant not cured by negative answers or sustaining of defendant's objections]; *People* v. *Duvernay* (1941) 43 Cal.App.2d 823, 828 [prejudice from prosecutor's argument that defendant fit the characteristics of a habitual narcotics user not cured by admonition].)

In addition, courts have recognized that a trial court has a particular duty to ensure a fair and constitutional trial in cases involving tragic circumstances, much public interest, and a determined prosecution. In *Gall v. Parker* (6th Cir. 2000) 231 F.3d. 265 (overruled on other grounds

in *Matthews v. Simpson* (W.D. Ky. 2008) 603 F. Supp.2d 960, 1038), the Sixth Circuit Court of Appeals observed:

> This is indeed a tragic case. The primary tragedy is that a young girl's life was taken in the most cruel and grisly fashion. It is also evidence that [defendant] was the man who cut her life short. And naturally, the death and [defendant]'s culpability engendered an understandably outraged and angry public as well as a prosecution determined to convict. *In these situations, it is a court's duty to ensure that amid the tragedy, anger and outrage over hideous acts perpetrated, a fair and constitutional trial takes place.* (*Id.*, at p. 277, italics added.)

Appellant has shown above in the reproduced segments of the prosecutor's opening statement that the trial court here did make multiple, albeit unsuccessful, attempts to stop the prosecutor from impermissibly arguing the case during her opening statement. Given the trial court's notice to the prosecutor that she was arguing the case when she should not be and the court's multiple attempts to put a stop to the improper arguing, appellant's claim should not be procedurally barred from being considered in this appeal.

It has long been established that a prosecutor may not appeal to the passions or prejudices of the jury. In *People v. Talle* (1952) 111 Cal.App.2d 650, stated:

> It hardly needs citation of authority that an argument by the prosecution that appeals to the passion or prejudice of the jury, that asks for a guilty verdict because of sympathy for the deceased, that repeatedly characterizes the defendant as a "despicable beast," . . . that engages in fanciful inferences, not warranted by the evidence, and makes them as statements of

> fact not warranted by the record, . . . is erroneous and prejudicial. (*People* v. *Talle*, *supra*, 111 Cal.App.2d at 675.)

Appellant has pointed out the various appeals to the jury's sympathies and passions that were part of the prosecutor's remarks set forth above.

"An appeal for sympathy for the victim is out of place during an objective determination of guilt." (*People v. Stansbury* (1993) 4 Cal. 4th 1017, 1057, reversed on other grounds sub nom. *Stansbury v. California* (1994) 511 U.S. 318; accord, *People v. Arias* (1996) 13 Cal. 4th 92, 160; *People v. Pensinger* (1991) 52 Cal. 3d 1210, 1250; *People v. Fields* (1983) 35 Cal. 3d 329, 362.)" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

The universally recognized rule that appeals to sympathy are a form of misconduct that has been characterized by one authority as the "paradigm" of prosecutorial misconduct. (Lawless, *Prosecutorial Misconduct*, 2d ed. 1985; see also *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 711-713; *United States v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1443.)

In *Drayden v. White*, *supra*, 232 F.3d 704, the prosecutor delivered a soliloquy in the voice of the murder victim as part of his closing argument. The Ninth Circuit found the prosecutor committed several kinds of misconduct. "[T]he Prosecutor inappropriately obscured the fact that his role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim. Furthermore, the prosecutor seriously risked manipulating and misstating the evidence by creating a fictitious character based on the dead victim and by 'testifying' in the voice of the character as if he had been a percipient witness. Finally, by

testifying as [the murder victim], the prosecutor also risked improperly inflaming the passions of the jury through his first-person appeal to its sympathies for the victim who, in the words of the prosecutor, was a gentle man who did nothing to deserve his dismal fate." (*Id.*, at pp. 711-713.)

In *Kipp*, *supra*, during closing argument for the guilt phase, the prosecutor said: "So when you think about the elements of the offense of murder, as you will when you go back to deliberate, and as we, perhaps in somewhat of a legal abstract sense, the element satisfied a human being was killed. [¶] If you would, think for a moment about what it means. A living, breathing human being had all of that taken away." (*Id.*, at p. 1129.) This Court stated: "The prosecutor's argument, inviting the jury to reflect on all that the victim had lost through her death, was an appeal for sympathy for the victim, and therefore it was improper at the guilt phase of this capital trial." (*Id.*, at p. 1130.)

Here, as appellant has shown above, the prosecutor sought from the outset of trial to color the jury's view of appellant by improperly appealing to the passions and prejudices of the jury. The prosecution repeatedly characterized the defendants as vile and depraved sexual predators and made multiple attempts to evoke the jury's sympathy for Vanessa Samson and members of her family.

In addition to the improper appeals to sympathy, passion, and prejudice appellant has pointed out above, the prosecutor also committed misconduct in her remarks during opening statement and closing argument involving the use of rope restraints and access to the van's anchor bolts. "A prosecutor may not go beyond the evidence in his argument to the jury." (*People v. Benson* (1990) 52 Cal.3d 754, 795; *People v. Pinholster* (1992) 1

Cal.4th 865, 948 [reference to matter outside record is practice that is clearly misconduct].)

In *People v. Kirkes* (1952) 39 Cal.2d 719, the prosecutor contended in closing argument that the jury could infer that a witness who saw the murder victim ride away in the defendant's car on the date of the murder but who told no one about what she was seen until after the defendant had been indicted withheld the information because she feared the defendant would harm her. This Court concluded the prosecutor had committed misconduct. "Here, Mrs. Egan's long silence was excused by her asserted fear for her own safety if she testified against Kirkes. There is no evidence whatever upon which to base that statement. To picture Kirkes as a murderer who would kill again to cover his crime and so bold that he had threatened those who might testify against him was entirely unjustified." (*Id.*, at p. 724.)

In appellant's case, as appellant explained in Argument X, the prosecution presented no forensic evidence that Vanessa Samson had been restrained. The prosecution presented no eyewitness evidence that Vanessa had been restrained. The prosecution presented no evidence, forensic or otherwise, that any person had been spread-eagled and restrained in the van with ropes attached to the anchor bolts as the prosecutor argued occurred.

The prosecutor committed misconduct in arguing an inference based on facts not in evidence.

As appellant has explained elsewhere, the United States Supreme Court has recognized that improper speculative inferences have an impact on the reliability of the truth-seeking process in violation of the heightened reliability requirements of the Eighth and Fourteenth

Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1982) 462 U.S. 862, 879.)

C. SIMILAR MISCONDUCT BY THIS PROSECUTOR IN OTHER CAPITAL CASES

In *People v. Hill* (1998) 17 Cal.4th 800, this Court reversed the judgment of conviction in a capital case due to the gross misconduct of prosecuting attorney Rosalie Morton. In finding that the prosecutor's conduct had deprived the defendant of a fair trial, *Hill* took judicial notice of other cases in which Morton had committed misconduct. The Court said:

> In reaching this conclusion, we address an institutional concern as well. Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system. In the vast majority of cases, these men and women perform their difficult jobs with professionalism, adhering to the highest ethical standards of their calling. This case marks an unfortunate exception. We take judicial notice of a 1987 unpublished opinion of the Court of Appeal, Second Appellate District, Division Two, affirming a conviction of Roderick Congious, which not only cites Deputy District Attorney Rosalie Morton for prosecutorial misconduct, but identifies her as the offending prosecutor in two other, published appellate court decisions in which the Court of Appeal found prosecutorial misconduct without identifying the prosecutor. (See *People v. Kelley* [(1977)] 75 Cal. App. 3d 672, 680-682; *People v. Mendoza* (1974) 37 Cal. App. 3d 717, 726-727.) As the opinions in these cases make clear, defendant's is not the first case in which this prosecutor committed misconduct. We are confident the prosecutors of this state need no reminder of the high standard to which they

> are held, and that the rule prohibiting reversals for prosecutorial misconduct absent a miscarriage of justice in no way authorizes or justifies the type of misconduct that occurred in this case. (*People v. Hill* (1998) 17 Cal. 4th 800, 848.)

Similar examples of misconduct involving inappropriate appeals to the emotions and prejudices of the jury by this trial prosecutor attend the trials of other capital cases presently before this Court, *viz.*, *People v.Ropati Seumanu* (S093803) and *People v. Keith Lewis* (S086355).[88] These examples are both illuminative and informative of this experienced trial prosecutor's methodology and her determination to describe factual events in language calculated to appeal to the passions and prejudices of the jury.

In *Seumanu*, the murder victim, a bridegroom, was shot to death on his wedding day. Ms. Backers, again choosing language calculated to appeal to passion and prejudice, sought to have the jury view the events in the context of the forces of good and evil. She said:

> This case is about good and evil. It is about the joyful bliss of the anticipation of your wedding day which is replaced with sheer and unending terror; it is about Nolan, an innocent bridegroom, a son, a brother, who becomes Paki's captive. And the first day of the rest of your life never comes.
>
> It is about a bride's gift to her handsome husband that be-comes a murderer's trophy. It is about a wedding that becomes a funeral, a plea for mercy which is denied with an intense explosion that rips apart your heart.

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[88] Contemporaneously with the filing of this brief, appellant will file a request that this Court take judicial notice of the appellate record in *People v. Seumanu* (S093803) and *People v. Lewis* (S086355).

> The breath of life becomes bloody lungs filled with hot pellets. And you die, scared to death, begging for your life all alone on your wedding day. (Seumanu 17RT 3429.)

In *People v. Lewis*, *supra*, the defendant was convicted of killing a six-year-old girl in a case in which the defense contended that Ms. Backers cried during the trial – during opening statement, during closing guilt and penalty phase argument, and during other portions of the trial. (See Motion to Reduce Penalty to Life without Parole dated January 18, 2000, Lewis 5CT 1151-1156.) Defense counsel in appellant's case, as appellant has noted above, made the identical claim Ms. Backers appeared to be crying at a point in her opening statement.

In *Lewis*, Ms. Backers continued in her attempt to involve the passions and prejudices of the jury during her examination of first responders to the crime scene by eliciting irrelevant evidence concerning the emotional responses experienced by these individuals. Ms. Backers elicited testimony that Sergeant Kevin Traylor was reduced to tears at the crime scene. The trial court took note that Traylor either cried or was "verging on tears" during his testimony. (*Lewis* 25RT 4346-4347.) Ms. Backers elicited testimony from Sergeant Fred Mestas that Traylor lost his composure and broke down at the crime scene. (*Lewis* 26RT 4451.) Ms. Backers elicited Officer Steven Thurston's testimony that the incident was the worst in his career; elicited Officer Chris Del Rosario's testimony that it was a "hard case" for him; elicited Officer Chris Trim's testimony he "freaked out" after he was relieved; elicited Paramedic Sean Parking's testimony and bystander Ray Starnes' testimony that police officers were

crying at the scene. (*Lewis* 26-27RT 3992-3993, 4007-4008, 4468, 4652, 4659, 4665.)

In the context of this documented history of this experienced prosecutor's repeated efforts to appeal to a jury's passions and prejudices, these by now settled and familiar words bear repeating: "'Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. [Citation.]'" (*People v. Haskett* (1982) 30 Cal. 3d 841, 866.) A prosecutor has a duty to prosecute vigorously. "But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) Misconduct need not be intentional in order to constitute reversible error. (*People v. Bolton* (1979) 23 Cal. 3d 208, 214.)

D. PREJUDICE

"Conduct by a prosecutor can so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) But conduct by a prosecutor that does not render a trial fundamentally unfair may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods in an attempt to persuade the trier of fact. (*Ibid.*) [¶] If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *People v.*

Benson (1990) 52 Cal.3d 754, 793.) No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*People v. Benson, supra*, 52 Cal.3d at p. 793.)" (*People v. Woods* (2006) 146 Cal. App. 4th 106, 111.)

Here, appellant has shown above that the prosecutor's attempts to influence her jury began with the prosecutor's opening statements to the jury and were repeated in the closing argument. As the representative samples set forth above show, for example, the prosecutor spoke in language selected to evoke an emotional response rather than a reasoned consideration in the mind of the individual juror. Thus, appellant was not so much a defendant as she was a predator, moreover a vile predator, one who committed vile acts, depraved acts. Daveggio did not insert his fingers into a place; he shoved his fingers into that place. Appellant did not so much seek to sexually assault as she sought to subdue the victim, induce fear in the victim. She did not so much inflict pain as she sought to inflict gratuitous pain. And, despite the absence of any evidence that anyone was shackled to the van by spread-eagled extremities, the prosecution argued this occurred to Vanessa Samson.

In reversing a judgment of conviction, the court in *People v. Pitts* (1974) 223 Cal.App.3d 606, recognized that the strength of the evidence is not dispositive in assessing the injury that flows to the defendant as the result of the prosecutor's misconduct.

> Nor is it an answer to say, as respondent suggests, that this case was "sufficiently strong as to render any misconduct harmless. . . ." Assuming the evidence was sufficient to convict, it did not point unerringly to guilt. Under such circumstances, the type of misconduct involved here could reasonably have tipped the scales. Accordingly, reversal is

> required. (*People v. Kirkes*, *supra*, 39 Cal. 2d at p. 727.) "That the jury was instructed generally to base its verdict exclusively upon the evidence does not prevent the misconduct from being prejudicial and requiring a reversal." (*Ibid.*) (*People v. Pitts*, *supra*, 223 Cal. App. 3d 606.)

Appellant has also demonstrated above that the prosecutor's attempts to appeal to the jury's passions and prejudice were multiple and frequent and invidious. As such, they rendered appellant's trial fundamentally unfair so as to make appellant's conviction a denial of due process. The prosecutor's misconduct was such that it cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) Moreover, under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. (*People v. Frye* (1998) 18 Cal.4th 894, 969; *People v. Parson* (2008) 44 Cal.4th 332, 359.)

Accordingly, appellant respectfully submits that a reversal of the judgment of conviction is warranted.

IX.

THE TRIAL COURT ERRED IN REFUSING TWO DEFENSE REQUESTS RELATING TO THE ADMISSIBILITY OF FINGERPRINT IDENTIFICATION EVIDENCE. THESE RULINGS DEPRIVED APPELLANT OF THE RIGHT TO PRESENT A DEFENSE AND THE RIGHT TO CONFRONT WITNESSES AGAINST HER IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO, AND OF THE GUARANTEE OF GREATER RELIABILITY REQUIRED IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. INTRODUCTION

The trial court erred in refusing two defense requests relating to the admissibility of fingerprint identification evidence, thereby depriving appellant of the right to present a defense and the right to confront witnesses in violation of the Sixth and Fourteenth Amendments to, and of the guarantee of greater reliability in the determination of guilt required in a capital case under the Eighth Amendment to the Constitution of the United States.

In particular, the defense sought to preclude the prosecution expert from testifying that latent fingerprints recovered during the investigation matched exemplars obtained from the defendants. When that request was denied, the defense requested a hearing on this issue pursuant to *People v. Kelly* (1976) 17 Cal.3d 24.[89] That request was also denied.

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[89] Overruled in part on other grounds in *People v. Wilkinson* (2004) 33 Cal.4th 821, 839.

The *Frye* test or general acceptance test is a test that once determined the admissibility of scientific evidence in federal courts.[90] *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 articulated the rule that expert opinion evidence based on a new scientific technique is admissible at trial only if the technique is generally accepted as reliable in the relevant scientific community.

In *People v. Kelly*, *supra*, this Court reaffirmed its allegiance to the rule requiring a preliminary showing of general acceptance of a new technique in the relevant scientific community.[91] (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

The admission of fingerprint identification evidence in trials predated both *Frye* and the adoption of the general acceptance standard in California. Because of this historical circumstance, fingerprint identification evidence has never been subjected to the standard later adopted for the admission of "new" scientific evidence in *Kelly*.

Since the time fingerprint identification evidence was routinely admitted into trials, however, substantial research within the

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[90] *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 establishes the now prevailing federal standard in accordance with the Federal Rules of Evidence.

[91] Although the rule of the general acceptance standard has been traditionally referred to as the "*Kelly/Frye*" rule, the adoption of this standard in California actually predated the decision in *Kelly*. (See *Huntingdon v. Crowley* (1966) 64 Cal.2d 647, 653.) In addition, because *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 abandoned *Frye* as the federal standard, appellant uses the more accurate label "*Kelly*" in this brief rather than the more familiar label, "*Kelly/Frye*," to describe the "general acceptance" standard for the admission of scientific evidence in California.

relevant forensic community has cast doubts on the reliability of the theory and techniques underlying fingerprint identification evidence, including the very issue of whether a "match" should be declared. Defense counsel attempted to bring these concerns to the trial court's attention, but, as appellant describes in the following section, was unsuccessful in doing so. It is appellant's contention here that because the acceptability of fingerprint identification evidence within the relevant forensic community is in question, *Kelly* requires that courts re-evaluate the admissibility of the evidence. Here, the trial court committed error when it summarily rebuffed counsel's attempts to notify it that the reliability of fingerprint identification evidence was being questioned within the forensic community.

