IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. SCOTT THOMAS ERSKINE, *Defendant and Appellant.*	No. S127621 San Diego County Superior Court No. SCD161640

Automatic Appeal From the Superior Court of San Diego County
Honorable Kenneth K. So, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this reply brief appellant addresses specific contentions made by respondent requiring additional discussion in order to present the issues fully to this court. Appellant does not address every claim raised in the opening brief, nor does he reply to every contention made by respondent with regard to the claims discussed. Rather, appellant focuses only on the most salient points not previously covered in the opening brief. The absence of a reply to any particular point made by respondent is not intended as a concession of any point made by respondent, or an abandonment or waiver of any argument advanced in the opening brief, but merely reflects appellant's view that the matter has been adequately addressed and that the positions of the parties have been fully presented. (See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

AUTHORITIES AND ARGUMENT

I.

THE TRIAL COURT ERRED IN ADMITTING IMPROPER CHARACTER EVIDENCE WHICH WAS MORE PREJUDICIAL THAN PROBATIVE.

With respect to appellant's first assignment of error, respondent argues that the trial court properly admitted evidence of two prior incidents under Evidence Code section 1101, subdivision (b), to show identity, preparation, plan, modus operandi, and intent, and under section 1108, to show propensity to commit sexual assaults. Alternatively, respondent argues that any error was harmless. (See Respondent's Brief at pp. 60-77.) However, as discussed at length in appellant opening brief, and further below, the evidence was not properly admitted under either section. (See Appellant's Opening Brief at pp. 51-86.) Additionally, the evidence should have been excluded under Evidence Code section 352 as unduly prejudicial, because it lacked probative value, was cumulative and unnecessary, and because it was time consuming, confusing and inflammatory. (See Appellant's Opening Brief at pp. 78-84.) Moreover, the erroneous admission of this improper character evidence cannot be regarded as harmless. (See Appellant's Opening Brief at pp. 84-86.)

A. The Evidence Did Not Tend Logically, Naturally and by Reasonable Inference to Prove a Material Issue of Fact as Required for Admission Under Subdivision (b) of Section 1101.

Respondent argues first that the trial court properly admitted evidence of the uncharged offenses under Evidence Code section 1101, subdivision (b). (Respondent's Brief at pp. 67-72.) However, the evidence did not tend logically to prove a material issue of fact as required for admission under subdivision (b) of section 1101.

(1) ***Identity***

Respondent contends that the other crimes evidence was admissible on the question of identity in that "the uncharged offenses shared plenty of distinctive similarities with the charged offense to be highly probative for this purpose." (Respondent's Brief at p. 68.) For other crimes evidence to be admissible to prove identity, "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* (1994) 7 Cal.4th 380, 403-404; accord *People v. Balcom* (1994) 7 Cal.4th 414, 424-425.) "'"The highly unusual and distinctive nature of both the charged and [uncharged] offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offense." [Citation.]'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1003.) Respondent's argument must be rejected because the offenses at issue in the present case have virtually no common marks with any degree of distinctiveness and they could not, by any stretch of the imagination, be regarded as "signature" crimes.

With respect to the Baker case, respondent argues: "Erskine accomplished his murders of Baker, Jonathan, and Charlie the same way — strangulation." (Respondent's Brief at p. 69.) However, on the next page respondent correctly notes that "Renee Baker's cause of death was actually drowning not strangulation, that she sustained blunt force trauma injuries to her head and face, and that there was no indication she had been tied up or gagged." (Respondent's Brief at pp. 69-70.) However, respondent contends that: "These differences are diminished by the fact that Renee Baker's, Jonathan's, and Charlie's bodies were found in secluded outdoor locations,

their clothing was neatly piled, Erskine's sperm was in Renee's and Charlie's mouths, and Erskine's cigarette butts littered both crime scenes." (Respondent's Brief at p. 70.) The circumstances referred to by respondent do not satisfy the test for admissibility on the question of identity as they can not be described as so "unusual and distinctive as to be like a signature." (See *People v. Ewoldt, supra*, 7 Cal.4th at pp. 403-404.) Consequently evidence regarding the Baker case was inadmissible on the issue of identity. (See also Appellant's Opening Brief at pp. 68-71.)

