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Lecture

**Evidentiary Issues in Criminal
Appeals**

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LECTURE MATERIALS

EVIDENCE

by

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INTRODUCTION

The following course materials are to be used in connection with the lectures on Evidence, Jury Selection and Jury Misconduct. For each topic, the materials consist of hypothetical questions designed to raise current and important issues.

Following each set of hypothetical questions appears a proposed approach to the issue, and some of the authority that is available. Keep in mind that since the selected issues are so current, that the law may be vulnerable to sudden change. Please check the finality and subsequent history of any cases cited in these materials.

Also included within in each topic are summaries by CCAP Staff Attorney Melissa Nappan of cases decided in the past two years. The CCAP summaries are updated for subsequent history, but a case will remain in the summaries even if rehearing or review is granted, or the case is ultimately not certified for publication. The index codes seen at the beginning of point of law are the index codes used within the CCAP brief bank. A partial index to the codes is included at the beginning of each section of cases. The CCAP summaries can be found on the internet by accessing the CCAP web page at www.capcentral.org.

Also, following the Evidence section, is a sample brief raising typical Evidence Code section 1109 issues, written by CCAP Staff Attorney Shama Mesiwala, incorporating other briefs written by John Doyle, Brendon Ishikawa, and William Arzbaeher.

SELF QUIZ

1. Under California case law, is a post-offense statement of codefendant that inculpates the defendant admissible hearsay when the co-defendant is unavailable to testify? Is there currently a confrontational problem posed by the admission of this evidence?

2. Under what situations can the out-of-court written statements of a person claiming physical abuse be admitted into evidence? What about out-of-court statements of children claiming physical abuse or neglect?

3. How does the analysis of propensity evidence offered under Evidence Code sections 1108 and 1109 differ from the analysis under Evidence section 1101? What is the role of section 1101, subdivision (b) in criminal prosecutions after the enactment of sections 1108 and 1109?

4. How might trial counsel prevent the prosecution from proving that the defendant is a member of a street gang in a case in which a criminal street gang enhancement is not charged? Is there any recourse on appeal if trial counsel fails to pursue these remedies?

5. What are the potential grounds for challenging the testimony of the prosecution's "gang expert" that a particular crime was committed for the purpose of aiding a street gang?

6. Under what circumstances can uncertified records be used to prove prior convictions?

EVIDENCE ISSUES

A. Hearsay/Constitutional Problems/Unavailable Accusers

Hypothetical #1

Appellant called 911 to report that he accidentally shot his wife in the chest, and she was losing consciousness. Upon arrival of the emergency personnel within five minutes of the shooting, she tells them. "It was an accident. He dropped the gun and it fired." She loses consciousness and passes away within an hour. Subsequently, the police interview the son's child care worker, who tells them that the child had one day weeks before the shooting said several times that his father hit him and had threatened to kill his mother. The police search the defendant's home, and find a month old entry in the wife's diary which says, "[The defendant] has been upset by the things they have been saying about him at work. He has threatened to kill us all out of the hurt."

The defendant is charged with the murder of his wife and child abuse as to his three-year-old son. At trial the parties stipulate that the three-year-old child is "truth incompetent," and the minor is not called as witness. The diary entry is admitted into evidence, as is the child's statement to the child care worker. However, the court denies the defense offer of the victim's dying statement on the grounds that it was not established that she knew she was dying.

- 1) Was the court in error in denying admission of the statement by the defendant's wife that the shooting was an accident?
- 2) Assuming that the California courts find that the statement was not admissible under the hearsay rule in this jurisdiction, is the evidence admissible under, among other things, the federal constitution?
- 3) Is the wife's diary entry admissible?
- 4) Are the son's statements to the child care worker admissible?

Proposed Answers to Hypothetical # 1

1) **Dying Declarations: Must the Victim Be Aware of Impending Death?** In law school everyone learned that the victim's dying declaration concerning the causal circumstances would be admissible, as the victim would not die with a lie upon his or her lips. The problem in establishing the exception in the present case is in showing that the defendant's wife knew she was dying. Here, the nature of the injury and the extent to which the victim knew of it, are important to the determination of admissibility. (*People v. Sims* (1993) 5 Cal.4th 405, 458.) However, on appeal, inferences would be made against the offer of proof, and the decision of the trial court to exclude the statement as a dying declaration would likely be sustained.

However, the expanding "excited utterance" exception set forth in Evidence Code section probably covers the statement. Under the California Supreme Court cases of *People v. Poggi* (1988) 45 Cal.3d 306, 315-316, and *People v. Farmer* (1989) 44 Cal.3d 888, statements of injured persons concerning the nature of their injuries will be admissible if made under conditions insuring the reliability. Reliability is guaranteed by factors such as the pain of the injury, the need to get proper treatment, and the spontaneity of the statement. As there is some indication that the victim had personal knowledge of how she came to be shot, the statement may be admissible.

2) **Absence of a Hearsay Exception Governing Reliable and Necessary Evidence.** It would be good for the defense to plan for the contingency that the courts might find that Evidence Code section 1240 did not cover the victim's statement to emergency personnel. A constitutionally-based exception grounded in the reliability of the statement and its necessity to the defense should be argued, citing authority such as *Chambers v. Mississippi* (1973) 410 U.S. 284.

3) **Diary Entries From the Grave.** Historically, prior statements of the victim concerning prior threats by another were not valid to prove past occurrences, and would be relevant only to prove actions or non-actions of the victim in accordance with her state of mind. (1953) 111 Cal.App.2d 881; *People v. Hamilton* (1963) 55 Cal.2d 881; cf., *People v. Alcalde* (1944) 24 Cal.2d 177; *People v. Waidlaw* (2000) __ Cal.4th __ [99 DJDAR 3605].) A similar result was reached under Evidence Code section 352. (*People v. Coleman* (1985) 38 Cal.3d 69.) In the present case neither the victim's diary entries nor the defendant's acts related to the threat made a month earlier. The diary entries are likely inadmissible.

It is uncertain how the result would be changed by the 1996 enactment of Evidence Code section 1370. It provides for admission into evidence of statements made by an unavailable declarant concerning injuries or threats of injury to the declarant, made at or near the time of the event, under reliable circumstances, and corroborated. The statement must be written, electronically recorded, or made to a law enforcement officer, such as a report made to an officer responding to a 911 call. (*People v. Hernandez* (1999) 71 Cal.App.4th 421.) Diary entries, however, still have the problems of bias and lack of spontaneity described in the older cases.

4) **Child Hearsay Exceptions.** Evidence Code section 1380 permits the child's statements to the extent the statements were corroborated. Section 1380, like section 1370, has survived challenges in state courts. (*People v. Brodit* (1998) 61 Cal.App.4th 1312.) However, a hearsay exception like section 1380, that does not contain require indicia of reliability, may violate the due

process and/or confrontation clauses. (*Idaho v. Wright* (1990) 497 U.S. 805.) The similar “child dependency exception” in Welfare and Institutions Code section 355 is before the California Supreme Court in *In re Lucero L.* (1998) 68 Cal.App.4th 912 [rev. granted, March 9, 1999; S075342]. Our Supreme Court previously set forth the new exception in *In re Cindy L.* (1997) 17 Cal.4th 15, and in *Lucero. L.*, the same court will decide whether the corroboration and reliability safeguards set forth in *Cindy L.* are constitutionally mandated.

B. Hearsay/Confrontational Problems/Unavailable Co-Defendant's Statements

Hypothetical #2

The defendant and his co-defendant are charged with kidnaping, murder, and the kidnap special circumstance. At trial, the prosecution offers the statement of the co-defendant to a friend to the effect that he and the defendant had taken the victim with them in their car to the victim's automated teller and they beat the victim to death when he was unable to obtain his money from the automated teller machine. The co-defendant will not testify at trial. The defendant objects to the statements on the following grounds: 1) the statements violate his right to confront witnesses; 2) the statements are hearsay not falling within an exception.