Kelly, as will be seen, expressly requires the re-evaluation appellant contends her trial court should have performed. With a good deal of prescience, this Court, in *Kelly*, anticipated that the views of the scientific community might change over time and that certain scientific theories and/or techniques once widely accepted would be questioned, abandoned, or come to be viewed with disfavor. Thus, although *Kelly* held on the one hand that the admission of a new scientific technique need not be relitigated once it has been found acceptable in a published opinion, it also expressly stated that the admission of such evidence as an accepted scientific technique would continue only until such time new evidence showed a change in the view of the relevant scientific community.

> Moreover, once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, *at least until new evidence is presented reflecting a change in*

the attitude of the scientific community. (*People v. Kelly*, *supra*, 17 Cal.3d at p.32, italics added.)

Here, there was, as appellant will explain below, sufficient reason to question the continued validity and acceptability of fingerprint identification evidence under *Kelly*.

In light of this circumstance, the trial court abused its discretion in denying appellant's requests for a *Kelly* hearing on the admissibility of fingerprint identification evidence and to preclude the prosecution's expert witnesses from testifying that appellant's fingerprints matched latent prints recovered during the investigation and to prevent the prosecutor from commenting that appellant's prints matched the prints found. Appellant's contention, in brief, is that the trial court erred in refusing the defense request for a *Kelly* hearing because there was sufficient reason to question the reliability of the fingerprint identification evidence to warrant a *Kelly* hearing; it is not that the fingerprint evidence was necessarily inadmissible.

As part of her right to present a defense guaranteed under the right to due process of law and her right to confront witnesses, appellant should have been allowed to question the basis of this evidence in the forum of a *Kelly* hearing.

B. THE MOTIONS AT TRIAL; THE EVIDENCE INTRODUCED; AND THE ARGUMENTS OF THE PROSECUTOR

Prior to trial, the defense moved to preclude the prosecution from presenting expert witnesses who would testify that the defendants'

fingerprints matched latent prints recovered during the investigation into Vanessa Samson's murder.

The record shows that counsel for Daveggio presented the court with a newspaper article about a federal district court judge who had concluded that fingerprint identification evidence did not pass "*Kelly/Frye* muster." That particular court (Fourth Circuit) allowed the expert witness to testify to points of similarity between the prints being compared, but did not allow the expert to testify that the prints resulted in an identification match. (15RT 3513.) Defense counsel further advised the trial court that the admissibility of fingerprint identification evidence was also a topic of controversy in the local federal courts. (15RT 3513.)

The defense objected "to any expert introduced here making a conclusionary statement on the fingerprints in that there's no scientific evidence to support such a conclusion." (15RT 3513:21-23.) The defense also moved to preclude the prosecutor from stating there was a fingerprint match on the same ground. (15RT 3513.) Counsel for appellant joined in the motion. (15RT 3514.)

The trial court responded that it "was bad enough" that it was "saddled with the Ninth Circuit sometimes," and stated it was "not going to stretch it out to the Fourth Circuit." The court explained: "That's part of the problem with the federal circuits, they wander where no man had good cause." (15RT 3513:27-28 – 3514:1-4.) The trial court judge concluded that: "In this court[,] fingerprint evidence is still good." (15RT 3514:5-6.)

The defense then asked for *Daubert* or *Kelly/Frye* hearings. The court responded: "We are not doing any *Kelly/Frye* hearings because

back east some judge decides he wants to write new law. That's not happening." (15RT 3514:10-12.)

Defense counsel then asked if he would be allowed to examine the fingerprint experts regarding a Federal Bureau of Investigation (FBI) study in which the FBI asked different examiners to analyze the same sampling of exemplars and the returns showed no unanimity of result. The defense further asked to examine the prosecution experts on whether he or she participated in that FBI study. The trial court stated it would hold a hearing pursuant to Evidence Code section 402, but if the experts were not aware of that study, the defense would be precluded from asking about it. The court cautioned counsel that it would not hold a *Kelly/Frye* hearing in the guise of an Evidence Code section 402 hearing. (15RT 3514-3515.)

Thereafter, at trial, prosecution fingerprint experts testified that prints matching those of appellant, Daveggio, and Vanessa Samson were found on a cup from an AM/PM market that was recovered from the green van. (28RT 6152- 6154.) The fingerprint expert also testified that appellant's prints were found on the duct tape wrapping the curling iron and on the curling iron as "reversed" prints, i.e., prints that were transferred from the sticky side of the duct tape to the curling iron itself. (28RT 6135-6142, 6145-6146.) The expert also testified that appellant's prints matched those found on a number of other cans and bottles recovered from the green van. (28RT 6148-6149.)

In her closing argument, the prosecutor told the jurors that a total of 28 positive identifications of Daveggio or appellant or Samson were made in this case from latent fingerprints recovered from the van and the motel room from which appellant was taken into custody. The prosecutor

further argued that the most important of these was the evidence that appellant's, Daveggio's, and Vanessa Samson's fingerprints were all found on the AM/PM cup recovered from the van. (33RT 7087-7088.)

C. THE HISTORICAL BASIS FOR, AND RECENT DEVELOPMENTS IN, THE ADMISSION OF FINGERPRINT IDENTIFICATION EVIDENCE

Fingerprint identification evidence first appears to have been admitted under prior lax standards of admissibility that failed to properly assess the reliability and validity of the science underlying the proffered "scientific evidence." Thereafter, fingerprint identification evidence developed a "pedigree" that has allowed it to evade judicial scrutiny.

The first case to admit fingerprint identification evidence appears to have been *People v. Jennings* (Ill. 1911) 96 N.E. 1077. In that case, the Illinois Supreme Court wrote that "[e]xpert testimony is admissible when the subject-matter of the inquiry is of such a character that only persons of skill and experience in it are capable of forming a correct judgment as to any facts connected therewith." (*Id.*, at p. 1082.) Although *Jennings* characterized fingerprint identification as a science, the court admitted the fingerprint evidence for reasons other than the scientific studies supporting the theories being asserted.

The next two states to admit fingerprint identification evidence, New Jersey and New York, did so on grounds that the evidence should be admitted and the jury tasked with determining its appropriate weight. (*State v. Cerciello* (N.J. 1914) 90 A. 1112, 1114); *People v. Roach* (N.Y. 1915) 109 N.E. 618.) *Roach* did not inquire into the frequency of error associated with fingerprint identification evidence, but nonetheless

stated, "[t]he fact that error may sometimes result in effecting identification by this means affords no reason for the exclusion of such evidence." (*Ibid.*)

Thereafter, other states, relying primarily on *Jennings*, *Roach*, and *Cerciello*, began to admit fingerprint evidence. (Epstein, Robert, Fingerprints Meet *Daubert*: *The Myth of Fingerprint "Science" Is Revealed* (2002) 75 S.Cal.L.Rev. 605, 615-616, hereinafter "Epstein.")

What is noteworthy about these events is that *Frye* was decided in 1923, some 12 years after fingerprint evidence was ruled to be admissible evidence in trials, and *Kelly* was decided in 1976, over half a century after fingerprint evidence was routinely admitted into evidence. The anomalous result of this historical circumstance is that fingerprint identification evidence is now routinely admitted despite the fact that the "science" underlying it has never been tested for admissibility under the standards the courts subsequently determined was appropriate for scientific evidence.

In recent years, in light of questions concerning the reliability and validity of fingerprint identification theory and techniques, which appellant sets forth below, some courts have begun to either question fingerprint identification evidence or re-evaluate the basis of its admissibility.

In *United States v. Llera Plaza* (E.D. Pa. 2002), 188 F. Supp. 2d 549, for example, the trial court reconsidered and modified its ruling excluding fingerprint identification evidence. The trial court had originally excluded fingerprint identification evidence on the ground that the expert could not express the opinion that *a particular latent print was the print of a particular person.* The trial court then reversed its earlier ruling, but not

by holding that fingerprint identification evidence had scientific reliability. Rather, the court explained it had changed its view of the proffered evidence. The court's revised view was that fingerprint analysis was not a science but a technical discipline. (*Id.*, at p. 562.) The court thereafter admitted the evidence under the standard set for expert evidence concerning technical or specialized knowledge in *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, 141. That case governs the admission of testimony of engineers and other experts *who are not scientists.*[92]

The irony, and ultimately the fallacy, in the reasoning embraced by *Llera Plaza* is that law enforcement and, by extension, the prosecution have claimed from the beginning that latent fingerprint identification is a science. Indeed, fingerprint technology was presented as a science in the first fingerprint case. (See *People v. Jennings*, *supra*, 96 N.E. at p. 1083.) Latent fingerprint identification is still claimed to be a science today. The FBI's standard text in this area, for example, is entitled, *The Science of Fingerprints*. (Fed. Bureau of Investigation, U.S. Dept. of Justice, *The Science of Fingerprints* (rev. ed. 1998).)

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[92] The U.S. Supreme Court held in *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137 that the federal trial judge's gatekeeping obligation under the Federal Rules of Evidence – to insure that expert witness' testimony rests on a reliable foundation and is relevant to the task at hand – applied not only to expert scientific testimony, but to all expert testimony, including "technical" and "other specialized" knowledge. (*Id.*, at p. 147.) In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the U.S. Supreme Court articulated the standard under which scientific expert testimony was admissible and there assigned to the trial judge the task of insuring that an expert's testimony rested on a reliable foundation and was relevant to the task at hand. Appellant summarizes the *Daubert* standard in the footnote that follows.

As noted, courts have continued to admit fingerprint identification evidence without testing its reliability and validity under the standards articulated in *Kelly* or *Frye* or *Daubert*.

In *United States v. Crisp* (4th Cir. 2003) 324 F.3d 261, for example, the court rejected a challenge to fingerprint identification evidence on the ground the evidence had not been established as admissible under the new federal standard set forth in *Daubert*.[93]

The dissent in *Crisp* pointed out that the majority had concluded that fingerprint identification evidence is reliable based upon its long history of acceptance by the judicial system. In fact, however, fingerprint identification evidence had never been subjected to judicial

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[93] Appellant synopsizes the *Daubert* standard in this footnote and discusses *Daubert* in the context of appellant's claim in the text below. *Daubert* stated: "In determining whether a theory or technique is scientific knowledge that will assist the trier of fact, so as to be the basis of admissible evidence under Rule 702 of the Federal Rules of Evidence, (1) a key question to be answered is, ordinarily, whether the theory or technique can be and has been tested; (2) a pertinent consideration is whether the theory of technique has been subjected to peer review and publication, although the fact of publication, or lack thereof, in a peer-reviewed journal is not a dispositive consideration; (3) the court should ordinarily consider the known or potential rate of error of a particular scientific technique; (4) the assessment of reliability permits, but does not require, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance of the theory or technique within that community, as (a) widespread acceptance can be an important factor in ruling particular evidence admissible and (b) a known technique that has been able to attract only minimal support within the scientific community may properly be viewed with skepticism; and (5) the inquiry is a flexible one, and the focus must be solely on principles and methodology, not on the conclusions that such principles and methodology generate.

scrutiny for relevance and reliability under either the standard of *Frye* or "the more careful scrutiny" of *Daubert.* (*Id.*, at p. 272.) The dissent further noted that nothing in *Daubert* suggested that evidence previously found to be admissible under *Frye* should be "grandfathered in" so as to avoid "the more exacting analysis now required." (*Ibid.*; see also *United States v. Saelee* (D. Alaska 2001) 162 F.Supp.2d 1097, 1105, "[T]he fact that [expert] evidence has been generally accepted in the past by courts does not mean that it should be generally accepted now, after *Daubert* and *Kumho.*").

Crisp's dissent made the same observations appellant sets forth here – that fingerprint identification evidence appears to have been first admitted with minimal judicial scrutiny of the scientific standards and techniques employed, and that later admissions were made because the earlier admissions had established legal precedent for admission. The courts do not appear to have admitted fingerprint identification evidence because the evidence had been proven to be reliable and without controversy within the relevant scientific community. (*U.S. v. Crisp*, *supra*, 324 F.3d at p. 277.)

Crisp's dissent observed that there were reasons to question the underlying scientific validity of the technique. The dissent noted that a number of aspects of fingerprint identification evidence failed to meet *Daubert*'s standard of acceptance, including but not limited to: (1) the lack of studies establishing the likelihood that a partial print taken from a crime scene will match only one set of fingerprints in the world; (2) the possible lack of peer review and publication; (3) the fact that the error rate is not

known; (4) the lack of objective, universal standards governing the field; (5) the lack of safety checks. (*Id.*, at pp. 274-276.)

In sum, fingerprint identification evidence was first admitted when the prevailing standards for the admission of scientific evidence were low or non-existent. Although more restrictive standards for the admission of scientific and technological expert evidence have since been adopted and now govern admissibility in our courtrooms, these newer standards have never been applied to fingerprint identification evidence, which, as the dissent in *Crisp* noted, has been routinely "grandfathered" in from the days of *Frye* to the era of *Daubert*. However, this Court has been willing to take another look for *Kelly* purposes at some forensic practices.

In *People v. Leahy* (1994) 8 Cal.4th 587, our Supreme Court considered the question of whether the results of a horizontal gaze nystagmus (HGN) field sobriety test, which had been used by law enforcement agencies for years, were admissible in the absence of a *Kelly* foundational showing. The Court concluded that given the recent history of legal challenges to the admissibility of HGN test evidence, "it seems appropriate that we deem the technique 'new' or 'novel' for purposes of *Kelly*." (*Id.*, at p. 606.) In reaching this decision, the Court dismissed the People's contention that the HGN test had been used by law enforcement for 30 years. "In determining whether a scientific technique is 'new' for *Kelly* purposes, long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians." (*Id.*, at p. 605.)

In language of particular relevance to the present discussion on fingerprint identification evidence, *Leahy* stated: "To hold that a

scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom seems unjustified. (*Id.*, at p. 606.) *Leahy* thereafter concluded that HGN tests involve a "new scientific technique" that is required to meet *Kelly*'s general acceptance test. (*Id.*, at p. 607.)

Thus, *Leahy* establishes that fingerprint identification techniques are not immunized from *Kelly* scrutiny on the basis of their history. Appellant has shown above that fingerprint identification evidence was first allowed in at a time when, in the words of the FBI/USDOJ[94] solicitation to various agencies regarding the validation of examination techniques, "society was less demanding of proof and more trusting of authority." (http://www.forensic-evidence.com/site/ID/ID_fpValidation.html, "Validating Friction Ridge Examination Techniques Proposal Study.") Appellant has further shown that significant concerns exist concerning the validity and reliability of fingerprint identification evidence.

In *People v. Stoll* (1989) 49 Cal.3d 1136, this Court observed that the purpose of the *Kelly* doctrine was to protect the jury from techniques which convey a misleading aura of certainty. (*Id.*, at pp. 1155-1156.) Appellant respectfully submits that the validity and reliability concerns associated with fingerprint identification evidence set forth above provide sufficient notice that the routine admission of fingerprint identification evidence to prove substantive guilt is wrong.

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[94] Federal Bureau of Investigation/United States Department of Justice.

D. THE THEORY UNDERLYING THE ADMISSIBILITY OF FINGERPRINT IDENTIFICATION EVIDENCE AND THE DEVELOPING RECOGNITION THAT THE VALIDITY AND RELIABILITY OF FINGERPRINT IDENTIFICATION EVIDENCE ARE IN QUESTION

All forensic identification sciences and techniques involve two steps: Comparison of a questioned item to a known exemplar and evaluation of whether the comparison resulted in a match. Both steps are fraught with potential problems. Where fingerprint analysis is concerned, the risks associated with both making the comparison and assessing the results of the comparison have not been properly evaluated. (Saks, Michael J. & Koehler, Jonathan J., *The Individualization Fallacy in Forensic Science Evidence*, (2008) 61 Vanderbilt L.Rev. 199, 199-200 (hereinafter "Saks & Koehler").)

Even the premises governing fingerprint identification analysis are in question. Two fundamental premises underlie fingerprint identification: 1) the premise that two or more people cannot possibly share the same basic fingerprint pattern; and 2) the premise that examiners can reliably assert absolute identification from small fragments of latent prints. Neither of these fundamental premises has ever been tested. (Mears, Michael & Day, Terese M., *The Challenge of Fingerprint Comparison Opinions in the Defense of a Criminally Charged Client*, 19 Ga. St. U. L. R. 705, 714 (hereinafter "Mears & Day").)