With respect to the Jennifer M. case, respondent argues that any dissimilarities in the cases "are diminished by the fact that Erskine used the exact same materials to bind and gag Jennifer M., Charlie, and Jonathan, as well as forced oral copulation and strangulation involved in the offenses." (Respondent's Brief at p. 69.) Initially it is important to note that Jennifer M. was not "strangled." She testified that appellant choked her with his hands at one point to gain her compliance, but she was not killed. (26 RT 3695-3696.) In fact appellant ultimately drove her to a location at her request, and dropped her off. (26 RT 3710-3711.) In this respect the Jennifer M. case was very unlike the charged offenses where the victims died as the result of ligature strangulation. Additionally, the "materials" used to bind Jennifer M. — duct tape and rope — were not unique, and certainly did not amount to a signature crime method. Contrary to respondent's argument, there were virtually no distinctive similarities between the Jennifer M. case and the charged offenses.

Since there were insufficient distinctive common marks between the prior incidents and the offenses charged in the present case to render them "signature" crimes, the evidence was not admissible on the question of identity.

(2) Common Scheme or Plan

Respondent argues that "[t]he prosecutor was entitled to bolster its case that Erskine was the perpetrator and acted in the requisite manner with evidence that he had acted pursuant to a common scheme or plan." (Respondent's Brief at p. 70.) "In establishing a common design or plan, evidence of uncharged misconduct must demonstrate, 'not merely a similarity in 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." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) "To establish the existence of a common design or plan, the common features must indicate the existence of a plan . . . ." (*Id.* at p. 403.)

Respondent argues that "[t]he trial court properly exercised its discretion in admitting the evidence as it tended to show a common plan in luring victims to secluded locations in order to sexually assault them." (Respondent's Brief at p. 71.) However, respondent's argument is based on generic factors showing only a propensity to commit sex offenses rather than a concurrence of common features — an impermissible purpose under Evidence Code section 1101. In light of the high potential for prejudice associated with other crimes evidence, when prior misconduct evidence is presented under subdivision (b) of section 1101, courts must carefully consider whether it is genuinely being offered for a proper, non-character purpose, or whether it might actually be aimed at sustaining an improper inference of action in conformity with a person's bad character. Otherwise evidence of past misconduct could routinely be allowed to sustain an inference of action in conformity with bad character — so long as the proponent of the evidence could proffer a plausible companion inference that does not contravene the rule. (*People v. Smallwood* (1986) 42 Cal.3d 415, 428

["Whenever an inference of the accused's criminal disposition forms a 'link in the chain of logic connecting the uncharged offense with a material fact' [citation] the uncharged offense is simply inadmissible, no matter what words or phrases are used to 'bestow[] a respectable label on a disreputable basis for admissibility — the defendant's disposition.' [Citation.]"].) Here the evidence was not plausibly aimed at a proper purpose, and was, therefore, inadmissible as evidence of a common scheme or plan.

(3) Intent

Respondent argues that the other crimes evidence was admissible on the question of intent because "the prosecutor was required to prove all elements of the crimes and special circumstances, including that he killed Jonathan and Charlie intentionally while committing the sex offenses." (Respondent's Brief at p. 72.) This court has articulated a three-part test for determining the admissibility of other-crimes evidence which takes into consideration: "(1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence." (*People v. Kelly* (2007) 42 Cal.4th 763, 783.) Here the evidence did not relate to a material fact, and did not have any tendency in reason to prove intent other than on the basis of propensity.

"In order to satisfy the requirement of materiality . . . the ultimate fact to be proved must be 'actually in dispute.' [Citation.] If an accused has not 'actually placed that [ultimate fact] in issue,' evidence of uncharged offenses may not be admitted to prove it. [Citations.]" (*People v. Thompson* (1980) 27 Cal.3d 303, 315.) Furthermore, otherwise relevant misconduct evidence is not admissible if it is merely cumulative with respect to other evidence the prosecution may use to prove the same issue. (*People v. Alcala* (1984) 36

Cal.3d 604, 631-632; *People v. Guerrero* (1976) 16 Cal.3d 719, 724.) As shown by the prosecution's closing argument to the jury, the other crimes evidence was cumulative and unnecessary with regard to issues of intent. Specifically with respect to intent to kill and premeditation and deliberation, the prosecutor argued that these matters were proved beyond dispute based upon the circumstances of the victims' deaths. (29 RT 4146.) The prosecutor also essentially conceded that the other crimes evidence was cumulative and unnecessary with respect to any issue regarding felony murder based upon the commission of sex offenses.[1] (29 RT 4149-4158.) Clearly then, the evidence did not relate to a material issue of disputed fact with respect to intent.