- 1) What should be the court's ruling under the confrontation clause?
- 2) How should the court rule on the hearsay objection?

Partial Answers For Hypothetical #2

1) **Constitutional Issues.** The present fact situation is drawn from *People v. Duke* (1999) 74 Cal.App.4th 23. In *Duke*, the Fourth District, Division 2, held that statements of this nature satisfy the “residual trustworthiness test.” The Fourth District distinguished *Lilly v. Virginia* (1999) __ U.S. __ [119 S.Ct. 1887, 144 L.Ed.2d 117].

In *Lilly*, there was also an abduction and a murder. One of the co-defendants told the arresting officers that although the co-defendant had stolen some liquor, it was Lilly who shot the victim. The United States Supreme Court unanimously reversed the conviction for a Confrontation Clause violation. Justice Stevens, writing the plurality opinion, wrote, “The decisive fact, which we make explicit today, is that the accomplice’s confessions that inculcate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence.” (I, 144 L.Ed.2d at p. 133.)

In *Duke*, the Fourth District found the statements of the co-defendant to be spontaneous and not at all self-serving. Therefore, the court held that the statements fell within the “residual trustworthiness test.” (*People v. Duke, supra*, 74 Cal.App.4th at p. 30.)

However in the hearsay context, the California Supreme Court has found these types of statements to be untrustworthy in the context of statements against penal interest. The *Duke* opinion should be questioned as to whether such statements can be considered trustworthy under a residual trustworthiness when they have been ruled untrustworthy in the context of statements against penal interest. (But see, *People v. Greenberger* (1997) 58 Cal.App.4th 298.) While *Lilly* was pending, the California Supreme Court granted review in a third case, *People v. Duarte* (1998) 60 Cal.App.4th 1027 (review granted April 15, 1999, S068162) and may address the present issue.

2) **Hearsay Issues.** In *Duke*, it does not appear that the appellate court ever directly reached the question of whether the statement of the co-defendant satisfied a hearsay objection. Apparently, from its analysis of the Confrontation problem, and its finding that the statement was residually trustworthy, the court believes that the statement fell within a “residual hearsay” exception.” Perhaps the court believes the statement was admissible as a statement against penal interest. Arguably, it is not valid under either theory.

First, the “firmly rooted” hearsay exception in California, statements against penal interest, do not provide for the admission of such statements to the extent that persons other than the declarant are inculpated. (*People v. Leach* (1975) 15 Cal.3d 419; cf., *People v. Wilson* (1993) 17 Cal.App.4th 271 [statement of accessory after the fact may be reliable].)

Second, the residual hearsay exception in California, Evidence Code section 1200, subdivision (b), permits establishment of common law hearsay exceptions by decisional law. (*In re Cindy L.*, *supra* 17 Cal.4th at p. 27.) This is not the same thing as having courts examine each case, on a case by case basis to determine whether the item offered should be permitted, as “trustworthy,” although not falling within an exception. Second, there is some question whether an interim appellate court may find evidence reliable under the context of a purported “residual hearsay

exception” that has been found unreliable by the California Supreme Court in ruling on the admissible scope of statements against penal interest.

C. Gang Evidence/ Gang Enhancements: Cases Having Numerous Evidentiary Issues.

Hypothetical # 3

The defendant, Frank, an eighteen-year-old gang member, was charged with the murder of another member of the neighborhood gang, John. The facts are that Frank's sister came home one evening, and said that the John had sexually assaulted her. Frank went over to John's house, and a fight ensued which resulted in John's death.

Frank was later charged with robbery, and a street gang enhancement, arising out of a situation occurring two weeks earlier. The prosecution offered the police department's street gang expert who would have testified that based on statements he received from gang members over the years, Frank committed this robbery of a convenience market to impress other gang members. There is no indication that the gang members required or expected him to do that.

- 1) At the jury trial on the murder, is the evidence of the victim and defendant's membership in the same gang admissible?
- 2) Will this change if the murder and robbery counts are tried together? How could Frank prevent this from occurring?
- 3) What are the elements the prosecution must establish to prove the street gang enhancement?
- 4) Can the prosecution's expert rely on hearsay evidence not offered in open court in opining as to Frank's purpose in committing the robberies?
- 5) If the prosecution offers to prove the basis for the expert's opinion, is there any limitation on the extent to which this matter will be brought before the jury?
- 6) May the expert express an opinion as to what Frank's purpose was?
- 7) Assuming that the prosecution can establish that Frank's gang is a street gang within the meaning of section 186.22, and the expert will be permitted to testify as to mental states of gang members, will the expert testimony prove a section 186.22, subdivision (b), enhancement?

Answers to Hypothetical # 3

1) **Gang Evidence.** The plurality opinion in *People v. Cardenas* (1982) 31 Cal.3d 897, to the effect that evidence of gang membership is so inflammatory that it should be excluded when its probative value is low, has been reaffirmed by the California Supreme Court in *People v. Sandoval* (1992) 4 Cal.4th 155, and *People v. Tuilaepa* (1992) 4 Cal.4th 569. (See also, *People v. Malone* (1987) 43 Cal.3d 1 [prison gang evidence not related to any issue in the case].) In *People v. Cardenas*, the Supreme Court held that it was improper for the trial court to admit evidence that defendant and his trial witnesses were members of the same gang, when the jury already know that they were all neighborhood friends. (See, also, *People v. Maestas* (1994) 20 Cal.App.4th 1482.) In Hypothetical #3, the relevance is even less, so evidence of gang membership would otherwise be excluded.

Of course evidence of gang membership may be admitted if related to an important issue, such as motive, but even for that purpose there are limits to its admissibility. (*People v. Cox* (1991) 53 Cal.3d 618.)

2) **Bifurcation and Severance.** Of course, Frank will be placed in a far worse situation if the robbery and gang enhancement are tried with the murder.

Defense counsel should consider moving to bifurcate the gang enhancement because this would prevent the jury from hearing the evidence needed to establish a street gang within the meaning of section 186.22, including the proof of prior convictions by gang members and the expert testimony by the police gang expert. Bifurcation is within the court's discretion. The potential for prejudicing the jury by proof of prior bad acts, although no longer an absolute ground for bifurcation (see *People v. Calderon* (1994) 9 Cal.4th 69 [limiting *People v. Bracamonte* (1981) 119 Cal.App.3d 644]), may continue to weigh heavily in the court's ruling. Although there does not appear to be any published authority on bifurcation, some of the published authority recognizes that trial courts have bifurcated street gang enhancements. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355; cf, *People v. Martin* (1994) 23 Cal.App.4th 76 [bifurcation not required where gang evidence would come out in case in chief] .)

Severance would have all of the benefits described above plus it might also prevent the jury in the murder case from hearing any gang motive evidence related to proof of the robbery. Severance would also reduce the number of negative allegations about Frank the first jury considers. The motion would stress the inflammatory nature of the evidence, the different nature of the cases, and the non-cross-admissibility of the evidence. (Cf., *Williams v. Superior Court* (1984) 36 Cal.3d 441; *People v. Smallwood* (1986) 42 Cal.3d 415, 425.)

3) **Ineffective Assistance of Trial Counsel.** If appellate counsel concludes that a severance or bifurcation motion should have been pursued by trial counsel, and that counsel's error in failing to do so prejudiced the client, the issue may be raised on appeal by contention of ineffective assistance of trial counsel. It is necessary to establish that counsel had no tactical purpose in not moving to sever or bifurcate, and the client would often benefit from the filing of petition for writ of habeas corpus to show that the attorney did not have a tactical purpose. (Cf., *Strickland v. Washington* (1984) 466 U.S. 66; *People v. Stratton* (1988) 205 Cal.App.3d 87.) The importance

of contacting trial counsel and obtaining authority to pursue habeas corpus will be discussed in the session on writs.