The average fingerprint contains between 75 and 175 ridge characteristics. The ability to identify and compare these characteristics underlies the technique of fingerprint comparison and analysis. However, fingerprint experts have not agreed upon a single standard concerning either

the actual number of characteristics that exist or even upon the nomenclature assigned to the different characteristics. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p. 714.)

Thus, although the theory underlying the process of fingerprint identification analysis is that a fingerprint examiner can detect and compare patterns in a questioned print and a known exemplar, examiners in fact differ both in their ability to perceive pattern similarities and in their thresholds for declaring matches. (Saks & Koehler, *supra*, 61 Vanderbilt L.Rev. at p. 210.) The reality is that the standards for determination of a match between fingerprints have been described as "ill-defined, flexible, and explicitly subjective." (Stoney, David A., "Measurement of Fingerprint Individuality," in Henry C. Lee & Robert E. Gaensslen, eds., *Advances in Fingerprint Technology* (2d ed. 2001), pp. 327, 329

A fingerprint identification is made when an examiner finds that a certain number of common ridge characteristics exist between the questioned and known prints. However, there is no established standard and no agreement among experts and examiners as to the number or precise nature of the characteristics required to be found before a match is declared. Some examiners, including those at the FBI, believe there should be *no* minimum number of required common characteristics. Instead, this group views the declaration of a match to be entirely within the subjective judgment of the examiner. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p.713, citing FBI, U.S. Dept. of Justice, Law Enforcement Bulletin: An Analysis of Standards in Fingerprint Identification 1 (June 1972) (hereinafter "FBI, Fingerprint Identification").)

Nor have the experts and examiners working outside of the FBI agreed on the number of common traits that must be found before a match can be declared. Some of these analysts contend that as few as four traits are required while others argue 36 common traits are necessary to the declaration of a match. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p. 714.)

An agreed-upon standard establishing the number of common traits necessary for the declaration of a match is critical because different individuals have been known to share as many as ten traits in common. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p. 714.)

Additional concern about the integrity of the fingerprint identification process arises because most comparisons are made with partial prints. The average latent print is only one-fifth of the full finger. Thus, even if fingerprints were truly unique, the examiner is generally attempting to make a comparison with a partial, possibly distorted, print. (Epstein, *supra*, 75 S.Cal.L.Rev. at p. 607 fn. 11, 611.) Partial prints raise the likelihood that a full-finger print might have revealed other non-matching traits. Because there is no research establishing that any particular portion of fingerprints are unique, fingerprint identification evidence based on partial prints are inherently problematic.

Other concerns about the fingerprint analysis process arise because there are often distortions in the questioned latent print brought about by variables ranging from the amount of pressure applied in leaving the print impression on a surface; the shape of the surface on which the impression is left; and the presence of foreign matter on the surface. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p. 714.)

Moreover, it appears that when experts are given "contextual information" about the case, their opinion as to whether there is a match is often altered. (Saks & Koehler, *supra*, 61 Vanderbilt L.Rev. at p. 210, citing Itiel E. Dror et al., *Contextual Information Renders Experts Vulnerable to Making Erroneous Identifications* (2006) 156 Forensic Sci. Int'l 74, 76.)

Evidence was presented in a *Daubert* hearing held in *United States v. Mitchell* (3rd. Cir. 2004) 365 F.3d 215, 223-227, that the government conducted a test in which it sent two latent prints along with a print card from the defendant to various agencies in all fifty states, the Royal Canadian Mounted Police, and Scotland Yard. The test asked the respective agencies to have court-qualified experts examine the prints to see if a match could be made. (*Id.*, at p. 224.) Three-quarters of the responding agencies matched the questioned and known prints consistently with the FBI's identification; one-quarter of the agencies failed to make the match with the FBI's identification. (*Ibid.*)

Although no "false positives" (i.e., a positive match that contradicted the FBI result) were produced in the test in *Mitchell* (*ibid.*), there have been incidents of false positives in other cases. (See section E, *infra*.)

Another anomaly attends the manner in which fingerprint identification matches are stated. Fingerprint analysis is premised on the theory that each person's fingerprints are unique. There are, however, no scientific studies establishing that fingerprints from different individuals have ridge characteristics that vary at certain probability rates. Because there are no probability studies, the rules of one of the main professional

associations, the International Association for Identification, prevent latent print examiners from expressing an opinion regarding a match in terms involving the use of probabilities. The irony of the circumstance is that examiners instead describe the reliability of their fingerprint identification matches as an "absolute certainty." (David L. Grieve, *Possession of Truth* (1996) 46 J. Forensic Identification 521, 527-528.) Given the lack of scientific studies establishing that individual fingerprints are in fact unique, fingerprint identification evidence should be stated in terms of probabilities instead of in the inherently misleading assertion the match is made with absolute certainty.

Moreover, in addition to reliability and validity concerns related to the theories and standards associated with the fingerprint identification process, studies also indicate that the prevailing technical standards appear to be so lax that examiners analyzing the same samples often reach different conclusions regarding comparisons. In a British study, 130 expert participants examined and compared the same fingerprints and produced a variety of responses that confirmed the subjective nature of fingerprint analysis. The number of points of comparison the examiners identified ranged between 10 and 40 for one pair of prints and between 14 and 56 for another pair. In an analysis of one particular pair, 44 percent of the examiners reached the conclusion that an identification could be made, while 56 percent concluded an identification could not be made. (Epstein, *supra*, 75 S.Cal.L.Rev. at p. 622.)

In another quality control study, only 58 percent of the participants correctly identified all of the latent prints and 14 different

participants made 21 erroneous identifications. (Mears & Day, 19 Ga. St. U. L. R., *supra*, at p. 734.)

Efforts to establish standards to address these recognized deficiencies in fingerprint analysis and theory have been unsuccessful to date. In 2002, the USDOJ solicited proposals for validating friction ridge (fingerprint, palm prints, footprints) examination techniques, explaining:

> The uniqueness of friction ridge patterns, be they fingerprints, palmprints, or bare footprints, has long been accepted by the scientific community and by the courts. The reason for this widespread acceptance perhaps lies in the fact that fingerprints were first introduced at a time in our history when society was less demanding of proof and more trusting of authority. (http://www.forensic-evidence.com/site/ID/ID_fpValidation.html, "Validating Friction Ridge Examination Techniques Proposal Study.")

The solicitation was developed by latent print examiners brought together by the FBI for the purpose of developing guidelines to improve the quality of examiners nationwide. The group determined there was a need for research "to determine the scientific validity of *individuality in friction ridge* examination based on measurement of features, quantification, and statistical analysis, [and] [p]rocedures for comparing friction ridge impressions that are standardized and validated." (*Ibid.*) In essence, the FBI and the USDOJ were attempting to solicit factual support to validate the very premises that the courts have relied upon in admitting fingerprint identification evidence for the last century, namely, that fingerprint examiners are able to detect and compare describable ridge

patterns from which they are able to conclude that the patterns provide proof of the individuality of the fingerprint.

Other concerns pertaining to scientific validity and reliability also haunt fingerprint procedures. Latent fingerprint identifications, for example, appear to be limited in their use to forensic applications. Consequently, the fingerprint identification process has been "under the control of the police community rather than the scientific community" and latent prints are used by law enforcement solely as a "tool for solving crime." (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p. 715.) Because of this circumstance, evaluation of the scientific or technical aspects of the process of fingerprint identification by an independent scientific community is non-existent. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at p. 715.)

While fingerprint identification evidence has been routinely admitted into our courts as substantive evidence of guilt, the same has not been true of other investigative tools. For example, polygraphs and hypnosis are used in medicine, in physiological research, and by law enforcement, but are not given evidentiary value within the courtroom. (Mears & Day, *supra*, 19 Ga. St. U. L. R. at pp. 719-270; see also *United States v. Scheffer* (1998) 523 U.S. 303, 312 fn. 8 (distinguishing between reliability of polygraph testing when used as tool in criminal and intelligence investigations, and as evidence at trials).)

Another example may be found in results that a crime scene DNA has been matched to DNA profiles stored in a database. Because the database search merely provides law enforcement with an investigative tool and not evidence of guilt, evidence that the defendant's DNA was found in

the database is not admissible to prove guilt. There is no authority applying *Kelly*'s requirements to a mere investigative technique. (*People v. Johnson* (2006) 139 Cal.App.4th 1135, 1150.)

Relying on the same rationale, drug courier profile evidence has been rejected as substantive proof of guilt because such evidence is "nothing more than the introduction of the investigative techniques of law enforcement officers," and not evidence of guilt per se. Accordingly, drug courier profile evidence is viewed as nothing more than the opinion of the investigating officers. (*United States v. Hernandez-Cuartas* (11th Cir. 1983) 717 F.2d 552, 555; *People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006.)

Recently, the National Judicial College (NJC) reported the results of a study concerning the state of forensic science in the United States in the *NJC News*. The study had been conducted by a committee of the National Academies of Science (NAS) at the request of Congress. (NJC News, "NAS Calls for 'Overhauling' a 'Badly Fragmented' Forensic Science System," Hon. Stephanie Domitrovich & Michael J. Saks, April 10, 2009, http://www.judges.org/news/news041009.html.)

The NAS committee called for an "overhaul" of the forensic sciences in general. "The committee cautioned judges about assuming the reliability of certain forensic science methodologies before these techniques have been properly studied and accurately verified by scientific research." (*Ibid.*) The committee found that a substantial variation and a lack of standardized principles and procedures exist among different agencies and jurisdictions. (*Ibid.*)

Of significance where appellant's present claim is concerned is the following observation: "The committee found some areas of forensic science (particularly those concerned with identification of the source of handwriting, *fingerprints*, bitemarks, toolmarks, etc.) 'have yet to establish either the validity of their approach or the accuracy of their conclusions. . . .' " (*Ibid.*; italics added.) The NAS committee recommended that standard terminology for both reporting on and testifying about results be established "so that triers of fact may better understand the scientific evidence offered." (*Ibid.*)

E. A SAMPLING OF FALSE POSITIVES – INCORRECT IDENTIFICATIONS RESULTING FROM FLAWS IN FINGERPRINT IDENTIFICATION TECHNIQUES

Flaws in fingerprint identification techniques have resulted in incorrect identifications, some of which resulted in convictions. A sampling follows:

Perhaps the most prominent recent case of fingerprint mis-identification involved a person suspected of being a participant in the Madrid subway bombings in 2004. In that case, Oregon lawyer Brandon Mayfield was held in custody for two weeks after FBI investigators and an independent examiner both matched latent prints found at the crime scene to Mayfield. Print examiners from the Spanish National Police, on the other hand, concluded the prints were not Mayfield's. Eventually, another man was matched to the prints and Mayfield was released. (*LiveScience* (Sept. 13, 2005), "The Real Crime: 1,000 Errors in Fingerprint Matching Every Year.")[95]

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[95]http://www.livescience.com/strangenews/050913_fingerprint_mist

A defendant in Minnesota was convicted of murder after a positive fingerprint match was independently declared by two print examiners. The fingerprint identification evidence, which constituted the only significant evidence of guilt presented at trial, was subsequently discredited as a misidentification, resulting in a reversal of the conviction. (*State v. Caldwell* (Minn. 1982) 322 N.W.2d 574, 587.)

A defendant in another case was eventually vindicated after being convicted in a trial where the experts identified sixteen points of similarity and Scotland Yard examiners had triple-checked the prints. (Stephen Gray, *Yard in Fingerprint Blunder*, London Times, Apr. 6, 1997, at p. 6, cited in Mears & Day, 19 Ga. St. U. L. R. at p. 732.)

F. A *KELLY* HEARING IS THE NECESSARY FIRST STEP IN A REEVALUATION OF THE VALIDITY AND RELIABILITY OF FINGERPRINT IDENTIFICATION EVIDENCE

Appellant has shown that significant concerns have been articulated within the relevant forensic community regarding the validity and reliability of fingerprint identification evidence. Here, defense counsel attempted to bring these concerns to the trial court's attention through a news article about a case in which fingerprint identification evidence was determined not to satisfy *Kelly* requirements. The trial court chose not to hear counsel on the merits of the objection, but instead summarily

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akes.html; see also http://www.fbi.gov/pressrel/pressrel04/mayfield052404.htm

dismissed the objection as having its origin in a case from a foreign jurisdiction. In so ruling, the trial court prejudicially erred.

In *People v. Kelly*, *supra*, this Court considered the admissibility of voiceprint evidence produced by a technique used to identify voices by spectrographic analysis. As part of its analysis, *Kelly* observed that a general principle of admissibility of expert testimony based on new scientific techniques involved establishing the reliability of the method employed. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.) The *Kelly* court next considered the appropriate test for determining the reliability of a new scientific technique and adopted the "general acceptance" test set forth in *Frye*, *supra*, 293 F. 1013.

Although *Kelly*'s formulation was constructed to test the reliability of new scientific techniques, nothing in either its test or its rationale *limits* its application to new scientific techniques. There appear to be no cases holding as part of the *ratio decidendi* of the case that *Kelly* is limited to new scientific techniques. Indeed, *Kelly*, as earlier noted, foresaw the need for a re-evaluation of the admissibility of evidence in light of new scientific developments:

> Moreover, once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, *at least until new evidence is presented reflecting a change in the attitude of the scientific community.* (*People v. Kelly*, *supra*, 17 Cal.3d at p.32, italics added.)

Appellant has discussed above the case of *People v. Leahy*, *supra*, which involved a challenge to the scientific foundation for the HGN field sobriety test. In *Leahy*, this Court noted that *Kelly* applies to "new" scientific techniques, but nonetheless applied its test to a well-used technique. (*Id.*, at p. 605; see also *People v. Webb* (1993) 6 Cal.4th 494 524.) At the time of the challenge, HGN had in fact been used by law enforcement agencies for 30 years. *Leahy* reasoned that "long-standing use by police officers seems less significant a factor than repeated use, study, testing and confirmation by scientists or trained technicians." (*People v. Leahy*, *supra*, 8 Cal.4th at p. 605.) *Leahy* then interpreted *Kelly*'s use of "new" and "novel" as terms of art: "Given the recent history of legal challenges to the admissibility of HGN test evidence in this and other states, it seems appropriate that we deem the technique 'new' or 'novel' for purposes of *Kelly*." (*Id.*, at p. 606.)

At trial below, appellant attempted a legal challenge to the admissibility of fingerprint identification evidence on grounds analogous to those in *Leahy*. A *Kelly* hearing is the necessary first step in a much-needed reevaluation of the validity and reliability of fingerprint identification evidence. A *Kelly* hearing provides the judicial system with a rational means of evaluating claims that newly derived scientific knowledge casts doubt upon the reliability and validity of heretofore routinely admitted scientific test results as evidence of substantive guilt.

Appellant has explained above that fingerprint identification evidence was routinely admitted as substantive evidence of guilt prior to this Court's decision in *Kelly* and that, since *Kelly*, it has continued to be routinely admitted as proof of guilt despite a developing body of scientific

indicators that fingerprint identification evidence may not be as scientifically reliable or valid as once thought.

Appellant has also shown that this Court recognized in *Kelly* that while a published appellate decision confirming that a particular scientific technique has been generally accepted within the relevant scientific community confers precedential value upon that scientific technique, that precedential value exists only until "new evidence is presented reflecting a change in the attitude of the scientific community." (*People v. Kelly*, *supra*, 17 Cal.3d at p. 32.) Appellant has also shown that in *People v. Leahy*, *supra*, this Court acted consistently with that view when it "deemed" the HGN field sobriety test "new" or "novel" for purposes of *Kelly* and explained, "To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom, seems unjustified." (*People v. Leahy*, *supra*, 8 Cal.4th at p. 606.)

In view of this showing, appellant asserts that the trial court erred in refusing appellant's request for a *Kelly* hearing on the fingerprint identification evidence the prosecution intended to present as substantive evidence of her guilt. Such a hearing is the necessary first step in reevaluating the reliability and validity of fingerprint identification evidence.

Significantly, other courts, albeit in the federal context, have, as this Court did in *Leahy*, begun to reevaluate the validity and reliability of other scientific techniques routinely used in forensic identification with the result that limits have been placed upon the use of some forensic techniques.