Even had there been a disputed issue of fact regarding intent, the other crimes evidence did not have a tendency in reason to prove intent other than by means of inferences based upon propensity. (See Appellant's Opening Brief at pp. 72-74.) Under these circumstances, the prior crimes evidence was not admissible under subdivision (b) of section 1101 on the question of intent.

B. <u>The Trial Court Erred in Admitting the Prior Crimes Evidence Under Evidence Code Section 1108.</u>

Respondent's argument with regard to admissibility of the other crimes evidence under Evidence Code section 1108 is fully addressed by the discussion set forth in appellant's opening brief, and it would serve no purpose to repeat it here. (See Appellant's Opening Brief at pp. 62-65, 75-84.)

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[1] In this regard the prosecutor stated: "I don't think there will be any argument but that the defendant committed the crime of oral copulation with Charlie and that the murder was committed during the commission of that offense." (29 RT 4153.) Similarly, the prosecutor stated: "As to both boys, there's no contest — it is uncontradicted — what lewd acts occurred." (29 RT 4156.)

C. The Evidence Should Have Been Excluded Under Evidence Code Section 352.

The first relevant factor under Evidence Code section 352 is the probative value of the evidence. "[E]vidence is probative if it is material, relevant, and necessary. '[H]ow much "probative value" proffered evidence has depends upon the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the importance of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity).'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 318, fn. 20 [disapproved on another point in *People v. Rowland* (1992) 4 Cal.4th 238, 260].) Respondent argues only in a conclusory way that "there were substantial similarities between the Jennifer M. sexual assault, the Renee Baker murder, and the murders of Jonathan and Charlie so as to make the evidence of the uncharged crimes highly probative." (Respondent's Brief at p. 77.) However, as discussed above, and further in appellant's opening brief, the other crimes evidence admitted in the present case did not tend logically and by reasonable inference to prove any contested issue of material fact. The probative value of the evidence was, therefore, essentially non-existent, and respondent sets forth no specific argument leading to a contrary conclusion.

"Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value." (*People v. Kelly*, *supra*, 42 Cal.4th at p. 783.) Even if the evidence were determined to have some tendency in reason to prove a material fact, under section 352 this weak probative value must be balanced against factors affecting its potential for negatively impacting the trial including the likelihood of confusing, misleading, or distracting the jurors from their main

inquiry, 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 excluding irrelevant though inflammatory details surrounding the offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) On this point respondent argues that "[n]o reason existed to exclude this evidence." (Respondent's Brief at p. 75.) However, as discussed at length in appellant's opening brief, all of the relevant section 352 factors weighed against admission of the evidence. (See Appellant's Opening Brief at pp. 81-84.)

D. Prejudice

Traditionally, propensity evidence is disfavored on the ground that people should be tried for their charged acts and not for their past deeds or personalities. (*United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044 ["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. Garceau* (1993) 6 Cal.4th 140, 186 [noting that the use of such evidence may dilute the presumption of innocence].) The prohibition against admission of character evidence to prove conduct on a specified occasion is, thus, based on fundamental principles of fairness. "'While to the layman's mind a defendant's criminal disposition is logically relevant to his guilt or innocence of a specific crime, the law regards the inference from general to specific criminality so weak, and the danger of prejudice so great, that it attempts to prevent conviction on account of a defendant's bad character. . . .'" (*People v. Smallwood, supra* 42 Cal.3d at p. 429.) The rule guards against the "natural and inevitable tendency" of jurors to give excessive weight to the prior conduct and either allow it to bear too strongly on the present charge, or to take the proof of it as justifying a conviction irrespective of guilt of the present charge. (*People v. Guerrero*,

supra, 16 Cal.3d at p. 724; *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6; see also *People v. Ortiz* (2003) 109 Cal.App.4th 104, 111.) "[O]nce prior convictions are introduced, the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." (*United States v. Burkhart* (10th Cir. 1972) 458 F.2d 201, 204.)