4) **Elements of the Street Gang Enhancement.** Proof of the street gang enhancement requires a showing of an active as well as a passive element because it is generally held that a mere membership in a group is protected by the first amendment freedom of association. (*Lanzetta v. New Jersey* (1939) 306 U.S. 451.)

a) The California Supreme Court in *People v. Gardeley* (1997) 14 Cal.4th 605, described the passive element, membership, as follows:

. . . [T]here must be an ongoing association of at least three persons that has as one of its primary activities the commission of specific types of criminal activity, uses a common name or identifying sign or symbol, and has members who individually or collectively have actually engaged in “two or more” acts of specified criminal conduct committed either on separate occasions or by two or more persons.

Pattern of Criminal Gang Activity. Note that because of the wording of the last part of the definition, one of the offenses establishing the enhancement can be the present offense, if both offenses are committed by a single person. (*People v. Olguin, supra*, 31 Cal.4th 1355, 1383, and authorities therein cited.) When the offenses are committed by more than one person, both present offenses qualify to establish a “pattern.” (*People v. Loewen* (1997) 17 Cal.4th 1, 8.)

The pattern offenses need not have been committed for a gang-related purpose. (*People v. Gardeley, supra*, 14 Cal.4th at pp. 624-625.) However, at least one of the offenses must have occurred after the 1988 date of enactment of section 186.22, and the last offense must have occurred within three years of another offense. (Sec. 186.22, subd. (e).)

b) the active element, the present offense, must have been committed “for the benefit of, at the direction of, or in association with,” the gang.

5) **Gang Expert’s Reliance on Hearsay Not Admitted At Trial.** The California Supreme Court in *People v. Gardeley, supra*, 14 Cal.4th 605, held that gang experts, like other experts, are permitted to rely on matters normally relied on by experts in the particular field. (*Id.*, at p. 618, citing Evid. Code sec. 801, subd. (b).) This may include hearsay. (*Ibid.*)

6) **Limitations on Proof of Basis for Gang Expert’s Opinion.** The defense may object to the gang expert’s detailed descriptions of incompetent hearsay (*People v. Price* (1991) 1 Cal.4th 324, 416; *People v. Soto* (1984) 157 Cal.App.3d 694 [expert’s conversations with unknown individuals concerning rumors constitute incompetent hearsay]) and unduly prejudicial items, in the description of the basis for his opinion. (*People v. Coleman, supra*, 38 Cal.3d 69, 91.)

7) **Expert’s Opinion as to Defendant’s Purpose.** This testimony does not violate the Evidence Code section 28 prohibitions against experts testifying on mental state. An expert’s opinion as to

defendant's purpose does not relate to mental disease, defect, or disorder. However, there is an objection that such testimony is not objective analysis (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1371.) There also may be an objection to the expert's usurpation of the jury's function. (*People v. Hernandez* (1977) 70 Cal.App.3d 271.)

8) **Effect of Expert Opinion That Frank Was Trying To Impress the Gang.** Keeping in mind that expert opinion is only of value to the extent that it has a basis (*Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923), the expert's opinion is worthless unless it shows that the present offense was committed for a gang purpose. Here the purpose was to impress the gang. There was no showing that the gang had encouraged or previously participated in robberies. The enhancement can be challenged as activities of a street gang members on his or her own behalf may not qualify as an offense committed for a gang purpose.

A good source that is often used to rebut testimony of gang experts is Jeffery L. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 Wake Forest L. Rev. 943. This law review article, which dispels many myths about gangs, was cited as authority by the court in *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337.

D. Propensity Evidence Under Evidence Code Sections 1101, 1108 and 1109.

Hypothetical # 4

The defendant was charged with a 1999 spousal abuse and spousal rape. The events occurred while the couple were at home. At trial the People offered to prove, as evidence of the defendant's propensity and common plan or scheme, two separate incidents which occurred in 1988. In the first incident, the defendant's wife would have testified that the defendant struck her and broke her nose. In the second incident, a woman would have testified that the defendant stalked her and raped her in a parking lot. The People gave full discovery of the incidents as set forth in Penal Code section 1054.7, and notified the defense 30 days prior to trial that it intended to offer both incidents at trial.

- 1) Is the evidence of the prior spousal abuse admissible under Evidence Code section 1101, subdivision (b)?
- 2) Is that event admissible under Evidence Code section 1109?
- 3) Is the evidence of the prior rape admissible under Evidence Code section 1101, subdivision (b)? What is the analysis set forth in *People v. Ewoldt* (1992) 7 Cal.4th 380, and how far would the court proceed in its analysis in the present case?
- 4) Is the evidence of the prior rape admissible under Evidence Code section 1108? How would the court analyze this question?
- 5) Assuming that the court admitted the rape into evidence to show propensity under section 1108, could the defendant's appellate attorney challenge the admissibility under section 1101, subdivision (b), as well?
- 6) Although *Falsetta* upholds that Evidence Code section 1108, is there any point in continuing to challenge the constitutionality of section 1108, or of the use of prior conduct in the present case?

Possible Answers to Hypothetical # 4

1) **Incidents of Prior Domestic Violence Under Section 1101, subdivision (b).** The answer does not require a detailed analysis under section 1101 because the evidence is admissible under *People v. Zack* (1986) 184 Cal.App.3d 409, 415. *Zack* holds, “Where a defendant is charged with a violent crime and has had a previous relationship with a victim, prior assaults upon the same victim, when offered on disputed issues, e.g., identity, intent, motive . . . are admissible based solely on the consideration of identical perpetrator and victim without resort to a distinctive modus operandi analysis of other factors.” (*Id.*) Note that this exception only applies as to prior acts involving the same victim. Also, *Zack* did not involve a remote offense.

2) **Incidents of Prior Domestic Violence Under Section 1109.** Again this is a short answer. Section 1109, subdivision (a), provides:

(a) Except as provided in subdivision (e), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant’s commission of other domestic violence is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

Subdivision (e) provides:

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

So, if one skips to subdivision (e), it becomes apparent that the prior incident of abuse is presumptively inadmissible because it occurred more than 10 years before the charged offense, and because there are no facts in this case that are “exceptional.” The prior act would likely be inadmissible at trial.

The case law has not set forth what factors under section 1109 might support the admission into evidence under section 1109 of acts occurring more than 10 years before the charged offense. Perhaps prosecutors will offer “repressed memories” and “duress” as a justification for offering acts not previously reported. Also, it is possible that prosecutors will propose an analysis challenging whether the conduct truly “washed out” for 10 years, proving more recent incidents which would make the older incidents more probative.

3. **Admissibility of Prior Sex Offense Under Section 1101 (b).** The prior sex offense would likely be inadmissible under section 1101, subdivision (b). This subdivision provides:

(b) 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.

In *People v. Ewoldt* (1994) 7 Cal.4th 380, the defendant was charged with violations of Penal Code section 288, subdivision (a), and 647.6, subdivision (b). The defendant's stepdaughter testified on at least two of the occasions the defendant would come into her bedroom late at night and touch her breasts or request her to touch his penis. The People offered testimony of the victim's older sister that, many years earlier, when she resided in the defendant's home, he would come into her bedroom late at night and touch her breasts and vaginal area. The court admitted this as evidence of a common plan or scheme. The appellate court reversed under the authority of *People v. Tassell* (1984) 36 Cal.3d 77, and other cases.

The California Supreme Court then granted review, overruled *Tassell* and other cases, and reversed the Court of Appeal. In coming to its conclusion, the Supreme Court reviewed many of the criminal cases decided under subdivision (b), summarizing the law as follows:

The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. . . . 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"[Citation omitted].

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 naturally to be explained as caused by a general plan of which they are individual manifestations." [Citation omitted.]