For example, in *United States v. Starzecpyzel* (S.D.N.Y. 1995) 880 F. Supp. 1027, the court held that a forensic document examiner's findings that a particular handwriting was a forgery did not meet *Daubert*'s criteria for admission as expert scientific evidence. (*Id.*, at p. 1028.) The defense there argued that forensic document examination has never been validated as involving credible scientific or technical knowledge and does not comport with the requirements of evidentiary reliability articulated by the Supreme Court in *Daubert.* At a hearing on the matter the prosecution presented the testimony of two examiners employed by the City of Cleveland Police Forensic Laboratory and several other experts in forensic identification. (*Id.*, at p. 1028.)

The *Daubert* hearing established that forensic document examination, "which clothes itself with the trappings of science, does not rest on carefully articulated postulates, does not employ rigorous methodology, and has not convincingly documented the accuracy of its determinations," constituted "precisely the sort of junk science that *Daubert*[96] addressed." (*Id.*, at p. 1029.)

Starzecpyzel concluded that forensic document expertise could not be regarded as "scientific knowledge" within the meaning of *Daubert*, and determined that it was instead "practical in character." The

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[96] *Daubert* stated: "The subject of an expert's testimony must be 'scientific . . . knowledge.' The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good ground.' [Citation.] (*Daubert v. Merrell Dow Pharmaceuticals, supra*, 509 U.S. at pp. 589-590.)

court noted that over a period of years forensic document examiners "gradually acquired the skill of identifying similarities and differences between groups of handwriting exemplars." (*Ibid.*) The court likened the forensic document examiner's skill to that "developed by a harbor pilot who has repeatedly navigated a particular waterway." The court concluded that forensic document expertise was instead admissible under another evidentiary rule governing admission of evidence that was nonscientific in character, but which assisted the trier of fact. (*Id.*, at pp. 1028-1029.)

Starzecpyzel assists the present discussion because the court's inquiry there disclosed that the conclusions of forensic document examiners were based on subjective standards that could not be articulated, that there were few published studies supporting even the underlying principles of forensic document analysis, and that there was a lack of statistical data supporting the technique. (*Id.*, at pp. 1033-1034.) As a result of these findings, *Starzecpyzel* concluded that if forensic document examination techniques were subjected to *Daubert*'s tests, the evidence would have to be excluded. (*Id.*, at p. 1037.)

Analogous criticism – the absence of agreed-upon objective standards as to what constitutes a match, the subjectivity of that examination process, the questionable premises underlying the process – has attached to fingerprint identification evidence, as appellant has described above. In addition, *Starzecpyzel* concluded that forensic document examination also lacked the final *Daubert* factor, "general acceptance" by the "relevant scientific community." The court noted that while forensic document examiners did find acceptance within their own community, that community was devoid of financially disinterested parties.

The court further noted that the government had failed to produce evidence of mainstream scientific support, including that of academics, for forensic document examination. (*Id.*, at p. 1038.)

The *Kelly* test, as described above, requires general acceptance within the relevant scientific community. Appellant has discussed above some of the general concerns regarding the validity and reliability of fingerprint identification evidence from both within and without the community of fingerprint examiners that suggest that it is time to reevaluate the admissibility of the evidence.

A few years after *Starzecpyzel* was decided, the U.S. Supreme Court extended the federal trial judge's evidentiary gatekeeping function, which the Court had described in *Daubert* as applying to testimony based on scientific knowledge. In *Kumho Tire Co. v. Carmichael* (1999) 526 U.S. 137, the Court held that in determining the admissibility of an expert's testimony, including testimony based on technical and other specialized knowledge, a federal trial judge may properly consider one or more of the specific *Daubert* factors where doing so will help determine that testimony's reliability. (*Id.*, at p. 142.)

Accordingly, if the issues raised in *Starzecpyzel* had been raised following the decision in *Kimho Tire Co.*, the likelihood is that *Daubert*'s test would have been applied and would have controlled the outcome.

In making *Daubert*'s test applicable to all expert testimony, the Court in *Kumho Tire Co.* explained that it was relying on the same evidentiary rationale it had employed in *Daubert* when it required that the federal trial judge ensure that any and all scientific testimony was not only

relevant, but reliable. (*Kimho Tire Co.*, *supra*, 526 U.S. at p. 148.) In *Daubert*, the Court explained this evidentiary rationale in terms of the testimonial latitude allowed experts by evidentiary rules. "Unlike an ordinary witness, . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. . . . Presumably, this relaxation of the usual requirement of firsthand knowledge – a rule which represents 'a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information,"' [citation omitted] – is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." (*Daubert v. Merrell Dow Pharmaceuticals*, *supra*, 509 U.S. at p. 592.)

Although *Daubert* and *Kumho* referred to the testimonial latitude accorded experts by the Federal Rules of Evidence, California's Evidence Code provides experts with parallel testimonial latitude. (Evid. Code, §§ 702, 800, 801.)[97] Moreover, the Evidence Code expressly invests

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[97] Evidence Code section 702, subdivision (a), states in relevant part: "Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. . . ."

Evidence Code section 800 states: "If a witness is not testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is permitted by law, including but not limited to an opinion that is: (a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony."

Evidence Code section 801 states: "If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

trial judges with gatekeeper obligations. Evidence Code section 803 states in relevant part: "The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion. . . ."

A federal court applied parallel reasoning in a case involving forensic comparative hair analysis. In *Williamson v. Reynolds* (E.D. Okla. 1995) 904 F. Supp. 1529 (overruled on other grounds in *Ross v. Ward* (10th Cir. 1999) 165 F.3d 793, 800), the court considered whether forensic comparative hair analysis results was subject to *Daubert*. The defendant there argued that the State's hair evidence was inadmissible because it was unreliable and inherently subjective in nature.

The court took note of the lack of consensus among hair examiners about the characteristics of hairs. The court also noted the lack of peer review and publication concerning forensic hair comparisons (one of the *Daubert* factors), and further observed that the few available studies tend to point to the method's unreliability. Similarly, the court noted the fact that there do not appear to be uniform standards for human hair identification, and the conclusions reached are necessarily subjective. Furthermore, what studies there were revealed error rates involving high percentages of error, with some police laboratories having an error rate as high as 67 percent. (*Williamson v. Reynolds*, *supra*, 904 F. Supp. at pp.

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion."

1556-1557.) Finally, the court noted that even the standard of "general acceptance" was not met, because "any general acceptance seems to be among hair experts who are generally technicians testifying for the prosecution, not scientists who can objectively evaluate such evidence." (*Id.*, at pp. 1557-1558.)

As a result, the court concluded that the introduction of expert hair testimony at the trial was "irrelevant, imprecise and speculative, and its probative value was outweighed by its prejudicial effect." (*Id.*, at p. 1558.)

G. *PEOPLE V. WEBB* AND *PEOPLE V. FARNAN* DO NOT COMPEL A DIFFERENT RESULT

This court has addressed the *Kelly* standard in the context of fingerprint evidence in *People v. Webb* (1993) 6 Cal.4th 494 and *People v. v. Farnan* (2002) 28 Cal.4th 107. Neither case compels a different result than the one urged by appellant.

In *Webb*, the defendant did not challenge the reliability of fingerprint identification evidence as appellant does, but rather argued the chemical and laser process by which the latent fingerprint was detected was not generally accepted as reliable in the scientific community. The *Webb* Court concluded that *Kelly* was not implicated because there was no danger that lay jurors would be "unduly influenced by procedures which seem scientific and infallible, but which actually are not." (*People v. Webb*, *supra*, 6 Cal.4th at p. 524.)

The *Webb* Court explained:

> The reliability of the laser procedure in producing an image commonly recognizable only as a human fingerprint was manifest at trial. The photographic result of [the latent print analyst]'s method was seen by the jury, and there was no

> dispute that the method produced this result without tampering or alteration of any kind. Since the laser process produced a directly recognizable image of defendant's fingerprint, it is unreasonable for defendant to suggest that the process might somehow have captured a fingerprint which did not exist, transformed some other image into a fingerprint, or changed the fingerprint of another person into one which matched defendant's.
>
> Where, as here, a procedure isolates physical evidence whose existence, appearance, nature, and meaning are obvious to the senses of a layperson, the reliability of the process in producing that result is equally apparent and need not be debated under the standards of *Kelly*, *supra*, 17 Cal.3d 24. We therefore conclude that the laser-derived fingerprint image could not properly have been excluded on grounds it was derived by scientifically unproven means. (*People v. Webb*, *supra*, 6 Cal. 4th at p. 524.)

Appellant's challenge here is not to the process by which the print was detected and recovered, but to the reliability of fingerprint identification evidence itself. Appellant challenges the process by which known and unknown prints are compared, determined to have certain identifiable characteristics, and determined to have sufficient matching identifiable characteristics that an identification may be declared. Unlike the chemical and laser process at issue in *Webb*, where the reliability of the process in producing the result was apparent to the jurors, there is a danger with fingerprint identification evidence that lay jurors, for the reasons stated above, would be "unduly influenced by procedures which seem scientific and infallible, but which actually are not." (*People v. Webb*, *supra*, 6 Cal.4th at p. 524.)

Thereafter, in *People v. Farnan*, *supra*, this Court followed the reasoning it had applied in *Webb* to find that the use of a computerized system in comparing latent prints to fingerprints in a law enforcement database (CAL-ID system) did not implicate *Kelly*. (*People v. Farnan*, *supra*, 28 Cal.4th at p. 160.)

> We conclude that the admission of Erwin's testimony concerning the CAL-ID system did not implicate the concerns addressed in *Kelly*. The reliability of the computerized system in comparing latent prints to fingerprints in its database was apparent at trial. The jury could make its own comparisons between the latent prints found at the Mar crime scene and defendant's fingerprints, and there was no dispute that the system made its comparisons "without tampering or alteration of any kind." (*People v. Webb*, *supra*, 6 Cal.4th at p. 524.) Moreover, Erwin did not suggest that the CAL-ID system positively identified the latent prints as defendant's fingerprints, or that any opinion regarding a fingerprint identification was based on the computer. Although the police used the CAL-ID system to narrow the range of potential candidates whose fingerprints might match the latent prints, the prosecution relied on a long-established technique – fingerprint comparison performed by fingerprint experts – to show the jury that defendant's fingerprints matched those found at the Mar residence. Accordingly, the trial court did not err under Kelly when it admitted Erwin's testimony. (*People v. Farnam*, (*supra*), 28 Cal. 4th at p. 160.)

Once again, appellant's claim of error is distinguishable from that in issue in *Farnan*. Appellant's challenge is not to the process by which the print was detected and recovered (in *Farnan* by computerized search; in *Webb* by laser and chemical process), but to the reliability of fingerprint identification evidence itself.

Because the reliability of fingerprint identification evidence was not in issue in either *Webb* or *Farnan*, the cases are distinguishable and may not be used to establish that this Court has reviewed and considered the admission of fingerprint identification evidence under *Kelly* and has concluded the evidence is admissible.

As Chief Justice Marshall explained in *Cohens v. Virginia* (1821) 19 U.S. 264:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. (*Cohens v. Virginia* (1821) 19 U.S. 264, 399-400.)

> Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. (*Webster v. Fall* (1925) 266 U.S. 507, 511; see also *Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127-128, fn. 2, quoting same; see *Johnson v. Bradley* (1992) 4 Cal.4th 389, 415 (cases are not authority for propositions not considered therein).)

H. OTHER PRINCIPLES OF LAW SUPPORT THE CONCLUSION THAT THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUESTS

Appellant has shown above that substantial questions are being asked within the relevant forensic community about the reliability of fingerprint identification evidence and that the trial court erred in denying the defense *Kelly* motion. When the trial court denied appellant's request for a *Kelly* hearing, it denied her the opportunity to question whether fingerprint identification procedures met *Kelly* standards. Accordingly, appellant was denied her federal constitutional rights to present a full and complete defense and to due process of law; all of a defendant's pertinent evidence should be considered by the trier of fact. (*People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 599; *Chambers v. Mississippi* (1973) 410 U.S. 284, 294-295; *Davis v. Alaska* (1974) 415 U.S. 308, 317; *People v. Reeder* (1978) 82 Cal.App.3d 543, 552.)

In *Chambers v. Mississippi*, *supra*, the Supreme Court held that exclusion of evidence vital to a defendant's defense constitutes a denial of a fair trial in violation of the due process clause of the Fourteenth Amendment. In *Chambers*, the Court invalidated a state's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." (*Id.*, at p. 302.) Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The state's evidentiary rules did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning the confessions, which were critical to his defense. The Supreme Court reversed the judgment of conviction, holding that the

combined effect of the trial court's rulings deprived the defendant of a "trial in accord with traditional and fundamental standards of due process." (*Ibid.*)

Chambers stated: "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. . . . 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'" (*Chambers*, *supra*, 410 U.S. at p. 294, citing *In re Oliver* (1948) 333 U.S. 257, 273.)

In *Davis v. Alaska* (1974) 415 U.S. 308, 320, the Supreme Court, concerned with the abridgement of a defendant's right to present all evidence in his defense, overturned his conviction because the lower court would not allow impeachment of a material witness with a prior juvenile record.

In *Rock v. Arkansas* (1987) 483 U.S. 44, the U.S. Supreme Court reversed the Arkansas Supreme Court's ruling that a criminal defendant's hypnotically refreshed testimony was inadmissible per se because it was unreliable. The U.S. Supreme Court held that Arkansas' per se rule excluding all hypnotically refreshed testimony infringed impermissibly on a criminal defendant's right to testify on her own behalf and reversed the manslaughter conviction of a woman for shooting her husband. The woman's hypnotically refreshed testimony, which contained exculpatory evidence concerning details indicating her gun was defective, had been barred by Arkansas' per se rule.

California courts also support the fundamental right of the accused to present all relevant evidence vital to his defense. In *People v. McDonald* (1984) 37 Cal.3d 351 (overruled on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, 914), our Supreme Court stated: "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial would be simpler without it. Rather, it should be accompanied by instructions clearly explaining to the jury the purpose for which it is introduced. (*People v. McDonald, supra*, 37 Cal.3d at p. 372.)

In *People v. DeLarco* (1983) 142 Cal.App.3d 284, considered the question of whether the trial court committed reversible error by excluding use of the preliminary hearing transcript to impeach a witness where there was some question that the interpretation of the witness' preliminary hearing testimony was inaccurate. In reversing, the Court of Appeal recognized the following principles.

> A trial court has broad discretion to exclude evidence pursuant to Evidence Code section 352 if "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*Jennings v. Superior Court* (1967) 66 Cal.2d 867, 877.) Character evidence may be properly excluded under this section. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448, citing *People v. Covino* (1980) 100 Cal.App.3d 660, 666.) An appellate court will not disturb a lower court's exercise of discretion under Evidence Code section 352, absent a clear showing of abuse of discretion. (*People v. Barrow* (1976) 60 Cal.App.3d 984, 995, disapproved on other grounds in *People v. Jimenez* (1978) 21 Cal.2d 595, 608.) However, evidence that is relevant to showing a defendant's innocence is admissible.

(*People v. Reeder* (1978) 82 Cal.App.3d 543, 553, citing *People v. Whitney* (1978) 76 Cal.App.3d 863, 869.) As was stated by Justice Jefferson in *Reeder*, "Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense." (*Id.*, at p. 553.) Still, the proffered evidence must be competent, substantial and significant. (*People v. Northrop* (1982) 132 Cal.App.3d 1027, 1041; *People v. Reeder* (1978) 82 Cal.App.3d 543, 553.)

Inclusion of relevant evidence is tantamount to a fair trial. Similarly, exclusion of prejudicial evidence can safeguard the defendant's rights as much as that of the prosecution. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 448 [185 Cal.Rptr. 370].) Indeed, discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance "is particularly delicate and critical where what is at stake is a criminal defendant's liberty." (*People v. Lavergne* (1971) 4 Cal.3d 735, 744; *People v. Murphy* (1963) 59 Cal.2d 818, 829.) (*People v. DeLarco, supra*, 142 Cal.App.3d at pp. 305-306.)

In *People v. Marsden* (1970) 2 Cal.3d 118, in the context of a request for new appointed counsel, this Court observed that a trial court cannot properly and intelligently exercise its discretion in ruling on the defendant's request without holding a hearing to explore the reasons for that request. (*Id.*, at pp. 123-124.)

In *Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, the Court of Appeal stated: "In *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal. App. 4th 257, 266-267, footnote 11, we expressed our frustration with law-and-motion judges who "refuse to hold oral hearings on critical pretrial matters of considerable significance to the

parties. . . . Fair warning: Both written and oral argument are complementary parts of good judging and elemental due process." (*Hobbs v. Weiss*, *supra*, 73 Cal. App. 4th at p. 78.) In *Mediterranean Construction Co.*, *supra*, the Court of Appeal further noted: "There is a reason why litigants are afforded their proverbial 'day in court' – to speak directly to the decisionmaker." (*Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal. App. 4th at p. 266 fn. 11.)