In the present case approximately 39% of the prosecution's testimonial evidence in the guilt phase related to other crimes.[2] The prosecution presented testimony from four witnesses relating to the Jennifer M. case (26 RT 3685-3875), and five witness regarding the Baker incident (28 RT 3979-4052, 29 RT 4078-4093). This evidence was probative only in terms of propensity, and the jurors were instructed that they could use the evidence to "infer that the defendant had a disposition to commit sexual offenses" and to "infer that he was likely to commit and did commit the crime or crimes of which he is accused. (CALJIC No. 2.50.01 at 12 CT 2728-2729.) During closing argument the prosecutor referred to the extensive other crimes evidence without intelligibly and logically connecting it directly to a material issue of fact, basically encouraging the jury to use inferences based on propensity to fill in any gaps it might find in the prosecution's case. (29 RT 4144 ["[Y]ou can use it for determining who it was that committed the murder against the boys for the identity of the perpetrator. [¶] You can use it for intent. What was the defendant's intent? You can use it for, what's called, M.O., which I'm sure you guys have heard of before. And you can use it for propensity. Okay? Did he have the disposition to commit the crimes?"].) Under these circumstances, and in light of the inherently prejudicial nature of the

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[2] Of the 724 pages of testimony 441 pages related to the current charges (23 RT 3235 - 24 RT 3468, 24 RT 3475 - 26 RT 3683), and 283 pages related to other crimes (26 RT 3685 - 28 RT 4053, 29 RT 4077 - 4094).

improperly admitted evidence, it cannot be said the error was harmless beyond a reasonable doubt. (See *People v. Garceau*, *supra*, 6 Cal.4th at p. 186 [applying the standard of review applicable to federal constitutional violations to find error harmless]; *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775 [holding that an erroneous instruction permitting the jury to consider the defendant's propensity to commit murder "so offended fundamental conceptions of justice and fair play as to rise to the level of constitutional violation.]; cf *Old Chief v. United States* (1997) 519 U.S. 172, 180 [holding that "generalizing a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged" constitutes unfair prejudice, and explaining that "[t]he term 'unfair prejudice' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."].) The judgment of the trial court must, therefore, be reversed.

II.

THE TRIAL COURT'S IMPROPER REMOVAL OF PROSPECTIVE JUROR #154 FOR CAUSE NECESSITATES REVERSAL OF THE DEATH PENALTY JUDGMENT.

In his opening brief appellant argued that the trial court erroneously granted the prosecution's challenge for cause to prospective juror #154. (See Appellant's Opening Brief at pp. 87-104.) The court dismissed this prospective juror after she voiced reservations about capital punishment, but also repeatedly confirmed that she was willing and able to set aside her personal beliefs and follow the court's instructions with respect to the matter of penalty.[3] Based on two of her responses on the written questionnaire, the trial court concluded that "she is unable to vote for death." (66 RT 10531.) However, as discussed at length in appellant's opening brief, and further below, the prosecution failed to carry its burden of proving that the excused potential juror's views would "prevent or substantially impair the performance of his [or her] duties as a juror" (*Wainwright v. Witt* (1985) 469 U.S. 412, 423). (See Appellant's Opening Brief at pp. 97-104.)

Respondent argues generally that the trial court properly excused prospective juror #154 under the *Witt* standard. (Respondent's Brief at pp. 83-86.) More specifically, respondent contends that prospective juror #154 gave conflicting answers "both in court and on the questionnaire." (Respondent's Brief at p. 86.) In light of the conflicting answers, respondent's argument continues, deference must be accorded to the trial court's ruling. (Respondent's Brief at pp. 84, 86.) Respondent concludes that

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[3] Prospective juror #154's responses regarding her ability to follow the law pertained directly and exclusively to the matter of punishment since she was a prospective juror in the second penalty phase trial.

"[t]he record supports the trial judge's reasoning." (Respondent's Brief at p. 85.)

Respondent's argument must be rejected for several reasons. First, contrary to respondent's characterization, prospective juror #154's answers were not clearly conflicting with respect to the critical *Witt* inquiry — whether a juror generally opposed to capital punishment can set aside his or her personal views and follow the law as the trial judge instructs (see *People v. Thompson* (2016) 1 Cal.5th 1043, 1065). Second, there is not even a hint in the record that the trial court's ruling was in any way based on findings of fact that are entitled to deference on appeal. Above all, the trial court's ruling excusing prospective juror #154 for cause is not supported by substantial evidence.