. . . .

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 need not be distinctive or original

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 omitted.] (*People v. Ewoldt, supra*, 7 Cal.4th 398, 402-403.)

Notably, in *Ewoldt*, the California Supreme Court favorably cited its previous decision in *People v. Thomas* (1978) 20 Cal.3d 615, in which a conviction was reversed where the previous incident involved a decade-old, dissimilar molest. Hypothetical #4 also involves a prior sexual assault so dissimilar to the present offense that no connecting link that can be inferred. The evidence would probably be excluded under section 1101, subdivision (b).

4. Applicability of Evidence Code Section 1108.

Evidence Code section 1108, subdivision (a), provides:

(a) 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.

In *People v. Falsetta*, *supra*, 21 Cal.4th 903, the California Supreme Court upheld section 1108 against a challenge that the use of propensity evidence deprived the defendant of due process. The court held that although section 1108 went contrary to three centuries of established case law, the shift was not unconstitutional. The court stated several reasons for its ruling, the most important of which for purposes of this problem is that Evidence Code section 352 could be used to exclude unduly prejudicial evidence. The Supreme Court cited with approval three recent cases from the Third District, *People v. Fitch* (1997) 55 Cal.App.4th 172, 181-182, *People v. Soto* (1998) 64 Cal.App.4th 966, and *People v. Harris* (1998) 60 Cal.App.4th 727. Any attempt to exclude the evidence within the confines of section 1108 must be attempted under section 352.

However, section 352 may set greater standards in the context of offers of prior conduct under section 1108, than it does under offers of other types of evidence. In fact, the analysis of the Third District in *Harris*, approved by the Supreme Court in *Falsetta*, even incorporates some of the factors used in *Ewoldt* and other cases interpreting section 1101, subdivision (b). In other words, section 1108 says that propensity is now a factor, not that other factors are ignored.

In *Harris*, the Third District reversed convictions of a defendant, a mental health nurse, charged with 1995 sexual misconduct (licking and touching) of two patients under his care in a mental hospital. His defense as to one victim was that the sexual contact was consensual, and as to the other, that her account was the product of hallucinations. At trial, the prosecution was permitted to admit into evidence an 1972 prior offense for burglary with infliction of great bodily injury, in which he was alleged to have used apartment keys, to which he had access as an apartment manager, to break into the apartment of a tenant. He stabbed her with in the chest with an ice pick and ripped her peritoneum with an instrument. He was found hiding nearby, almost immediately. His underwear and much of his body, including his penis, was covered with blood. (*People v. Harris, supra*, 60 Cal.App.4th at pp. 730-735.) The court noted that it was inflammatory, but found some connection between the cases because they both had "vaginal involvement." (*Id.*, at p. 740.)

The Third District examined the following factors: the inflammatory nature of the evidence; its likelihood to confuse the jury; remoteness; consumption of time, and relevance; and found the only factor in favor of its admission was the consumption of time. The evidence was found to be highly inflammatory -- much more so than the evidence of the present offenses; the fact that the offense occurred made it remote by any standard, especially since there had been no intervening conduct. There was some potential for confusion in that the jury might think he had been adequately punished for the prior offense. But the court had the greatest problem with relevance. "Probative of what?" The evidence had no tendency to bolster or impeach the victim's testimony

because there was not enough similarity between the prior and the present charged offenses to have a tendency to be particularly probative. The fact that the victims in all cases were Caucasian women in their 20's or 30's was not significant. (*Id.*, at pp. 737-741.)

In applying the analysis of *Harris*, approved by the Supreme Court, to Hypothetical # 4, it becomes apparent that some but not all of the considerations from *Harris* are present in the present case. Perhaps the most significant problem area is the fact that both events are rapes. In *Harris*, there was a disparity between the past and present conduct. However, there is a great disparity in the manner of commission, which is entitled to some weight under *Harris*. The *Thomas* analysis on common plan, would be of some value, although it would not, by itself, be determinative. The potential for confusion is significant in that there was no conviction mentioned as to the past offense. In *Harris*, it was stated that this may cause the jury to want to punish the defendant more for his past conduct. The offense is not as remote as in *Harris*, but it is fairly remote, and there is no indication of any more recent conduct. The offense is perhaps less inflammatory than the offense in *Harris*, but is still quite inflammatory.

5) **Backing Up the Section 1108 Arguments with Section 1101 Analysis.** In this situation the section 1108 argument must be followed (or preceded by) an analysis under section 1101, subdivision (b), because the People's offer of "common plan" invoked admissibility under that section. In other cases, it may not be all that clear whether section 1101, subdivision (b) admissibility is invoked; however, the attorney should keep in mind, that in its prejudicial error analysis the reviewing court might analyze whether the evidence was admissible under another theory.

6) **Maintaining Constitutional Challenges.** The appellate counsel for the defendant in *Falsetta* filed a petition for writ of certiorari, and the United States Supreme Court ordered the Attorney General to respond. As of the time these written materials were prepared, the petition for writ of certiorari in *Falsetta* was still pending. However, even if certiorari is denied, the attorney may wish to pursue a due process challenge in the federal courts. The California Supreme Court, in *Falsetta*, was not convinced that due process cases, such as *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, controlled. The Ninth Circuit may disagree. The sample brief enclosed with these materials contains one such argument.

7) **Cross-over Instructional Issues.** In *Falsetta*, the Supreme Court discussed two instructional matters. First, the court found that the trial court erred (harmlessly) by failing to instruct the jury, upon the defendant's request, concerning its use of other crimes evidence. (*People v. Falsetta, supra*, 21 Cal.4th at p. 922.)

Second in *Falsetta*, the court generally approved of the 1999 revision of CALJIC 2.50.01, but reserved the right to rule on specific issues in future cases. (*Id.*, at p. 924.) Also, a large number of cases have ruled on the appropriateness of the previous form of the instruction, which may, with other instructions, misadvise the jury as to the appropriate standard of proof. (See, e.g., *People v. Vichroy* (1999) 76 Cal.App.4th 92.) Currently, the non-final cases are widely split. As a result, attention should be given to these issues until they are finally resolved.

E. Proof of Prior Convictions

Hypothetical # 5

The defendant was charged with possession of heroin. He was also charged with a prior conviction for assault by force likely to produce great bodily injury, alleged both as a strike prior under Penal Code section 243, subdivision (d), and as a prior prison term under section 667.5, subdivision (b). He demanded a jury trial on the underlying offense, but the trial on the priors was bifurcated, and he waived a jury for that trial. He testified in his own defense on the drug charge.

He admitted that he had suffered a prior conviction because the court ruled it admissible for impeachment purposes. On cross-examination, the prosecutor asked him if the prior conviction was for assault by force likely to produce great bodily injury. The defendant responded, "Yes, but you have to understand. That man hit my children and I was trying to protect them." He was convicted, and in the trial on the priors, the People offered the information, clerk's minute order, and an abstract of judgment from the prior and a CLETS printout. The judge stated that although great bodily injury was not proven in the prior case, serious bodily injury is the legal equivalent of "great bodily injury." Because the defendant was the only person charged in the information, it would be assumed that he was the one who personally inflicted the injuries. The court declined the defendant's proffered declarations showing that he was not the man who actually hit the victim on the prior assault.

- 1) Is the defendant's testimony at trial also admissible to prove the priors?
- 2) Is a printout from the California Law Enforcement Telecommunications System (CLETS) admissible?
- 3) Did the trial court properly rule that since the defendant was the only person charged in the previous case, he was the only person who could have personally inflicted the injury?
- 4) Did the court err in not permitting the defendant to testify as to the level of his personal involvement in the prior case?
- 5) Assume instead that the People found more evidence of the prior. Which of the following items from the previous case are admissible to prove the prior?
 - 1) live witnesses at preliminary hearing;
 - 2) proposition 115 hearsay offered at preliminary hearing;
 - 3) defendant's statements to probation officer;
 - 4) other items contained in probation report;
 - 5) defendant's statements at time of plea;
 - 6) facts stated in appellate opinion from prior.