In *Spector* v. *Superior Court* (1961) 55 Cal.2d 839, this Court observed that a judicial determination made without giving a party an opportunity to present argument "is lacking in all the attributes of a judicial determination." (*Id.*, at p. 843.)

Accordingly, in denying appellant's motion for a *Kelly* hearing, the trial court denied appellant the right to present a defense.

The denial of appellant's right to question the reliability of fingerprint identification evidence also denied appellant the right to confront witnesses against her, which is guaranteed by the Sixth Amendment to the United States Constitution. In *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, this Court said of that constitutional right:

> The Sixth Amendment guarantees the right of an accused in a criminal prosecution " 'to be confronted with the witnesses against him.'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) "The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer v. Texas* 380 U.S. 400 (1965), 'means more than being allowed to confront the witness physically.' *Davis v. Alaska* [(1974)] 415 U.S. [308], 315. Indeed, ' "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination."' (*Id.*, at pp. 315-316 (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)." (*Delaware v. Van Arsdall*, *supra*, 475

> U.S. 673, 678.)" [T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405.) (*Alvarado v. Superior Court*, *supra*, 23 Cal. 4th at p. 1137.)

Cross-examination is more than a desirable rule of criminal procedure. Rather, it is implicit in the constitutional right of confrontation and is crucial to the accuracy of the truth finding process. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295; *Crawford v. Washington* (2004) 541 U.S. 36.)

The right of confrontation is also guaranteed by the California Constitution. In *People v. Harris* (1985) 165 Cal.App.3d 1246, this Court said of this right:

> [¶] The right of a defendant in a criminal prosecution to confront the witnesses against him is guaranteed by the Constitutions of California and the United States. (Cal. Const., art. I, § 15; U.S. Const., 6th Amend.) The federal provision has been incorporated within the concept of due process which is obligatory upon the states. (See *Davis v. Alaska* (1974) 415 U.S. 308, 315; *Brookhart v. Janis* (1966) 384 U.S. 1, 3-4; *Pointer v. Texas* (1965) 380 U.S. 400, 403.) (*People v. Harris*, *supra*, 165 Cal. App. 3d at p. 1256.)

Cross-examination has long been considered to be at the core of the truth-seeking function of trial courts. "Certainly no one experienced in the trial of lawsuits would deny the value of cross-examination in exposing falsehood and in bringing out the truth in the trial of a criminal case."

(*Pointer v. Texas*, *supra*, 380 U.S. at p. 404; *Davis v. Alaska*, *supra*, 415 U.S. at p. 316.)

In *Crawford v. Washington*, *supra*, the United States Supreme Court explained that the Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular matter: by testing in the crucible of cross-examination." (*Id.*, at p. 61.) "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.*, at p. 62.)

Because cross-examination is the "principal means by which the believability of a witness and the truth of his testimony are tested" (*Davis v. Alaska*, *supra*, at p. 316), the state "has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits." (*Hammerly v. Superior Court* (1979) 89 Cal.App.3d. 388,402; *People v. Hill* (1974) 10 Cal.App.3d 812, 816.) Consequently, "extensive cross-examination of a government witness designed to reveal any biases or prejudice of the witness is compelled by the confrontation clause." (*United States v. Alvarez-Lopez* (9th Cir. 1977) 559 F 2d 1155, 1160.)

In this case, the trial court's denial of appellant's request for a *Kelly* hearing denied her the right to fully explore and expose the fallacies and potential flaws in fingerprint identification evidence the relevant forensic community has presently identified and to make the necessary arguments against the admission of this flawed identification evidence. The trial court violated appellant's right of confrontation to which she is entitled under the Constitutions of the United States and California.

In addition, when, as here, the trial court's denial of appellant's request for a *Kelly* hearing denied her the right to fully explore and expose the fallacies and potential flaws in fingerprint identification evidence the relevant forensic community has presently identified and to make the necessary arguments against the admission of this flawed identification evidence, the jury is likely to reach its verdict based on an incorrect understanding of the circumstances of the crime and the particular acts by which the crime was committed, thereby undermining the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (because death penalty is qualitatively different from imprisonment there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case); *Godfrey v. California* (1980) 446 U.S. 420 (Eighth Amendment requires higher degree of scrutiny in capital cases); *Monge v. California* (1998) 524 U.S. 721, 732 (because the death penalty is unique in both its severity and its finality, there is an "acute need for reliability in capital sentencing proceedings"); *Gilmore v. Taylor* (1993) 508 U.S. 333, 344; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

I. PREJUDICE AND CONCLUSION

Courts have recognized that expert testimony has a tremendous impact on a jury. "Lay jurors tend to give considerable weight to 'scientific' evidence when presented by 'experts' with impressive credentials." (*People v. Kelly*, *supra*, 17 Cal.3d. at p. 31.) As *Kelly* further observed, " '[S]cientific proof may in some instances assume a posture of

mystic infallibility in the eyes of a jury. . . .' [citation]." *(People v. Kelly, supra*, 17 Cal.3d at p. 32.)

The power of expert testimony has also been recognized in other jurisdictions where concern has been expressed that jurors could be so impressed by the "aura of reliability" of expert testimony that they might trust it more than their own perceptions. (*State v. Middleton* (1982) 294 Or. 427, 437 (657 P.2d 1215, 1221).) (See also *Reynolds v. State* (1994) 126 Idaho 24, 31 (878 P.2d 198, 205).)

Jurors have come to expect expert testimony and to rely heavily on that testimony. (" 'CSI Effect' Has Juries Wanting More Evidence," *USA Today*, August 5, 2004, http://www.usatoday.com/tech/science/2004-08-05-csi-effect_x.htm.)

Other courts have recognized that expert testimony is extremely powerful and thus subject to extreme abuse. "[J]urors may be awed by an 'aura of special reliability and trustworthiness' which may cause undue prejudice, confuse the issues or mislead the jury." (*Williamson v. Reynolds* (E.D. Okla. 1995) 904 F. Supp. 1529, 1557 (quoting *United States v. Amaral* (9th Cir. 1973) 488 F.2d 1148, 1152); see also *Daubert, supra*, 509 U.S. at p. 595 ("Expert evidence can be both powerful and quite misleading because of the difficulty of evaluating it"); *United States v. Starzecpyzel, supra*, 880 F. Supp. at p. 1048 ("[W]ith regard to scientific experts, a major rationale for *Frye*, and now *Daubert*, is that scientific testimony may carry an 'aura of infallibility,' which may cause undue prejudice, confuse the issues or mislead the jury."); see also Charles T. Mccormick et al., *Mccormick on Evidence* (3d ed. 1984) § 203, pp. 608-609; see John W. Strong, *Language and Logic in Expert*

Testimony: Limiting Expert Testimony by Restrictions of Function, Reliability and Form, 71 OR. L. Rev. 349, 361 n. 81 (1992) ("There is virtual unanimity among courts and commentators that evidence perceived by jurors to be 'scientific' in nature will have particularly persuasive effect.")

"The risk of undue prejudice and confusion is especially great when it comes to latent fingerprint identifications because it has been uncritically accepted by the American legal system for the past eighty years. As a result, the general public has come to firmly believe that fingerprint identifications are scientifically based and that they are invariably accurate. In a recent study of jurors' attitudes toward fingerprint evidence, 93 percent of the 978 jurors questioned expressed the view that fingerprint identification is a science, and 85 percent ranked fingerprints as the most reliable means of identifying a person." (Mears & Day, *supra*, at p. 755.)

Fingerprints are so universally accepted as being inherently trustworthy that they have come to serve as a euphemism for reliability. For example, the infallibility of DNA evidence is expressed by describing it as a "genetic fingerprint." (*United States v. Kincade* (9th Cir. 2004)379 F.3d 813, 818; *United States v. Reynard* (S.D. Cal. 2002) 220 F.Supp.2d 1142, 1153.)

Dictionaries record the alternative definition of "fingerprint" to be "something that identifies: as a trait, trace, or characteristic revealing origin or responsibility"[98]; or "a distinctive or identifying mark or characteristic: 'the invisible fingerprint that's used on labels and packaging

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[98] http://www.merriam-webster.com/dictionary/fingerprint

to sort out genuine products from counterfeits' or a DNA fingerprint or a chemical fingerprint."[99]

In this case, the prosecution's fingerprint experts testified that latent prints matched to appellant's exemplar, in addition to latent prints matched to known exemplars from Daveggio and Vanessa Samson, appear on a cup recovered from the van the prosecution claimed was used in Samson's abduction, upon the curling irons, and other items seized from the van. Amidst the stew of bits and pieces of circumstantial evidence that comprised the prosecution's case against appellant, the fingerprint identification evidence thus provided powerful evidence linking appellant to Samson's kidnapping and murder by connecting Samson's abduction with the van and with appellant and Daveggio.

David Stoney, a leading fingerprint scholar and analyst, has written: "[T]here is no justification [for fingerprint identifications] based upon conventional science: no theoretical model, statistics or an empirical validation process." (Mears & Day, *supra*, at pp. 729-730.) Another forensic specialist commented: "A vote to admit fingerprints is a rejection of conventional science as the criterion for admission." (Saks, Michael J., "Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Identification Science." 49 Hastings L.J. 109, 1069, 1106 (1998).)

David Fraigman, coeditor of *Modern Scientific Evidence*, believes fingerprint evidence will be excluded at some future time because "[t]he research is just too thin to let it in." (*Los Angeles Times*, April 8, 2001, "Fingerprints' Accuracy on Trial," by Malcolm Ritter.)

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[99] http://www.thefreedictionary.com/fingerprint

"Expert testimony, like any other testimony, may be excluded if, compared to its probative worth, it would create a substantial danger of undue prejudice or confusion." (*United States v. Schmidt* (5th Cir. 1983) 711 F.2d 595, 599.)

Whether or not fingerprint evidence is ultimately held to be admissible, the trial court erred in refusing appellant's request for a *Kelly* hearing after it learned from defense counsel that questions concerning the reliability of fingerprint identification evidence had been raised within the relevant forensic community. For the reasons set forth above, the trial court's refusal of appellant's request for a *Kelly* hearing denied appellant her constitutional federal due process right to present a defense and to confront witnesses against her in violation of the Sixth and Fourteenth Amendments. The trial court should have granted appellant's request for a *Kelly* hearing to ensure the level of reliability required by the Eighth and Fourteenth Amendments for the determination that death is the appropriate punishment for appellant's crime. (See *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305

X.

THE TRIAL COURT ERRED IN ADMITTING ITEMS OF EVIDENCE OTHERWISE INADMISSIBLE UNDER EVIDENCE CODE SECTIONS 210, 350, 352, 1101. THE IMPROPER ADMISSION OF THIS EVIDENCE DENIED APPELLANT THE RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT

During the guilt phase of appellant's trial, the trial court admitted the following evidence, which admission appellant challenges here: (1) evidence that cuts had been made in the carpeting in appellant's van that allowed access to unused seat anchor bolts to which ropes could be secured to restrain someone in a spread-eagled position; (2) evidence that crossbows and bolts were seized from appellant's van and from a box of belongings Daveggio and appellant left with his daughters; and (3) evidence that guns were seized from appellant's van and from the motel room occupied by Daveggio and appellant at the time of their arrest.

As appellant will show below, the evidence was inadmissible character evidence under Evidence Code section 1101 and/or the evidence was either not relevant or, if probative, its probative value was outweighed by its prejudicial nature.

The wrongful admission of these items of evidence denied appellant due process of law and a fair trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution and deprived her of a reliable determination of the facts in a capital case as guaranteed by the Eighth Amendment.

A. THE EVIDENCE REGARDING SLITS CUT INTO CARPETING FROM MICHAUD'S VAN; THE OBJECTIONS TO THE EVIDENCE; THE ARGUMENTS TO THE JURY REGARDING THE EVIDENCE

At trial, the prosecution presented evidence that appellant's van was used in the kidnapping of Vanessa Samson; that at some point in time prior to the kidnapping the middle and rear seats were unfastened from their anchor bolts and removed from the van and the empty space covered with carpeting; that slits had been cut into the carpeting to provide access to the two anchor bolts closest to the front and the two closest to the back of the van; and that ropes slipped through the slits in the carpet and tied into the four anchor bolts could then be used to restrain someone, viz., Vanessa Samson, in a spread-eagle position during a sexual assault.

Prior to its admission, the defense objected on grounds of relevance and foundation to the admission of evidence pertaining to the cuts in the carpeting, including the prosecution-created template marking the location of the slits cut into the carpeting in relation to the anchor bolts and illustrations of ropes passed through the anchor bolts (People's Nos. 30, 31). (14RT 3445-3446.) Defense counsel argued there was no evidence that anyone had been tied down in the manner suggested by the prosecutor. Counsel pointed out while there was evidence that Vanessa had been strangled with a rope, there was no evidence she had been restrained, much less restrained with ropes, from which it might be referred she had been restrained by ropes passed through the van anchor bolts in the manner

urged by the prosecutor.[100] Counsel characterized the evidence as inflammatory and based on nothing more than speculation. (14RT 3446-3447.) Counsel for appellant objected "strenuously" to evidence of the ropes being admitted. (14RT 3448.)

The prosecutor in turn pointed to evidence that a section of rope was found in a white towel in the van and that Vanessa's DNA was detected upon other items found in the towel. The prosecutor represented that an eight-foot length of the rope was missing and that the rope found next to Vanessa's body and the rope found in appellant's pocket at the time of her arrest approximated eight feet in length. (14RT 3446.)

The trial court ruled the evidence of slits cut into the carpeting, including the template and ropes, more probative than prejudicial and therefore admissible to prove planning, premeditation, and scheming. (14RT 3506.)

During the prosecution's case-in-chief, District Attorney's Investigator Timothy Painter testified that four slits had been cut into the carpet in a manner that when linked formed a four-sided polygon. (People's No. 168, item Q-12732; 24RT 5513.) Painter measured the carpet at an overall length of 73 ½ inches and between 41-46 inches wide. The distance between the left and right forward slits was 29 inches and between the left and right rear slits was 44 inches. The distance of the diagonal between the left forward and right rear slit was 38 ½ inches and the distance between the opposing diagonal measured 53 inches. (24RT

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[100] As to this particular defense argument, the trial court inquired: "Were there any indications on any limbs of the deceased?" The prosecutor conceded the point: "No." (14RT 3448:8-10.)

5515-5517.) The carpet was placed on a plyboard and the slits in the carpet were displayed for the jury. (24RT 5518, 5520-5521.)

Painter did not have the carpet tested for hair fibers, metal particles, rope fibers, duct tape residue, or bodily fluids. (24RT 5522-5523.)

He did, however, create a paper template of the carpet on which he marked the location of the slits (People's No. 199). (24RT 5517-5518.) When Painter placed the paper template on the van floor, he found that the slits provided access to the anchor bolts. Painter tied a two-foot length of rope to each of the anchor bolts and passed them through the cuts in the template. (28RT 6109-6112.)

During his investigation, Painter learned from the manufacturer that the original length of the rope found in the van was 48 feet 8 inches; the rope recovered from the van was 37 feet 4 inches in length; the rope recovered from appellant's pocket when she was arrested was 3 feet 1 inch. (28RT 5179, 6112, 6113.)

Later, when the exhibits were being moved into evidence, the defense renewed its objection to this evidence, including to the photographs depicting ropes pulled through slits in the carpeting and template, on the ground there was no evidence that restraints had been applied to any victim in this manner. The trial court overruled the objection. (32RT 6889-6890.)

The prosecutor subsequently argued to the jury:

> And then you have the van and the fact that all the seats are out of the back and they put this carpet down, for which there is no other explanation than to put these four little tiny razor-like one inch slits so they could tie somebody down. There is no other explanation for that piece of carpet.

> You can't put the seats down through it. It came up positive for P30. There is no other explanation.
>
> Then you have ropes. The van is full of ropes. She has rope in her pocket. There is rope at the murder scene. There is eight feet of missing rope. If you take eight and divide it by four that makes four two-foot tiedowns. And the slits in the carpet, ladies and gentlemen, they match the anchor bolts exactly. You take the slits and look at where those anchor bolts are and they match the four outer most anchor bolts exactly. You slip a piece of rope through there and you can tie her wrists and ankles. (33RT 7089-7090; see also 33RT 7197.)

During the trial's penalty phase, Daveggio testified that he cut the slits into the carpeting with the idea of setting up a system of restraints, but after trying it he realized that the anchor bolts were not positioned to restrain someone. (37RT 7946-7948.)