Generally, a prospective juror's views about capital punishment may support an excusal for cause if those views would "'prevent or substantially impair'" performance of the juror's duties in accordance with the court's instructions and the juror's oath. (*Wainwright v. Witt*, *supra*, 469 U.S. at p. 424; *People v. Cunningham* (2001) 25 Cal.4th 926, 975.) "It is important to remember that . . . those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." (*Lockhart v. McCree* (1986) 476 U.S. 162, 176.) "The *Lockhart* approach contemplates a two-part inquiry. It recognizes that a prospective juror may have strong feelings about capital punishment that would generally lead to an automatic vote, one way or the other, on the question of penalty. However, it also allows for the possibility that such a juror might be able to set aside those views and fairly consider both

sentencing alternatives, as the law requires. Both aspects of the inquiry are important." (*People v. Leon* (2015) 61 Cal.4th 569, 591.)

In evaluating whether a prospective juror may properly be excused for cause, "[t]he critical issue is whether a life-leaning prospective juror — that is, one generally (but not invariably) favoring life in prison instead of the death penalty as an appropriate punishment — can set aside his or her personal views about capital punishment and follow the law as the trial judge instructs." (*People v. Thompson*, *supra*, 1 Cal.5th at p. 1065.) In the present case prospective juror #154 disclosed her general opposition to the death penalty, but also repeatedly confirmed her ability to set her personal feelings aside and follow the trial court's instructions in determining the appropriate penalty.

Throughout her questionnaire responses, prospective juror #154 declared that she would be willing and able to follow the trial court's instructions with regard to the question of penalty.[4] She subsequently confirmed her ability to follow the law during voir dire. For example when defense counsel specifically asked: "Given your views, are you someone who could nevertheless take the law from the judge, as he instructs it to you, listen

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[4] For instance, in response to question 77: "The jurors who decide this case will be told that they must follow the law as the judge explains it to them, whether or not they like the law. Can you promise to do that?" she answered "Yes." (72 CT 17748.) In response to question 80: "Everyone has some biases, prejudices or preconceived ideas. Do you believe you have any that would interfere with your ability to fairly decide this case?" she wrote: "I'm not in favor of the death penalty law in general but I am fair and honest about following the judge's direction." (72 CT 17749.) In response to the last question on the questionnaire: "Is there anything else the court should know about you?" she wrote: "I do feel I can follow the law laid out by the judge." (72 CT 17757.)

to this evidence and be as open to the idea of returning a death verdict as you might be to returning a life verdict?" she replied: "Yes. I'm able to follow the laws that the judge provides to me. However, I don't know how I would feel should the case be that this gentleman was, you know, sentenced to death. I'm not positive that I could handle that afterwards." (66 RT 10447.) Defense counsel continued: ". . . That's part of what we're here for this morning. It's not necessarily to find out how you feel. You're entitled to feel miserable. [¶] But the question is, if you felt that that was the appropriate sentence, if you'd heard the evidence, [you have] seen at least a little snippet of what it's about — the violent criminal history, the nature of the crimes against these boys — if you felt that death was appropriate, you went into the jury room, you discussed it with your fellow jurors, if you were convinced that that was the appropriate sentence, could you come into this courtroom and announce it, stand by it?" Prospective juror #154 replied: "If I was convinced that that was the appropriate sentence in accordance with the laws of the State of California, then yes." (66 RT 10447-10448.) When questioned by the prosecution, she was again consistent in declaring her ability to put aside her personal feelings regarding the death penalty and follow the law as set forth by the judge. (66 RT 10476 [confirming her statement on the questionnaire: "I'm not in favor of the death penalty law in general, but I am fair and honest about following the judge's direction."]; 66 RT 10476-10477 ["... I believe that I can follow the laws that are in place."]; 66 RT 10477 ["However, I do feel that, if it's the law, that I could follow that."]; 66 RT 10480 [". . . I am against the death penalty, but that doesn't mean that I can't follow the law as provided to me."]; 66 RT 10481 ["I could follow the rules, definitely."].)

Based on these responses prospective juror #154 was qualified to serve, and could not be excused for cause unless further questioning established that