Possible Answers to Hypothetical # 5

1) **Use of Defendant's Trial Testimony To Prove Prior.** Generally, the defendant's testimony is admissible to prove the prior conviction. However, the defendant's testimony is not admissible to the extent that there is a question of whether the facts of the prior case qualify the conviction as prior. This matter is to be proven by the record of the conviction. (*People v. Guerrero* (1988) 44 Cal.3d 343.) Trial counsel should move to strike the defendant's non-responsive answers to cross-examination, and should object if the People offer the evidence on any point other than the fact of the conviction.

2) **Admissibility of CLETS Printout.** This would be admissible under Evidence Code section 1280 (official records exception to the hearsay rule) even to prove multiple hearsay such as the facts of conviction, if an adequate foundation of reliability is made at trial. (*People v. Martinez* (2000) 22 Cal.4th 106.) There is no requirement that computers be shown reliable, but the court in *Martinez* did look to the method of preparation by law enforcement agencies. Notably, the Third District found that it was unreasonable for the police to rely on a computer-generated probation roster in *People v. Spence* (2000) __ Cal.App.4th __ [00 DJDAR 2685].

3) **Drawing Inferences In Favor Of People's Case.** A recent appellate court decision, *People v. Guerrero* 19 Cal.App.4th 401, 405-410, has used such an analysis. However, this approach was rejected by the California Supreme Court in *People v. Rodriguez* (1997) 17 Cal.4th 253, 262: "The People, who had the burden of proof, offered no evidence to show otherwise."

4) **Proof By Extraneous Evidence.** In light of the California Supreme Court's *Guerrero* and *Rodriguez* decisions, it is highly unlikely that any party will be permitted to go beyond the record of the prior.

5) **Other Types of Evidence.**

- 1) Preliminary hearing live witnesses: **Yes.** (*People v. Reed* (1996) 13 Cal.4th 217.)
- 2) Proposition 115 (hearsay) preliminary hearing evidence: **No.** (*People v. Best* (1997) 56 Cal.App.4th 41.)
- 3) Defendant's statements to probation officer: **Yes.** (*People v. Reed, supra.*)
- 4) Other hearsay contained in probation report: **No.** (*Ibid.*)
- 5) Defendant's statements made at time of plea: **Yes** (*People v. Abarca* (1991) 233 Cal.App.3d 1347.)
- 6) Appellate decision: **Yes.** (*People v. Woodell* (1998) 17 Cal.4th 448.)

F. Evidence Problems in Proceedings Under the Sexually Violent Predator Act.

Hypothetical #6

The defendant is in prison for one count of violating Penal Code, section 288, subdivision (b). The correctional staff had him examined by a psychologist and a psychiatrist. Both concluded that he constitutes a danger within the meaning of the Sexually Violent Predator Act (SVPA), Welfare and Institutions Code, section 6600, et seq. A probable cause hearing was conducted in a timely fashion. The psychiatrist was unavailable at the time of the hearing, and his uncertified report was offered. The defense objected. Also, the People offered uncertified minute orders and abstracts showing a Texas conviction for a forcible sex crime involving a second victim, which is an offense that would qualify under the SVPA had it been committed in California. The court found probable cause. A jury trial commenced. The People were unable to find certified proof of the Texas conviction, but the psychiatrist was available and he offered his opinion and it coincided with the opinion of the psychologist, who testified in both hearings. The jury found the defendant to be a predator, and he was committed to the state hospital for two years.

- 1) Was the psychiatrist's report admissible at the probable cause hearing? Could the superior court find probable cause based upon the testimony of a single professional? What if the report had been certified? Could the defense cross-examine experts and call its own witnesses at the probable cause hearing?
- 2) What is the effect of not having a certified record of the Texas conviction at the trial? Was it required at the probable cause hearing?
- 3) On the question of psychiatric opinions, does the fact that this is an appeal rather than a pretrial writ affect the result?
- 4) Does the defendant have any Fifth Amendment rights or any statutory privilege in SVP proceedings?

Partial, Tentative Answers on Hypothetical #6

1) **Uncertified Expert Opinions Offered at Probable Cause Hearing.** The objection should have been sustained if it was made under Evidence Code sections 1530 and 1531. (*In re Kirk* (1999) 74 Cal.App.4th 1066.) Certified records would likely be admitted, as section 6602 provides for the court to read the petition and, presumably, the attachments. However, the appellate courts have reversed trial court determinations to the effect that the court is limited to consideration of the petition and attachments. (*In re Parker* (1998) 60 Cal.App.4th 1453.) The defendant is permitted to cross-examine the preparers of the reports and be fully heard on the issue of probable cause. (*Ibid.*)

One valid report at the probable cause hearing is insufficient to sustain a probable cause finding, according to two non-final cases. (*Butler v. Superior Court* (2000) __ Cal.App.4th __ [2000 DJDAR 2555]; *Peters v. Superior Court* (2000) __ Cal.App.4th __ [2000 DJDAR 3597].)

2) **Uncertified Convictions.** Once again, the fact pattern shows non-compliance with Evidence Code sections 1530 and 1531. In *People v. Torres* (1999) 71 Cal.App.4th 704 (rev. granted Aug. 11, 1999; S079575), the Third District reversed an SVPA finding on this ground. The case is currently on review in the California Supreme Court on the issue of whether the priors need to be “predatory.” Incidentally, in a previously unpublished case, *People v. Vasquez* (rev. granted March 27, 2000; S085584), the California Supreme Court has also granted review on the issue of whether an expunged conviction may provide the basis for an SVPA adjudication.

There does not appear to be any published authority as to whether the *Martinez* opinion on CLETS records applies in SVPA proceedings. It seems likely that CLET printouts would be admissible.

Note that section 6600 permits a much wider use of probation reports than would be authorized by *Reed* in the context of proving prior convictions in criminal prosecutions.

3) **Pretrial Writ vs. Appeal.** Note that many of the pre-trial successes, such as *Butler*, have been sought on pretrial writ. Will the same result be possible on appeal? One expects that the rationale of *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, to the effect that insufficient proof at a preliminary examination is mooted by an offer of sufficient proof at the subsequent trial, will compel a different result. Here, two experts testified at the final hearing, and one would expect the respondent on appeal would probably argue that the issue has been mooted.

However, this type of issue is currently being raised on appeal. One would especially want to raise the argument if the expert was unavailable at both court dates because arguably the statute contemplates that the opinions of two experts will be given at some point, even though section 6600 does not expressly provide that both experts must testify at trial.

4) **Constitutional and Evidentiary Privileges.** The exact scope of privileges available in the SVPA context has not been fully litigated. One non-final case states that the defendant does not have a Fifth Amendment privilege to exclude statements made under duress, or to avoid being called as a witness. (*People v. Leonard* (2000) __ Cal.App.4th __ [2000 DJDAR 2179].)

Another case, *Albertson v. Superior Court* (2000) 77 Cal.App.4th 431, currently non-final, holds that the Department of Mental Health cannot directly transmit to a district attorney the mental health records of persons receiving SVP treatment, as these are treatment records protected under Welfare and Institutions Code section 5328.

On the other hand, a treating psychiatrist may be required to disclose confidential communications to prevent the release of an SVP, if the release would pose a community danger. Evidence Code section 1024 permits the psychiatrist to disclose more confidential information than in *People v. Wharton* (1991) 53 Cal.3d 522, and *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 where the testimony was limited to contents of warnings to a potential victim because SVP proceedings are civil rather than criminal in nature. At least that was the holding in *People v. Dacayana* (2000) 76 Cal.App.4th 1334 (rev. granted, March 22, 2000; S085498). Review has also been granted in *Dacayana* on the question of whether the prior conviction must be predatory.