B. THE EVIDENCE REGARDING THE CROSSBOWS AND GUNS; THE OBJECTIONS TO THE EVIDENCE; THE ARGUMENTS TO THE JURY ABOUT THE EVIDENCE

At trial, the prosecution presented evidence that Daveggio and/or appellant were at times in possession of metal crossbows and bolts; that Daveggio at times possessed a .38 caliber handgun; and that appellant at times possessed a smaller handgun.

The parties litigated the admission of this evidence before its introduction. The prosecutor urged admission of the weapons evidence, arguing that bolts and one of the crossbows were recovered from appellant's van and suggesting that they might be the source of the bruises on Vanessa Samson's buttocks while at the same time acknowledging the

absence of any supporting evidence for that surmise. (14RT 3442.) The prosecutor pointed to evidence that Daveggio told Christina and Rachel that it was "easier" to kill with a crossbow, a silent killer, than with his .38, which was loud, from which the jury might infer that Daveggio had studied killing methods. (14RT 3443.) The prosecutor further argued that guns were used in connection with some of the sexual assaults and that the gun use evidence was probative of the force and fear element of the crimes. (14RT 3442-3443.)

The defense pointed out that Vanessa Samson was not killed with a crossbow and objected on grounds of relevance and prejudice (Evid. Code, § 352). (14RT 3443.)

The court admitted the evidence as probative of the force and fear element of the crimes. "Force and fear is an allegation. It [the crossbow and bolts] is a deadly weapon and found at the scene and location of the alleged crime. I think that is certainly as relevant as you need to get." (14RT 3444:11-14.)

During the prosecution's case-in-chief, Rick Boune testified that he saw a crossbow in appellant's van. (16RT 37692.) Pleasanton Detective Donald Harms testified that during a December 8, 1997, search of the home where Daveggio's daughters Jamie and April lived, he found a crossbow in a box of items Daveggio and appellant had left there. (20RT 4596; 21RT 4779-4780, 4785, 4788, 4898-4899.) A cocked crossbow was seized during the search of appellant's van. (24RT 5433; 26RT 5807-5808.)

Prior to the receipt of the exhibits, the defense renewed its objection to the crossbows on grounds of relevance and prejudice (Evid. Code, § 352). The court overruled the objection. (32RT 6888-6889.)

The defense also objected to the admission of the .38 caliber handgun and ammunition seized from the van and the .25 caliber handgun seized from the motel room from which appellant was arrested because there was no evidence that either weapon had been used in the charged crimes. (32RT 6951.) The court overruled the objection. (32RT 6951.)

C. THE RELEVANT LAW; ITS APPLICATION; PREJUDICE

At trial, "[n]o evidence is admissible except relevant evidence." (Evid. Code, § 350.) Relevant evidence is "evidence having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

"While there is no universal test of relevancy, the general rule in criminal cases might be stated as whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution or to overcome any material matter sought to be proved by the defense. [Citation.] Evidence is relevant when no matter how weak it may be, it tends to prove the issue before the jury." (*People v. Slocum* (1975) 52 Cal.App.3d 867, 891.)

"There is no discretion vested in a court to admit irrelevant evidence." (*People v. Kitt* (1978) 83 Cal.App.3d 834, 849.) Indeed, this Court has reiterated that a court lacks discretion to admit evidence that is irrelevant or provides only speculative inferences. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681-682.) "Speculative inferences that are derived

from evidence cannot be deemed to be relevant to establish the speculatively inferred fact. . . ." (*People v. De La Plane* (1978) 88 Cal.App.3d 223, 244.)

In addition, due process, as interpreted by the United States Supreme Court, demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred. (*County Court of Ulster County v. Allen* (1979) 442 U. S. 140, 156; *Leary v. United States* (1969) 395 U.S. 6, 46.)

Evidence must not only be determined to be relevant, it must also be determined to be more probative than prejudicial pursuant to Evidence Code section 352, which states:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In applying Evidence Code section 352 to exclude evidence otherwise determined to be admissible, the trial court must weigh the probative value of the evidence against its prejudicial effect. "Prejudice" refers to evidence that tends to evoke emotional bias against the defendant. "Evidence is substantially more prejudicial than probative [citation] if . . . it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Lindberg* (2008) 45 Cal.4th 1, 49, quoting from *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

For the purposes of Evidence Code Section 352, "prejudicial evidence" is evidence "which uniquely tends to evoke an emotional bias against [a party] as an individual and which has very little effect on the

issues." (*People v. Wright* (1985) 39 Cal.3d 576, 585; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.)

The court must consider "'the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relative to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons cited in section 352 for exclusion.' [Citation.]" (*People v. Houston* (2005) 130 Cal.App.4th 279, 304, quoting *People v. Harlan* (1990) 222 Cal.App.3d 439, 445.)

In addition, evidence the defendants possessed the crossbows, bolts, and guns constitutes inadmissible character evidence (Evid. Code, § 1101), which appellant has discussed in the preceding two arguments and, the relevant law as to which, appellant herein incorporates by reference. Section 1101 encompasses "a crime, civil wrong, or *other act*," and its application is thus not limited to criminal conduct. (*People v. James* (1976) 62 Cal.App.3d 399, 407.) In this case, the jury was allowed to infer appellant's guilt from the defendants' possession of guns and crossbows and bolts. The same may be said of evidence that cuts had been made in the van carpet allowing ropes to be secured to unused seat anchor bolts for possible use as human restraints in spite of the fact there was no evidence anyone was restrained in this manner.

Here, in the absence of evidence that the guns, crossbows, and bolts, and restraints were actually used in the murder and special circumstance allegation pertaining to Vanessa Samson, the admission of the evidence was not relevant to a fact of consequence and, instead, allowed the jury to view appellant as a bad person or a person with a propensity for

violence because she possessed deadly weapons and owned a van that had been modified to allow a person to be tied down to it in spread-eagled fashion. In other words, the evidence of the weapons and the altered carpet allowing use of restraints was only probative of appellant's character as a person who possessed deadly weapons or implemented the means to restrain someone, i.e., that she was the type of person who would possess deadly weapons and would tie someone down to anchor bolts in a van. In light of the other evidence in this case, the inference that appellant was a person who possessed deadly weapons and a van modified to allow restraints gave rise to no permissible inference making a fact of consequence more or less probable.

In *McKinney v. Rees* (1993; 9th Cir.) 993 F.2d 1378, the defendant was charged with killing his mother by cutting her throat. The prosecution presented evidence that the defendant had a history of possessing knives not otherwise linked to the murder. The Ninth Circuit Court of Appeals concluded that much of the disputed evidence was "other acts" evidence that gave rise only to impermissible propensity inferences based on acts offered to prove character rather than opportunity. The *McKinney* court found the admission of the character evidence to show propensity constituted a violation of the Due Process Clause. (*Id.*, at pp. 1384-1386.)

When the prosecution seeks to introduce evidence of weapons found in the defendant's possession, additional considerations arise when there is no evidence that the weapon was actually used in the charged crime. By parity of reasoning, when the prosecution attempts to introduce

evidence that the van carpet was modified to allow the use of restraints, similar considerations arise, as the cases discussed below illustrate.

In *People v. Riser* (1956) 47 Cal.2d 566 (overruled on other grounds in *People v. Balderas* (1985) 41 Cal.3d 144), defendant was charged with murder in the shooting deaths of two victims. Police recovered fingerprints of the assailants and several expended bullets at the scene of the murder. Witnesses testified the defendant was the shooter. Experts testified that the fingerprints matched the defendant's and that bullets found in the accomplice's car were similar to bullets found at the scene. The prosecution's witness testified the gunman shot with a Smith and Wesson .38 Special revolver. This gun was never recovered.

Two weeks after the shooting police searched the accomplice's car found three holsters, two leather belts, and a box of .22 shells, and other ammunition. The police arrested the defendant the same day and seized a loaded Colt .38 revolver in his possession. All of this evidence was shown to the jury and admitted into evidence.

This Court ruled in *Riser* that "[i]t was error . . . to admit the Colt, two of the holsters, the belts, and the box of .22 shells." (*People v. Riser*, *supra*, 47 Cal.2d at p. 577.) The Court explained: "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. [Citations.] When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such

evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. [Citations.]" (*Ibid.*)

In appellant's case, the prosecution relied on evidence that Vanessa Samson had been killed by means of strangulation, either manual or ligature or both. *Riser* explains, as appellant has observed above, evidence appellant possessed other weapons was not probative of appellant's role as the killer of Vanessa Samson; rather, the evidence proved only that appellant is the sort of person who carries deadly weapons. In the same way, evidence the carpet in appellant's van had been altered to allow the use of the rope restraints urged by the prosecution tended not to prove that appellant killed Vanessa Samson whose person exhibited no signs of having been physically restrained by ropes or any other means, but only to prove that appellant is the sort of person to engage in the particularly horrific and heinous conduct of tying someone to the van's floor in a spread-eagled position with rope restraints.

In *People v. Henderson* (1976) 58 Cal.App.3d 349, the defendant was convicted of assault with a deadly weapon. Over defense objection, the trial court allowed the defendant to be cross-examined on whether he was aware that a loaded Derringer had been found in a pair of his trousers located in his bedroom, ostensibly to show the defendant had the requisite intent for the crime. The Court of Appeal concluded the trial court erred in overruling the objection. "Neither logic, experience, precedent nor common sense supports the proposition that, from the possession in one's home of two loaded guns, a reasonable inference may be drawn that the possessor has an intent to commit the crime of an assault with a deadly weapon. Evidence of possession of a weapon not used in the

crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons – a fact of no relevant consequence to determination of the guilt or innocence of the defendant. [Citation.]" (*Id.*, at p. 360.)

Henderson continued: "The claimed relevance of the loaded Derringer gun on the issue of defendant's intent is without substance. The inference sought by the prosecution is purely one of sheer speculation – the antithesis of relevancy. The admission into evidence of this irrelevant evidence – highly prejudicial in nature – also constitutes reversible error. (*Ibid.*)

Henderson, like *Riser*, offers examples demonstrating the separation between a reasonable inference and speculation. Again, evidence that appellant possessed guns, the crossbows, and bolts did not reasonably give rise to the inference appellant murdered Vanessa, who was strangled; it only gave rise to the inference that appellant was the sort of person who would possess deadly weapons. Evidence that appellant possessed a van in which the carpeting had been altered to allow the use of rope restraints did not reasonably give rise to the inference appellant murdered Vanessa, whose body bore no signs of having been physically restrained. It only gave rise to the inference was the sort of person who would tie someone down to the floor of her van. In short, the evidence fostered unreasonable speculation rather than reasonable inferences.

As appellant has explained elsewhere, the United States Supreme Court has recognized that improper speculative inferences created by the admission of such character evidence has an impact on the reliability of the truth-seeking process in violation of the heightened reliability

requirements of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1982) 462 U.S. 862, 879.)

In *United States v. Hitt* (1992 9th Cir.) 981 F.2d 422, the defendant was convicted of possessing an unregistered machine gun. The prosecution claimed the defendant had altered a semiautomatic rifle so it would rapid-fire at a speed to qualify as a machine gun. The prosecution's experts test-fired the gun and found it qualified as a machine gun. The defense expert test-fired it and found it did not. The defense expert suggested the prosecution expert's results may have been produced by a gun with dirty *internal* parts. The prosecution presented a photograph showing the *exterior* of the gun was not dirty, but the photograph also depicted nine other guns belonging to the defendant's roommate.

The Ninth Circuit Court of Appeals concluded that the probative value of the photograph was small – the defense expert's claim concerned the internal mechanism of the gun and the photograph depicted the gun's exterior. *Hitt* said: "At the same time, the photograph was fraught with the twin dangers of unfairly prejudicing the defendant and misleading the jury. It showed a dozen nasty-looking weapons, which the jury must have assumed belonged to Hitt. The photograph looked like it was taken at Hitt's residence: The guns were laid out in an obviously residential room; the jury knew Hitt was arrested at home; the photograph was talked about in the same breath as two others identified at trial as having been taken in Hitt's bedroom. Moreover, there was no one else the jury could have suspected of owning the guns. Hitt's roommate, who in

fact owned all the other weapons, wasn't even mentioned during Hitt's trial. Inferring that all the weapons were Hitt's wasn't just a plausible inference; it was the only plausible inference. [¶] Once the jury was misled into thinking all the weapons were Hitt's, they might well have concluded Hitt was the sort of person who'd illegally own a machine gun, or was so dangerous he should be locked up regardless of whether or not he committed this offense. Rightly or wrongly, many people view weapons, especially guns, with fear and distrust. Like evidence of homosexuality [citations], or of past crimes [citations], photographs of firearms often have a visceral impact that far exceeds their probative value. [Citations.] The prejudice is even greater when the picture is not of one gun but of many." (*United States v. Hitt, supra*, 981 F.2d at p. 424.)

Hitt explained the prejudice associated with weapons possession. Appellant was burdened with a similar prejudice by the introduction of the challenged evidence, which allowed the jury to view her as a person with a propensity to commit crimes. As *Hitt* observed of guns, many people view physical restraints of any kind, much less rope restraints suggestive of a spread-eagled tie down, as particularly horrific and heinous. The same might be said of a defendant's willingness to use a crossbow and bolts. As *Hitt* explained, people view evidence of deadly weapons with fear and distrust. The prejudice from the admission of the challenged evidence is manifest.

Erroneous admission of evidence is typically evaluated under the standard of *People v. Watson* (1956) 46 Cal.2d 818. However, appellant urges application of the stricter standard of *Chapman v. California* (1967) 386 U.S. 18 here because the admission of this

prejudicial evidence in conjunction with other improperly admitted evidence lightened the prosecution's burden of proof in violation of the Fourteenth Amendment.

The admission of this character evidence involving the use of deadly weapons and the use of physical restraints rendering a victim spread-eagled and helpless allowed appellant to be depicted in a particularly heinous way and allowed the jury to regard her as someone capable of committing atrocities. As appellant has explained above, the evidence had no relevance to the killing of Vanessa Samson because forensic and other evidence established her death was not produced by either bolts fired from a crossbow or shots fired from a gun. Forensic and other evidence also failed to establish that either crossbow or gun was used upon her person. Forensic and other evidence failed to establish that rope restraints passed through the carpet cuts and secured to the anchor bolts were used with Vanessa or any other individual.

In the colloquy attending the admission of this evidence, the court and parties primarily focused on the use of this evidence to prove the elements of Vanessa Samson's charged murder. With regard to the guns, however, the prosecutor also argued the guns were used in connection with some of the sexual assaults and that the gun use evidence was probative of the force and fear element of the crimes. (14RT 3442-3443.)

Appellant was charged with committing two sexual assaults upon Sharona and one against Daveggio's daughter April. Sharona testified that Daveggio and appellant physically overpowered her, that Daveggio struck her, cuffed then released her hands, and then began sexually assaulting her. Sharona said it was not until she was released at

the gas station that Daveggio displayed a gun and threatened her not to tell the truth about what happened. She also said she had seen Daveggio and appellant with a gun on another occasion and had seen a gun in the van. (20RT 4538-4540.)

April also testified that Daveggio had displayed a gun to her, but at her mother's house earlier in the day she was sexually assaulted by Daveggio.

The gun use evidence was thus separated in time from the sexual assaults upon both Sharona and April and thus marginally probative of the force and fear element of the charged crimes. Rather, the testimonies of both Sharona and April support the conclusion each was physically overpowered at the time each was sexually assaulted. The prejudicial effect of deadly weapons evidence has been set forth above. Because the gun use evidence was only marginally probative of the force and fear element of the charged crimes and the prejudice associated with the evidence so significant, the evidence should have been excluded (Evid. Code, § 352). The gun use evidence, as explained above, functioned as improper character evidence and allowed appellant to be viewed as someone with a criminal disposition.

Moreover, the prosecutor deftly used the evidence challenged here to argue for appellant's conviction. In arguments to the jury, the prosecutor incorporated evidence of the gun use and the cuts in the carpet allowing access to the anchor bolts in urging the jury to find the existence of a common plan from which the appellant's commission of the charged crimes might be inferred and from which the premeditation necessary to support a first degree murder conviction might be inferred. (See, e.g.,

33RT 7194-7198, 7200-7206, 7213-7216.) In *People v. Minifie* (1996) 13 Cal.4th 1055, this Court recognized the powerful impact a prosecutor's argument regarding the evidence may have upon the jury. "The jury argument of the district attorney tips the scale in favor of finding prejudice. . . ." (*Id.*, at p. 1071; see also *People v. Woodard* (1979) 23 Cal.3d 329, 341.)