Whether a person has a confidential privilege in SVPA litigation depends on context in which the allegedly confidential interview was conducted. It may depend on whether the statements were made in the context of treatment, or in the context of evaluation.

EVIDENCE [19.]

- A. Admitting and excluding evidence (Evidence Code §352)
 - 1. Admission proper/improper
 - a. Inflammatory photographs, etc.
 - 2. Excluded proper/improper
 - 3. Preliminary determinations
 - 4. Relevance (Evidence Code § 210)
- B. Judicial notice
- C. Presumptions of witnesses
- D. Examination of witnesses
 - 1. Direct
 - 2. Cross-examination
 - 3. Impeachment (SEE ALSO 5.C.)
 - a. Restriction: victim/prosecution witness
 - b. Defendant/defense witnesses
- E. Expert witnesses (includes *People v. Kelly* (1976) 17 Cal.3d 24)
- F. Immunity of witnesses
- G. Privileges
 - 1. Marital
 - 2. Attorney-client
 - 3. Physician-patient
 - 4. Psychotherapist-patient
 - 5. Clergyman-patient
 - 6. Official information
- H. Prior conduct/similars/character
 - 1. Sex case similars
 - 2. Non-sex similars
 - 3. Prior arrest/record
 - 4. Procedure re introduction
 - 5. Character
- I. Prior convictions/Impeachment
- J. Hearsay
 - 1. General provisions
 - 2. Exceptions
 - a. Confessions and admissions (SEE ALSO 23.B.)
 - b. Declarations against interest
 - c. Prior inconsistent and consistent statements
 - d. Statements of mental or physical state
 - e. Business records
 - f. Prior testimony
 - g. By-coconspirators
 - h. Evidence of extrajudicial identifications
 - i. Official records
 - j. Dying declaration
 - 3. Other
 - 4. Waived/failure to object

K. Writings/Best Evidence Rule

L. Scientific evidence

1. Breath alcohol tests
2. Blood tests
3. Ballistics
4. Fingerprints
5. Handwriting
6. Polygraphs
7. Sodium amytal, hypnosis, etc.
8. Pathology
9. Psychiatry
10. Shoe prints
11. DNA
12. Other

M. Miscellaneous (Not impeachment; not sufficiency of evidence)

N. Demonstrative evidence

O. Chain of custody

P. Defense evidence that someone else committed the crime (*People v. Arline* (1970) 13 Cal.App.3d 200; *People v. Buono* (1961) 191 Cal.App.2d 203)

Q. Accomplice testimony

R. Gang affiliation

[19.A.] *United States v. Nelson* (2/26/98)
137 F.3d 1094 (9th Cir.)

The trial court did not abuse its discretion in admitting evidence under Rule 403 of the Federal Rules of Evidence of appellant's involvement in a later robbery and evidence of his attempt to sell stolen jewelry where the evidence satisfied the Rule 404(b) facts, and where its prejudicial impact was substantially outweighed by its probative value, and where the court gave detailed limiting instructions.

[19.A.] *People v. Ritson* (C026168, 5/14/98)
63 Cal.App.4th 1276 (DCA 3) ****Review granted 8/12/98 (S071200)****

Evidence of appellant's prior crimes was properly admitted under Evidence Code section 1108 because the trial court did not abuse its discretion in finding that the evidence was not unduly prejudicial under Evidence Code section 352.

[19.A.] *United States v. Ellis* (7/2/98)
147 F.3d 1131 (9th Cir.)

In a prosecution for possession of explosives, it was error to admit testimony that the quantity of explosives seized were "sufficient to destroy an office building." Although the testimony was admitted under Federal Rule of Evidence 403 to show intent and potential victim impact, neither intent nor "potential victim impact" were elements of the offense, nor were they relevant. On the other hand, it could have caused the jury to draw a connection between the instant case and the highly publicized bombing of a federal office building in Oklahoma City which had occurred shortly before the trial. Since there was virtually no probative value to the testimony, and it was

highly prejudicial, it should have been excluded. The error was not harmless, and the judgment was reversed.

[19.A.] *People v. Frye* (7/30/98, S007198)

18 Cal.4th 894 ****Modification of opinion at 19 Cal.4th 253d; Rehearing denied 9/23/98****

The curtailment of Dr. Thornton's testimony on the inadequacy of the crime scene investigation was proper under Evidence Code section 352 as it was of limited probative value, the trial court could have reasonably found it to be potentially confusing, and it was irrelevant or cumulative. Frye's cross-examination of witness Wilson was not relevant to any disputed fact of consequence, to the question of Frye's guilt of the charged crimes, or to Wilson's veracity, and the trial court did not abuse its discretion in curtailing it or the cross-examination of other witnesses where the evidence was lacking in relevance and in some cases potentially prejudicial. Moreover, Frye did not establish that the prohibited cross-examination might reasonably have produced a significantly different impression of the witnesses' credibility.

Penalty phase issues were not summarized.

[19.A.] *People v. Poplar* (C027096, 3/24/99)

70 Cal.App.4th 1129 (DCA 3) ****Review denied 7/14/99****

The trial court did not abuse its discretion in admitting evidence of prior acts of domestic violence, not involving rape, under Evidence Code section 1109 in this prosecution for the forcible rape of a former lover. The definition of domestic violence encompasses the definition of rape. Moreover, the trial court did not abuse its discretion under Evidence Code section 352 because the evidence was extremely probative, showing defendant's propensity for violence against domestic partners, and was not the sort to evoke an emotional bias against defendant.

[19.A.] *People v. Poplar* (C027096, 3/24/99)

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[19.A.] *United States v. Mitchell* (3/26/99)

172 F.3d 1104 (9th Cir.)

Evidence of appellant's poverty is inadmissible under Federal Rule of Evidence 404(b) because that rule speaks only to evidence of other crimes, wrongs, or acts, and being poor is not a crime, wrong, or act. Here, the poverty evidence was of negligible probative value, but produced a high danger of unfair prejudice, rendering the court's discretion an abuse. The appellate court was in equipoise about whether the error was harmless, and as a result, the government did not establish harmlessness. The conviction was reversed and the case was remanded for a new trial.

[19.A.] *People v. Welch* (S011323, 6/1/99)

20 Cal.4th 701 ****Rehearing denied 8/18/99****

The trial court did not commit prejudicial error in denying a motion for mistrial when a witness said that Welch was a drug dealer. The jury had before it “virtually uncontradicted” evidence that Welch had committed six murders and had engaged in numerous instances of terrorizing and harassing people. The fact that the jury learned he was also a drug dealer was inconsequential. Penalty phase issues not summarized.

[19.A.] *People v. Pierce* (F027577, 6/21/99)

72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and further action deferred pending *People v. Falsetta* (S071521)****

Evidence Code section 1108 does not offend the due process clause because, due to the exclusion factors applicable under Evidence Code section 352, there is no risk that the jury will rest its verdict solely on proof of prior crimes.

[19.A.] *People v. Pierce* (F027577, 6/21/99)

72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and further action deferred pending *People v. Falsetta* (S071521)****

The trial court did not abuse its discretion in admitting, under Evidence Code section 352, the testimony of doctors, nurses, and detectives, who repeated what the kidnap/rape victim told them and who described the circumstances surrounding the making of the report. The trial court properly found that the probative value outweighed its prejudicial effect. Moreover, hospital records which contained the victim’s story were also properly admitted for nonhearsay purposes. Even if their admission was error, it was not prejudicial because the doctor and the victim each testified at trial.

[19.A.] *People v. Earp* (S025423, 6/24/99)

20 Cal.4th 826 ****Rehearing denied 9/1/99****

Any error in failing to instruct the jury on the lesser included offenses of implied malice, second degree murder and involuntary manslaughter was harmless because the jury necessarily concluded it was first degree murder in finding the special circumstances allegation to be true. Penalty phase issues were not summarized.

[19.A.] *United States v. Martinez* (7/12/99)

182 F.3d 1107 (9th Cir.)

In a drug smuggling case, evidence of a prior conviction for importing drugs was admissible to show appellant’s knowledge of the drug trade. Appellant was charged with smuggling methamphetamine from San Francisco into Hawaii. The prosecution introduced evidence of a prior conviction for importing heroin. On appeal, appellant argued that the evidence should have been excluded because the prior conviction was ten years old and involved heroin rather than methamphetamine. The appellate court found no abuse of discretion and affirmed, holding that the prior conviction was probative on the element of appellant’s knowledge of the drug importation scheme. The probative value of the evidence, in a case where the defense was that appellant did not know that the drugs were going to be delivered, outweighed any potential prejudice. The fact that methamphetamine was a different drug than heroin, though similar in composition, did not alter the balance. “There must be a lot of knowledge of smuggling that would carry over from one compact, relatively odorless, extremely expensive, illegal powder to

another.”

[19.A.] *People v. Hayes* (S004725, 12/23/99)

21 Cal.4th 1211

The trial court did not abuse its discretion in admitting evidence about appellant’s purported drug dealing activity, and his Mafia and C.I.A. connections. First, evidence that appellant had said he had been a member of the Mafia, Teamsters, and C.I.A., and had been engaged in drug activity was relevant to appellant’s credibility. Second, this testimony was not inadmissible as related to uncharged crimes because almost none of it related to uncharged crimes. In fact, the California Supreme Court saw no possibility that the jury understood the testimony about appellant’s statements to be evidence that appellant had in fact had the connections he claimed. The probative value outweighed any prejudicial impact.

Justices Mosk, Kennard and Werdegar dissented on the jury misconduct issue.

[19.A.] *People v. Hoover* (E020011, 1/27/00)

77 Cal.App.4th 1020 (DCA 4, Div. 2)

Evidence Code section 1109 does not violate due process by reducing the proof necessary to prove the offense beyond a reasonable doubt. The jury was properly instructed regarding the requisite proof, and the evidence of uncharged conduct did not lessen the prosecution’s burden. Further, Evidence Code section 352 guards against the use of such evidence resulting in a fundamentally unfair trial.

[19.A.1.] *People v. Jones* (1/29/98)

17 Cal.4th 279 ****Rehearing denied 3/18/98****

Evidence of traces of blood on appellant’s pants was properly admitted over appellant’s Evidence Code section 352 objection because it rebutted appellant’s claim that he was more than 10 feet away from the victim when she was shot. It was probative and not unduly prejudicial.

[19.A.1.] *People v. Bell* (D027299, 2/3/98)

61 Cal.App.4th 282 (DCA 4)

Appellant failed to show prejudice from admission of testimony by witness who had not been able to identify appellant prior to trial, but suddenly at trial decided he could identify appellant, where appellant was given a full opportunity to confront and cross-examine the witness about the reliability of his identification prior to trial and at trial, where the witness was thoroughly impeached with a fraud conviction, where other evidence of appellant’s guilt was overwhelming, and where appellant was positively identified by the victim.

[19.A.1.] *United States v. Shannon* (3/2/98)

137 F.3d 1112 (9th Cir.)

The admission of a letter to appellant was not relevant because it reflected the knowledge and thoughts of the author, not appellant, and any other probative value it had was very low, and was outweighed by its prejudicial effect. Nonetheless, the error in admitting this evidence was harmless.

[19.A.1.] *People v. Erving* (B111324, 4/29/98)

63 Cal.App.4th 652 (DCA 2) ****Review denied 8/12/98****

The trial court did not abuse its discretion in admitting the evidence of uncharged fires under Evidence Code section 352 because the court is not required to expressly weigh the probative value against the prejudicial effect, or to state that it has done so.

[19.A.1.] *People v. Barnett* (S008113, 5/4/98)

17 Cal.4th 1044 ****Rehearing denied 7/8/98****

The trial court did not abuse its discretion in admitting evidence of prior acts of violence and vandalism where the evidence shed light on motive rather than for an improper purpose under Evidence Code section 1101, subdivision (b), and where the probative value outweighed the prejudicial effect under Evidence Code section 352, particularly in light of the minimization of any prejudice achieved through cautionary jury instructions.

[19.A.1.] *People v. Barnett* (S008113, 5/4/98)

17 Cal.4th 1044 ****Rehearing denied 7/8/98****

Appellant's objection to the photographs and other evidence of the 1988 motorcycle tire tracks experiment was not timely and claimed no dissimilarity of conditions thereby entitling the reviewing court to refuse to consider them.

[19.A.1.] *People v. Barnett* (S008113, 5/4/98)

17 Cal.4th 1044 ****Rehearing denied 7/8/98****

The issue of whether the trial court erred under Evidence Code section 352 in admitting evidence that appellant escaped from the hospital while in police custody was not preserved for appeal because counsel objected only on relevancy grounds and made no objection to prejudicial effect.

[19.A.1.] *People v. Barnett* (S008113, 5/4/98)

17 Cal.4th 1044 ****Rehearing denied 7/8/98****

While use of two of appellant's aliases was proper, the questioning regarding 21 others was not, but it is not reasonably probable that a result more favorable would have been reached absent the perceived prosecutorial misconduct.

[19.A.1.] *People v. Barnett* (S008113, 5/4/98)

17 Cal.4th 1044 ****Rehearing denied 7/8/98****

The display of a fishing hook similar to that used to torture the victim was not error, and the display of a similar knife was not objected to and is therefore not preserved for appeal, but in any event there was no proof that the displayed knife was dissimilar to the knife used.

[19.A.1.] *People v. Milwee* (S014755, 5/18/98)

18 Cal.4th 96 ****Rehearing denied 6/26/98****

Appellant's testimony from another criminal prosecution was properly admitted, with a limiting instruction, for the purpose of showing the implausibility and untruthfulness of appellant's testimony in this case.

[19.A.1.] *People v. Milwee* (S014755, 5/18/98)

18 Cal.4th 96 ****Rehearing denied 6/26/98****

The trial court did not abuse its discretion in allowing the prosecution to introduce evidence in

rebuttal, and subject to a special instruction describing the limited purpose for which the evidence was admitted, of appellant's mother's fear of him which was relevant to assessing appellant's credibility and version of events leading up to killing her, and objections to this hearsay testimony were waived for failing to timely object.

[19.A.1.] *People v. Walker* (E018940, 5/22/98)
64 Cal.App.4th 1062 (DCA 4, Div. 2) ****Review denied 8/26/98****

The trial court did not abuse its discretion in admitting defendant Clemons' grand jury testimony which affirmatively showed that he did not witness the shooting, and served as a denial that he was at a party at the time of the murders. The evidence was not cumulative, and its probative value outweighed its minimal prejudicial impact.

[19.A.1.] *People v. Falsetta* (A077116, 5/28/98)
64 Cal.App.4th 291 (DCA 1) ****Review granted 8/12/98 (S071521)****

Adopting the view expressed by the Third District in *People v. Fitch* (1997) 55 Cal.App.4th 172, the court held that Evidence Code section 1108, which permits the introduction of other sex crimes to prove a defendant's disposition to commit the charged sexual offenses, does not violate the right to fair trial under the due process clause, because evidence admissible under section 1108 is still subject to the balancing process required under Evidence Code section 352, and its probative value must be found to outweigh its prejudicial effect.