For the reasons set forth herein, appellant respectfully submits that the incorrect admission of the challenged evidence was not harmless beyond a reasonable doubt and that the admission of this evidence contributed to appellant's conviction. (*Chapman v. California*, *supra*, 386 U.S. at p. 26.)

XI.

THE TRIAL COURT ERRED IN REFUSING THE DEFENSE-REQUESTED MODIFICATION FOR CALJIC NO. 8.81.17, REGARDING KIDNAPPING AS AN "INCIDENTAL" CRIME TO THE MURDER. THIS ERROR DEPRIVED APPELLANT OF THE RIGHT TO TRIAL BY JURY, THE RIGHT TO A RELIABLE DETERMINATION OF THE FACTS, AND THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES

A. INTRODUCTION

The prosecution alleged appellant committed special circumstance murder based on the underlying crimes of kidnapping and rape by instrument. During the colloquy between court and counsel regarding jury instructions, counsel for Daveggio requested that the court modify the felony murder special circumstance instruction (CALJIC No. 8.81.17) to include language counsel had taken from *Ario v. Superior Court (Alameda County)* (1981) 124 Cal.App.3d 285 that would have made clear that the kidnapping/murder special circumstance was not established if the kidnapping was committed for the purpose of committing the murder. (33RT 7025-7026.)

Although counsel for appellant Michaud did not expressly join in this request, counsel did not indicate he was not joining in it. The record shows that the court and parties had earlier agreed that all oral and written motions be deemed joint motions unless otherwise expressly indicated to the contrary by counsel. (3CT 749; 1RT 23, 32.) Accordingly, counsel's silence at the time of this discussion carries no legal consequence for appellant's ability to make this claim of error.

The trial court declined to give the requested instruction on the ground the defense proffer incorrectly stated the law. (33RT 7053-7054.)

As appellant will show below, the language proposed by the defense was, in fact, a correct statement of the law and the trial court erred in refusing the proffered clarification. As a result of its action, the court denied appellant the right to a trial by jury, the right to a reliable determination of the facts in a capital case, and the right to due process of law under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

B. THE INSTRUCTION REQUESTED; THE INSTRUCTION GIVEN; THE PROCEEDINGS BELOW

The trial court instructed the jury in this case in language based on the pattern instructions in CALJIC. In 1997, when the charged crimes were committed, CALJIC No. 8.81.17, the pattern instruction for the felony murder special circumstance, stated:

> To find that the special circumstance, referred to in these instructions as murder in the commission of _____, is true, it must be proved:
>
> [1a. The murder was committed while [the] [a] defendant was [engaged in] in the [commission] [or] [attempted commission] of a _____.]
>
> [1b. The murder was committed during the immediate flight after the [commission] [attempted commission] of a _____ [by the defendant] [to which [the] [a] defendant was an accomplice].]
>
> [2. The murder was committed in order to carry out or advance the commission of the crime of _____ or to facilitate the escape therefrom or to avoid detection. In other

> words, the special circumstance referred to in these instructions is not established if the [attempted] _____ was merely incidental to the commission of the murder.] (CALJIC 5th ed.)

A "comment" to the instruction stated: "Where kidnapping was for purpose of murder, murder was not committed while defendant was engaged in kidnapping. (*Ario v. Superior Court, Alameda County* (1981) 124 Cal.App.3d 285, 287-290.)" (CALJIC 5th ed., CALJIC no. 8.81.17, Comment.)[101]

During the discussion on instructions to be given the jury, defense counsel stated that he found the version of CALJIC No. 8.81.17 set forth above to be confusing. Counsel proposed that the instruction be clarified by modifying it to accommodate language taken from *Ario*, which counsel proffered in a special instruction.

The proffered defense special instruction read:

> If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established. (7CT 1779.)

The prosecutor argued the defense special instruction incorrectly stated the law. The prosecutor said the law, correctly stated, is, "if you find that the kidnapping was solely for the purpose of intent to kill," and that the concept was captured in the language of paragraph two of

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[101] The identical comment still appears in the most recent edition of CALJIC (Fall 2008 ed.) published at the time of this writing.

CALJIC No. 8.81.17, which instructed "if the kidnapping was merely incidental to the commission of the murder, then the special circumstance is not true." (33RT 7026:8-14.) The prosecutor further represented that the current state of the law was set forth in *People v. Barnett* (1998) 17 Cal.4th 1044, 1158; *People v. Raley* (1992) 2 Cal.4th 870, 902-903; *People v. Clark* (1990) 50 Cal.3d 583, 608. (33RT 7026-7027.) These cases state that a "concurrent intent to kill and to commit an independent felony will support a felony-murder special circumstance." (See e.g., *People v. Barnett, supra*, 17 Cal.4th 1044.) Notably, as appellant explains below, the fact that a felony murder special circumstance is supported by a concurrently held intent to kill and to commit an independent felony does not render the defense special instruction an incorrect statement of the law.

Subsequently, the court advised defense counsel that it had reviewed the *Ario* case and had concluded that the defense special instruction incorrectly stated the law. Counsel protested that the special instruction was taken from a "footnote" in CALJIC. (33RT 7053-7054.)

The court then quoted the following passage from *Ario*:

> THE COURT: Says right here: The kidnapping special circumstance allegations here may be sustained only if the evidence will support a reasonable inference that the kidnapping was for some purpose other than to merely facilitate the primary crime of murder. Period. (33RT 7054:16-20.)[102]

Although the court concluded that the defense special instruction did not say what the court's quotation from *Ario* said, both the

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[102] The quote is taken from *Ario v. Superior Court, supra*, 124 Cal.App.3d at p. 289.

proffered instruction and the court's chosen quotation in fact stated different facets of the same law.

This seeming paradox concerning a correct statement of the law regarding the felony murder special circumstance serves to illustrate the point made by defense counsel at the outset – the instruction required clarification.

Moreover, when the defense-proffered language and the court's chosen language are viewed together, the defense special instruction is direct and clear – the special circumstance is not established if the kidnapping was for the purpose of murder – whereas the court's language is obscure – the special circumstance may be sustained only if the evidence supports a reasonable inference that the kidnapping was for some purpose other than to merely facilitate the primary crime of murder.

Ultimately, the trial court chose to instruct the jury in the language of a third alternative –the pattern instruction – as follows:

> To find that the special circumstance, referred to in these instructions as murder in the commission of kidnapping in violation of Penal Code section 207, or rape by instrument, in violation of Penal Code section 289, is true, it must be proved:
>
> 1. The murder was committed while a defendant was engaged in, or was an accomplice in, the commission or attempted commission of a kidnapping or rape by instrument; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of kidnapping, rape by instrument, or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely incidental to the commission of the murder. (138CT 36428; 34RT 7366-7367.)

As appellant will explain below, the relevant language in the given instruction was also much more obscure and therefore elusive of comprehension than the defense-proffered instruction.

C. THE RELEVANT LAW

1. The Kidnapping/Murder Special Circumstance Is Not Established Where the Kidnapping Facilitates the Primary Crime of Murder

In *People v. Green* (1980) 27 Cal.3d 1, this Court found the felony-murder special circumstance provisions of the 1977 death penalty legislation inapplicable if the defendant intended to commit murder and only incidentally committed one of the specified felonies while doing so. (*Id.*, at pp. 61-62.) As relevant here, the *Green* Court considered what interpretation should be given to the phrase, "during the commission of a robbery," within the meaning of the death penalty statute as it then existed.

Green's reasoning was subsequently summarized in *Ario*, *supra.*

> The *Green* court noted that the 1977 death penalty legislation was enacted to comply with the mandate of *Furman v. Georgia* (1972) 408 U.S. 238 and *Gregg v. Georgia* (1976) 428 U.S. 153, that the states provide a rational basis for distinguishing between those murderers who deserve to be considered for the death penalty and those who do not. (*People v. Green*, *supra*, 27 Cal.3d at p. 61.) The court concluded that the Legislature's goal "is not achieved . . . when the defendant's intent is not to steal but to kill and the robbery is merely incidental to the murder . . . because its sole object is to facilitate or conceal the primary crime. . . . To permit a jury to choose who will live and who will die on the basis of whether in the course of committing a first degree

> murder the defendant happens to engage in ancillary conduct that technically constitutes robbery or one of the other listed felonies would be to revive 'the risk of wholly arbitrary and capricious action' condemned by the high court plurality in *Gregg*. [Citation.] (*People v. Green*, *supra*, 27 Cal.3d at pp. 61-62.) (*Ario v. Superior Court*, *supra*, 124 Cal. App. 3d at p. 288.)

Subsequent to *Green*, the Court of Appeal considered whether *Green*'s interpretation of "during the commission of" was in any way affected by the change in the relevant death penalty provision, which included, as it did at the time of the charged crimes, the terminology, "while the defendant was engaged in . . . the commission of, attempted commission of, or the immediate flight after committing or attempting to commit" the specified felonies, including kidnapping in violation of section 207 (§ 190.2, subd. (a)(17)). (*Ario v. Superior Court*, *supra*, 124 Cal. App. 3d at p. 289.)

The *Ario* court concluded: "It seems clear, however, that the terms, 'while . . . engaged in' and 'during the commission of,' should carry the same meaning." (*Ibid.*)

Ario explained further in the language relied upon by the trial court in denying the defense-proffered special instruction[103]:

> In light of the foregoing, the kidnapping special circumstance allegations here may be sustained only if the evidence will support a reasonable inference that the kidnapping was for some purpose other than merely to facilitate the primary crime of murder. If it were merely incidental to the murder or ancillary to it, with no separate purpose, the rationale of *Green* prevents a determination that

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[103] See above (Section B); see also 33RT 7054:16-20.

> the murder was committed while the defendant was engaged in kidnapping. (*Ario v. Superior Court*, *supra*, 124 Cal. App. 3d at p. 289.)

In short, *Green* and *Ario* held that if the defendant intended to commit murder and kidnapped for the purpose of committing the murder, then the rationale of *Green* prevents a determination that the murder was committed while the defendant was engaged in kidnapping and the special circumstance of murder in commission of kidnapping is not established.

This is what the defense-proffered instruction, repeated here for purposes of this discussion, in fact stated.

> If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established. (7CT 1779.)

Appellant noted above that the prosecution contended that the defense special instruction incorrectly stated the law. The prosecutor further contended the "current state" of the law was that set forth in *People v. Barnett*, *supra*, 17 Cal.4th at p. 1158; *People v. Raley*, *supra* 2 Cal.4th at pp. 902-903; *People v. Clark*, *supra*, 50 Cal.3d at p. 608. (33RT 7026-7027.) These cases held that the fact that a defendant may have held a concurrent intent, consisting of both an intent to kill and an intent to commit an independent felony, does not invalidate the felony-murder special circumstance. (*Ibid.*) Contrary to the prosecution's assertion, the holding in these cases does not render the law as stated in *Green*, *Ario*, and the defense proffer an incorrect statement of the law. And, where there is

evidence tending to show concurrent intent as well as a solitary intent, logic does not require that instruction concerning solitary intent is obviated. The jury, after all, as the finder of fact, may well find the defendant did not hold a concurrent intent and held only a solitary intent.

The defense special instruction comprised a correct statement of the law and appellant was entitled, for the reasons set forth below, to have her jury instructed on this particular theory of defense.

2. A Criminal Defendant Is Entitled upon Request to an Instruction Pinpointing Her Theory of Defense

The due process and trial by jury clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution mandate that "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63, citing *Stevenson v. United States* (1896) 162 U.S. 313 (refusal of voluntary manslaughter instruction in murder case where self-defense was primary defense constituted reversible error); see also *Keeble v. United States* (1973) 412 U.S. 205, 213; *United States v. Escobar deBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ("[T]he principle [is] established in American law . . . that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support that theory"); *United States v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337 ("jury must be instructed as to the defense theory of the case").)

This mandate derives from the fact that the "right to submit a defense for which [a defendant] has an evidentiary foundation is fundamental to a fair trial and has been considered protected under both the

Fifth and Sixth Amendments." (*Whipple v. Duckworth* (7th Cir. 1992) 957 F.2d 418, 423, overruled on other grounds in *Eaglin v. Welborn* (7th Cir. 1995) 57 F.3d 496.) Accordingly, refusing to instruct on the defense theory of the case denies a defendant a fair trial. (*United States v. Douglas* (7th Cir. 1987) 818 F.2d 1317, 1320-1321.)

A criminal defendant is entitled upon request to an instruction pinpointing the theory of the defense. (*People v. Wharton* (1991) 53 Cal.3d 552, 570.) Such an instruction may direct attention to evidence or amplify legal principles from which the jury may conclude that guilt has not been established beyond a reasonable doubt. (*People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1137.)

In *People v. Woodward* (1873) 45 Cal. 293, 294, this court held with regard to an instruction analogous to the defense special instruction in issue here that it was error to refuse an instruction informing the jury that a defendant who merely stands by at the time of the offense is not guilty of aiding and abetting the commission of the crime.

This Court has explained the importance of pinpoint instructions as follows:

> Ordinarily, the relevance and materiality of circumstantial evidence is apparent to the trier of fact, but this is not always true, and the courts of this state have often approved instructions pointing out the relevance of certain kinds of evidence to a specific issue. (*People v. Sears*, *supra*, 2 Cal.3d at p. 190.)

In *People v. Wright*, *supra*, this Court clarified this rule by holding that the defendant has no right to direct the jury's attention to

specific evidence or testimony. Nevertheless, *Wright* specifically held that CALJIC No. 2.91 (regarding eyewitness testimony) and CALJIC No. 4.50 (regarding alibi) are proper pinpoint instructions. Each of those instructions calls attention, in a generic form, to the evidence upon which the defense theory is based and admonishes the jurors that if they have a reasonable doubt after considering such evidence, they must acquit. (See Evid. Code, § 502; *People* v. *Simon* (1996) 9 Cal.4th 493, 500-501 (as to defense theories, the trial court is required to instruct on who has the burden and the nature of that burden).)

In *People v. Saille* (1991) 54 Cal.3d 1103, this Court further explained that a defendant is entitled to a pinpoint instruction upon request. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille*, *supra*, 54 Cal.3d at p. 1119; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1019, Brown, J. concurring.)

California courts have long recognized the importance of focusing the jury's attention on its task through such pinpoint instructions, as the discussion of the following cases illustrates. In *People v. Roberts* (1967) 256 Cal.App.2d 488, the defendant was convicted of oral copulation. The evidence showed that the police, who had received complaints that a public bathroom was being used for sexual purposes, looked through a peephole and observed individuals engaging in oral sex. The evidence further showed that lighting conditions were poor and that the

initial identification of the defendant was "tentative" and uncorroborated. (*Id.*, at p. 491.)

The trial court in *Roberts* refused to give the defense-requested instruction that the jury should acquit the defendant if the jurors had a reasonable doubt of his guilt based on the ability of the officers to identify him from their place of concealment. (*Id.*, at p. 492.) The defendant was convicted. The reviewing court reversed the conviction on the ground the trial court prejudicially erred in refusing to give an instruction that directed the jury's attention to the potential weaknesses of the identification, which was the core of the defense. (*Id.*, at p. 494; see also *People v. Guzman* (1975) Cal.App.3d 380, 388 (it is error to refuse a defendant's request for an instruction relating identification to reasonable doubt).)

In *McDowell v. Calderon* (9th Cir. 1990) 130 F.3d 833, the court stated:

> A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions. (*Id.*, at p. 836)

McDowell v. Calderon made clear that standard instructions are not always sufficient to assure that the jury will fulfill its purpose:

> Jury instructions are only judge-made attempts to recast the words of statutes and the elements of crimes into words in terms comprehensible to the lay person. The texts of "standard" jury instructions are not debated and hammered out by legislators, but by ad hoc committees of lawyers and

> judges. Jury instructions do not come down from any mountain or rise up from any sea. Their precise wording, although extremely useful, is not blessed with any special precedential or binding authority. This description does not denigrate their value, it simply places them in the niche where they belong. (*Id.*, at p. 841.)

Accordingly, jury instructions in general, and here CALJIC instructions in particular, are neither sacrosanct nor above being modified. As the case authorities set forth above show, California courts have long recognized that modification of instructions for purposes of clarification is both advisable and legally warranted.

Recently, the Judicial Council endorsed a new series of pattern instructions known as California Criminal Jury Instructions or CALCRIM[104] as the official instructions for use in this state.

Indeed, the recent wholesale revamping of the entire set of jury instructions from CALJIC to CALCRIM shows that the state judiciary officially recognized that CALJIC had substantial room for improvement and required a complete review and revision. The CALCRIM instructions are the work of a committee that was tasked with writing "instructions that are both legally accurate and understandable to the average juror." (CALCRIM (Fall 2009 ed., Preface.) The committee noted that its effort "addressed a need for instructions written in plain English and responded to the specific recommendation of the Blue Ribbon Commission on Jury System Improvement that observed: 'jury instructions as presently given in

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[104] Rule 2.1050 of the California Rules of Court provides: "The California Jury instructions approved by the Judicial Council are the official instructions for use in the State of California. . . ."

California and elsewhere are, on occasion, simply impenetrable to the ordinary juror.'" (*Ibid.*)

Fairness dictates that the court must also give instructions directing the jury's attention to those items of evidence that support the defense's case. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473 fn. 6, the Supreme Court noted that state trial rules that provide for non-reciprocal benefits violate the due process clause. (See also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377.) Although *Wardius* was concerned with reciprocal discovery rights, the same principle should apply to jury instructions. (*People v. Moore* (1954) 43 Cal.2d 517, 526-527 ("There should be absolute impartiality as between the People and the defendant in the matter of instructions that have been given by the court, including the phraseology employed in the statement of familiar principles.").)

Appellant has observed above that the relevant portion of the instruction given to the jury was more obscure than the defense proffer. That portion of the instruction stated that in order to prove the felony murder special circumstance, the following proof was in part required: "The murder was committed in order to carry out or advance the commission of the crime of kidnapping, rape by instrument, or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely incidental to the commission of the murder." (138CT 36428.) In contrast, the defense proffer stated: "If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in

kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established." (7CT 1779.)

That portion of the instruction given the jury that states the special circumstance is not established "if the kidnapping was merely incidental to the commission of the murder" is fundamentally obscure and does not lend itself to being readily understood.

A random sampling of dictionaries shows that "incidental" is defined variously as follows: (1) Occurring or likely to occur as an unpredictable or minor accompaniment;[105] (2) Of a minor, casual, or subordinate nature;[106] (3) Being likely to ensue as a chance or minor consequence;[107] (4) Occurring merely by chance or without intention or calculation;[108] (5) Happening or likely to happen in an unplanned or subordinate conjunction with something else.[109]

If the word "incidental" is replaced by each of these definitions in turn in the instruction given to appellant's jury, the results are as follows:

1. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely occurring or likely to occur as an unpredictable or minor accompaniment to the commission of the murder.

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105 http://www.thefreedictionary.com/incidental

106. http://www.thefreedictionary.com/incidental

107 http://www.merriam-webster.com/dictionary/incidental

108 http://www.merriam-webster.com/dictionary/incidental

109 http://dictionary.reference.com/browse/incidental

2. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely of a minor, casual, or subordinate nature to the commission of the murder.
3. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely likely to ensue as a chance or minor consequence to the commission of the murder.
4. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was occurring merely by chance or without intention or calculation to the commission of the murder.
5. In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely happening or likely to happen in an unplanned or subordinate conjunction with something else to the commission of the murder.

None of these substituted forms of the instruction properly and adequately instructs the jury that the special circumstance is not established if the kidnapping is committed for the purpose of murder, as *Green* and *Ario* state the law to be.

"Instructions in a criminal case should be as clear and understandable to the layman juror as possible, and should avoid undue repetition." (Witkin, Cal.Crim. Law (2d ed.), Trial, § 2932; *People v. Bickerstaff* (1920) 46 Cal.App.764, 775.)

This Court has recognized that:

> Even in the absence of a request, a trial court must instruct on general principles of law that are . . . necessary to the jury's understanding of the case. (*People v. Mayfield* (1997) 14 Cal.4th 668, 773; *People v. Prettyman* (1996) 14 Cal.4th 248, 264.) That obligation comes into play when a statutory term "does not have a plain, unambiguous meaning," has a "particular and restricted meaning" (*People v. Mayfield, supra*, 14 Cal.4th at p. 773), or has a technical meaning peculiar to the law or an area of law (see *People v. Howard* (1988) 44 Cal.3d 375, 408). (*People v. Roberge* (2003) 29 Cal. 4th 979, 988.)

In *Roberge* and in *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, this Court granted review to resolve the meaning of the word "likely" as it was used in different provisions of California's Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600, et seq.)

The Court, in *Ghilotti*, noted that several dictionaries and modern legal references had given the word "likely" a variety of meanings flexibly covering "a range of expectability from possible to probable." (*Ghilotti, supra*, 27 Cal.4th at p. 916; see *People v. Roberge, supra*, 29 Cal.4th at p. 986.)

The *Roberge* Court observed that the meaning of the word "likely" in the context of SVPA legislation is neither plain nor unambiguous and further observed that not all of the dictionary definitions of "likely" are consistent with the particular and technical meaning the SVPA assigns to "likely." The Court concluded: "Accordingly, in an SVPA trial the court must instruct the jury on this meaning even without a request by any party." (*People v. Roberge, supra*, 29 Cal.4th at pp. 988-989.)

Appellant has shown above that the meaning of the word "incidental" in the context of the felony murder special circumstance instruction is also neither plain nor unambiguous. As with the SVPA's term "likely," the dictionary definitions of "incidental" are not consistent with the particular meaning *Green* and *Ario* assign to the term. (See *People v. Roberge*, *supra*, 29 Cal.4th at p. 988.) Moreover, "incidental," as used in the instruction, not only does not comport with the various standard dictionary definitions set forth above, it does not comport with typical daily usage of the word, e.g., incidental expenses, or problems incidental to change, or duties incidental to the job.

The defense special instruction that the special circumstance of murder in the commission of kidnapping is not established if the kidnapping was committed for the purpose of murder plainly and correctly stated the law. The trial court erred in refusing the defense request that the given instruction be modified to include the proffered instruction, which would have provided the particular and technical meaning of the word "incidental" in the instruction: "In other words, the special circumstance referred to in these instructions is not established if the kidnapping or rape by instrument was merely *incidental* to the commission of the murder." (138CT 36428; italics added.)

Appellant's contention that the term "incidental" in the CALJIC instruction given to her jury had a particular and technical meaning that required explication has been given implicit recognition in CALCRIM's corresponding instruction, CALCRIM No. 730, in which the term "incidental to" is stated in the disjunctive and its meaning expanded because it is preceded by the term "merely part of."

The relevant portion of that instruction states:

> In addition, in order for this special circumstance to be true, the People must prove that the defendant intended to commit ____ independent of the killing. If you find that the defendant only intended to commit murder and the commission of _____ was merely part of or incidental to the commission of that murder, then the special circumstance has not been proved. (CALCRIM No. 730.)

It bears repeating at this point that the Task Force that developed the CALCRIM instructions was charged with writing instructions that were "both legally accurate and understandable to the average juror." (CALCRIM (Fall 2008 ed.) Preface.)

When, as here, the jury is not properly instructed that the special circumstance is not established if the kidnapping is for the purpose of murder, the jury is likely to reach its verdict based on an incorrect understanding of the law, thereby undermining the requirement of heightened reliability in capital cases, in violation of the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Gilmore v. Taylor* (1993) 508 U.S. 333, 344; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879.)

The court's unjustified refusal to give the instruction violated the due process and trial by jury clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and denied appellant a fair trial.

D. THE TRIAL COURT ERRED IN REFUSING THE DEFENSE INSTRUCTION; THE ERROR WAS PREJUDICIAL

The prosecutor argued that Daveggio and appellant were motivated to stalk and kill Vanessa Samson based on evidence that Daveggio talked to April in their Candlewood Suites Motel room about "hunting," which he described as "where you stalk someone to kill." Although appellant did not say anything during this conversation, the conversation occurred in her presence and April heard appellant making sighing or giggling sounds during the conversation. (20RT 4634-4636; 33RT 7149.)

The next day, the Friday after Thanksgiving, Daveggio and appellant took April home. When they were in the laundry room, appellant asked April if she wanted to go "hunting" with Daveggio and herself. Appellant said the day after Thanksgiving was the biggest shopping day of the year and would be the best day to go on a hunt. When April declined the invitation, appellant became angry. (20RT 4704-4705.)

The prosecutor also argued that Daveggio and appellant were copycats motivated to be "bigger and better than the Gallegos [serial killers] based on evidence that appellant pulled out a serial murder trading card at Rick Boune's home and said she and Daveggio might one day have a card like that and that *she* might one day have a card like that. (16RT 3781-3787, 3805; 33RT 7148, 7198-7199.)

The evidence was obviously substantial enough that the prosecutor relied on it in argument to the jury and the jury could certainly have concluded from such evidence that appellant aspired to be a serial killer and therefore participated in "hunting" Samson, i.e., in stalking and

killing Samson. In brief, the jury could have found that appellant participated in Samson's kidnapping for the purpose of murdering Samson and moving toward her goal of becoming a serial killer.

There was therefore evidence that warranted a proper instruction to the jury on the distinction in the law on felony murder special circumstance recognized in *Green* and *Ario* at which the defense-proffered instruction was directed.

Appellant was prejudiced by this instructional error, which adversely impacted her right to due process of law and to have a jury determine every material element of her guilt. As such, the error is evaluated under the standard of *Chapman v. California* (1967) 386 U.S. 18, which mandates that the conviction must be reversed unless the beneficiary of the error can show that the error was harmless beyond a reasonable doubt.

Counsel for appellant argued that appellant, who had been sexually abused by her father and had worked as a prostitute, suffered from Post Traumatic Stress Disorder. Counsel pointed to Dr. Stewart's expert opinion of appellant's condition and to evidence that appellant's attempts to improve and stabilize her life ended when she met Daveggio. As a result, counsel contended, the dynamic in their relationship was that appellant was submissive to Daveggio and it was Daveggio who was the moving force in the charged crimes. According to counsel's argument, appellant's role was that of a major participant. Counsel urged the jury to evaluate and determine appellant's individual liability. (34RT 7262-7267, 7271.)

Here, the prosecution's evidence showed that Daveggio and appellant admired serial killers and that they made plans for a "hunting"

shortly before Vanessa Samson was kidnapped and killed. Daveggio's defense was that Samson was the victim of that "hunting," i.e., that she was kidnapped for purposes of murder. Appellant's defense was that Daveggio was the leader and she was submissive to him, i.e., that her intent was to help Daveggio achieve his intent or, in other words, that she helped Daveggio in kidnapping Samson for purposes of murder.

A reasonable juror could find under a properly given kidnapping/murder special circumstance instruction that appellant assisted Daveggio in the "hunting," i.e., assisted Daveggio in kidnapping Vanessa Samson for purposes of murder and accordingly find that the kidnapping/murder special circumstances was not established. For these reasons, the error was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 26.)

XII.

THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND REQUIRES A REVERSAL OF THE JUDGMENT OF CONVICTION AND DEATH SENTENCE

Even where individual errors do not result in prejudice, the cumulative effect of such errors may require reversal. (*Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6 [cumulative errors may result in an unfair trial in violation of due process]; accord *United States v. McLister* (9th Cir. 1979) 608 F.2d 785, 788; see also *People v. Hill*, *supra*, 17 Cal.4th 800, 845-847 [cumulative effect of multiple errors resulted in miscarriage of justice, requiring reversal under California Constitution]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process".)

Where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Furthermore, when errors of federal magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. In *People v. Williams* (1971) 22 Cal.App.3d 34, the court summarized the multiple errors committed at the trial level and concluded:

> Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, was not harmless error. [Citations.] (*People v. Williams*, *supra*, 22 Cal.App.3d at pp. 58-59; see also *Harrington v. California* (1969) 395 U.S. 250, 255, dis.opn, Brennan, J.)

A cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the trial court. Courts have recognized that the curative effect of any instruction is uncertain and lingering prejudice can remain even after an admonition. Thus, if there are errors which individually may have been cured by instruction or admonition, the trace of prejudice may remain and a court reviewing the effects of cumulative error in a case should consider any "traces" of prejudice that may remain. (*United States v. Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; *see also United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

In this case, the cumulative effect of the guilt phase errors requires a reversal. This is especially so because many of the errors are related. As a result, the prejudicial effect of each error is compounded, much as in a circumstance involving compound interest, interest is compounded into the principal. For this reason, the errors must be evaluated together and the prejudicial effect of each should be viewed cumulatively in the context of the aggregated prejudice. Although individual errors looked at separately may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial as to

require reversal. (*United States* v. *Necoechea*, *supra*, 986 F.2d at p. 1282, citing *United States v. Wallace*, *supra*, 848 F.2d at p. 1475.)

In appellant's case, for example, many of the errors set forth in this briefing concerned the admission of and comment upon character evidence aimed at portraying both appellant and Daveggio as so morally debased, so deficient in a moral sense of concern, so lacking in regard for others, and so blameworthy as to compel the jury to decide the case on improper grounds.

The effort to improperly influence the jury with improper character evidence began with the prosecution's opening statement, which described Daveggio and appellant as serial sexual predators seeking out and preying upon vulnerable young girls and women and callously inflicting pain and degradation in their efforts to emulate the serial killers they idolized. (See Argument VIII.)

Moreover, during her opening statement, this experienced trial prosecutor persisted in arguing the case, despite the repeated and explicit admonishments of the court, and including in that argument inflammatory speculative inferences based on irrelevant evidence, such as cuts in the van's carpet to allow the use of seat anchor bolts when combined with rope bindings to function as restraints in the absence of evidence such restraints were ever used. (See Argument X.)

The prosecution's case against appellant was dominated by character evidence revolving around appellant's prior sexual misconduct presented for the jury to use to prove appellant's disposition to commit the charged crimes. The use of a defendant's prior bad acts as evidence to prove the defendant has a propensity to commit the charged crimes is

viewed with caution because such evidence endangers a fair trial and impacts the presumption of innocence. The disposition evidence was even more freighted with prejudice because the incidents involved the use of force, the use of restraints, the use of violence, and included evidence of forcible sexual assaults against appellant's own daughter. (See Argument V.)

In addition, as appellant explained in Argument IV, an instructional error incorrectly allowed the jury to consider prior charged sexual offenses as evidence of appellant's propensity to commit the charged crimes.

The jury was also allowed to use evidence of prior sexual offenses to prove facts such as common plan or identity, when the facts of those prior offenses did not support such inferences. (See Argument VI.) The jury's perception of the defendants' character was further prejudiced by evidence of guns and crossbows, items which were not involved in the charged crimes. (See Argument X.)

In addition to the character evidence presented to the jury, which affected the presumption of innocence and the burden of proof to the prosecution's advantage, during jury selection the trial court gave extemporaneous versions of the reasonable doubt instruction that misdescribed the prosecution's burden of proof, also to the prosecution's advantage. (See Argument I.)

As a result of the emotional bias embedded in the prosecutor's opening statement cum argument, the emotional bias inherent in the character evidence and flawed instructions concerning the use of that character evidence, and the omission of an instruction that the special

circumstance of kidnapping for sexual purpose was not proven if the evidence establishes Vanessa Samson was kidnapped for purposes of murder, the jury, the jury naturally, but incorrectly, find the special circumstance to be true. (See Argument XI.)

Finally, appellant's jury was incorrectly instructed that all principals are "equally guilty" (CALJIC No. 3.00), which allowed the jury to convict appellant of the charged crimes in the face of evidence that appellant did not share Daveggio's mental state. (See Argument II.)

The cumulative effect of these related errors so infected the trial with unfairness that the judgment of conviction regarding appellant must be reversed.

JOINDER

XVIII.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HER COAPPELLANT THAT MAY ACCRUE TO HER BENEFIT

Appellant Michelle Lyn Michaud joins in all contentions raised by her coappellant that may accrue to her benefit and joins, in particular, in her coappellant's arguments against the California Death Penalty. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44.)

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant MICHELLE LYN MICHAUD that the judgment of conviction and sentence of death must be reversed.

DATED: 11 March 2010

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's opening brief in an appeal taken from a judgment of death produced on a computer must not exceed 102,000 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 101,457 words.

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. I am an employee of Bleckman & Blair, Attorneys at Law, and my business address is Suite 3 Ocean Plaza, 302 West Grand Avenue, El Segundo, California 90245.

On **17 March 2010**, I served the

Appellant's Opening Brief on behalf of
Michelle Lyn Michaud

in People v. James Anthony DaVeggio and **Michelle Lyn Michaud**
(CSC No. S110294; Alameda County Superior Court No. 134147),

on the interested parties in said action by placing_____ the original/_XX_ true copies thereof, enclosed in sealed envelope(s) addressed as stated on the attached mailing list,
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Executed on 17 March 2010, at El Segundo, California.

JANYCE K. BLAIR

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