[19.A.1.] *People v. Soto* (F026644, 6/11/98)
64 Cal.App.4th 966 (DCA 5)

The trial court did not abuse its discretion in admitting the testimony of Linda and Raquel under Evidence Code section 1108, where its prejudicial nature was far outweighed by its probative value under Evidence Code section 352. Because section 1108 was intended to supersede Evidence Code section 1101, appellant's contention that the evidence was inadmissible under section 1101 was not reached.

[19.A.1.] *People v. Bolin* (S019786, 6/18/98)
18 Cal.4th 297

The trial court did not abuse its discretion in admitting testimony concerning defendant's actions after fleeing the scene of the shootings under Evidence Code section 352.

[19.A.1.] *People v. Kipp* (S004784, 6/22/98)
18 Cal.4th 349

The trial court did not abuse its discretion when it ruled that, based on the number and distinctiveness of the shared characteristics of the charged crime with other uncharged crimes, the offenses displayed a pattern so unusual and distinctive as to support an inference that the same person committed both within the meaning of Evidence Code section 1101. The trial court did not abuse its discretion when it ruled that the charged and uncharged offenses were sufficiently similar to support an inference that appellant harbored the same intents, and the danger of prejudice in admitting this evidence was outweighed by the probative value.

[19.A.1.] *People v. Kipp* (S004784, 6/22/98)
18 Cal.4th 349

The testimony of the victim's mother was brief, factual and included no overt emotional display, so that it had no potential to inflame the jurors and could not have prejudiced appellant.

[19.A.1.] *People v. Hoover* (E020011, 6/23/98)
64 Cal.App.4th 1422 (Div. 2, DCA 4)

Adopting the reasoning of *People v. Fritch* (1997) 55 Cal.App.4th 172, the Second District held that Evidence Code section 1109, which permits the admission of character evidence to prove disposition to commit a criminal act of domestic violence, subject only to the restrictions of Evidence Code section 352, and which supplants the ban against use of character evidence to prove a defendant's conduct on a specific occasion contained in Evidence Code section 1101, does not violate the due process clause and is constitutional on its face and as applied.

[19.A.1.] *People v. Tufunga* (6/29/98)
65 Cal.App.4th 287 (DCA 1)

It was not error for the court to admit evidence of an uncharged March 1995 incident which had prompted the victim to take refuge in a women's shelter. Appellant did not show how the jurors may have improperly used the prior act evidence to prove intent, and there were other instructions which did clearly say that the prior conduct could not be used to show bad character.

[19.A.1.] *United States v. Merino-Balderrama* (7/21/98)
146 F.3d 758 (9th Cir.)

In a prosecution for possession of child pornography, where appellant offered to stipulate that the films were child pornography and had traveled in interstate commerce, the films were less probative of knowledge than were their box covers. The films' content was highly prejudicial, and the jury's viewing of ten minutes of children portraying graphic sexual conduct with adults was likely to be more inflammatory than seven still photographs and a magazine. Since the probative value was small, given appellant's stipulation, and the prejudicial value great, it was error to have allowed the jury to view the films. The error was not harmless since it significantly reduced any possibility that the jury would acquit the appellant.

[19.A.1.] *United States v. Blitz* (8/6/98)
151 F.3d 1002 (9th Cir.)

The trial court did not abuse its discretion in admitting the company's bank records as more probative than prejudicial. The evidence of appellant's prior employment at a fraudulent telemarketing company was properly admitted at trial because it satisfied the four-part test under Rule 404(b) of the Federal Rules of Evidence, and because the trial court did not abuse its discretion in finding that the evidence was not unfairly prejudicial.

Sentencing issues under federal law were not summarized.

[19.A.1.] *United States v. Sanchez-Lima* (12/11/98)
161 F.3d 545 (9th Cir.) ****As amended on denial of rehearing****

The district court abused its discretion and committed reversible error when it permitted Agent Loven to testify, over objection, to his opinion as to whether another agent, who was the crime victim in this case, was telling the truth during his postincident interview.

[19.A.1.] *People v. Tabios* (C024963, 10/5/98)
67 Cal.App.4th 1 (DCA 3) ****Review denied 1/20/99****

The court did not abuse its discretion in admitting evidence of a court order prohibiting Tabios from possessing weapons. The evidence was probative on the question of planning, an issue relevant to the first degree murder charge, and the prejudicial effect was minimal.

[19.A.1.] *People v. Ochoa* (S009522, 11/5/98)
19 Cal.4th 353 ****Rehearing denied 1/27/99****

There was no due process violation where the victim's boyfriend was shown post-mortem photographs of the victim during his testimony, which induced distress. The photographs had probative value, as the witness testified that when he left the victim, she was not in the condition shown in the photographs. The trial court properly ruled that the probative value outweighed the prejudicial effect.

Penalty phase issues not summarized.

[19.A.1.] *People v. Roybal* (S029453, 11/12/98)
19 Cal.4th 481 ****Modification of opinion 19 Cal.4th 1231a; rehearing denied 1/13/99****

It was not error to admit a 911 recording in which the victim's husband described the scene and said it appeared that his wife had been murdered. The statements were made spontaneously while the husband was under stress or excitement, and thus fall into an exception to the hearsay rule. The tapes' relevance to repel any suggestion that the husband was not involved in the murder far outweighed any potential prejudice to appellant.

Penalty phase issues not summarized.

[19.A.1.] *People v. Yovanov* (G020955, 1/20/99)
69 Cal.App.4th 392 (DCA 4, Div. 3) ****Review denied 4/14/99****

Evidence of uncharged sexual misconduct was admissible at trial because evidence of uncharged sexual offenses is so uniquely probative in sex crime prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101. The only restrictions on the admissibility of such evidence are contained in Evidence Code section 352. Here, the uncharged acts had great probative value, and the jury already knew that appellant had been convicted of many of the uncharged acts. There was no abuse of discretion in their admission at trial.

[19.A.1.] *People v. Odam* (D029822, 2/10/99)
69 Cal.App.4th 1192 (DCA 4, Div. 1) ****Review granted 5/12/99 (S077469);**

further action deferred pending disposition in *People v. Williams* (S066106)**

The trial court did not err in admitting evidence of the prior revocation of Odam's license. Odam's knowledge of the danger of one infant's situation went directly to the issue of whether her behavior following his birth was the result of reasonable or mistaken judgment, and whether she had knowledge of the risks, an essential factor in establishing criminal negligence.

**[19.A.1.] *United States v. Bensimon* (4/13/99)
--- F. Supp. --- (C.D. Cal.) ****Citation not available******

The district court erred in allowing the government to introduce evidence of Bensimon's previous bankruptcy petition. Evidence of poverty is admissible if accompanied by evidence of a specific and immediate financial need. The fact that a defendant has declared bankruptcy does not demonstrate by itself that Bensimon had a particular need for money at the time the crime was committed. Given the lack of probative value of the bankruptcy evidence here and its likely prejudicial effect, the evidence should have been excluded.

**[19.A.1.] *People v. Davis* (E021991, 5/11/99)
71 Cal.App.4th 1492 (DCA 4, Div. 2) ****Review granted 8/25/99 (S079736);
further action deferred pending disposition in *People v. Falsetta* (S071521)
and *People v. Murphy* (S075263)******

The trial court did not err in admitting prior uncharged acts in a child molestation trial. Davis was convicted of committing a lewd act on a child under the age of 14. On appeal, Davis argued that the trial court erred in admitting evidence of prior uncharged sexual acts with his stepchildren, who were also under 14. The appellate court held that the evidence was properly admitted under Evidence Code section 1108. That section makes admissible evidence of another sexual offense of the accused, limited only by the trial court's discretion under Evidence Code section 352. Section 1108 created a presumption of admissibility of prior sexual offenses when applying section 352. Here, although the prior offenses were inflammatory because they were more violent than the present incident, they were probative and relevant because they demonstrated a pattern of molestation of children of like ages to the victim. The offenses were not too remote, because Davis had not led a "blameless life" for a period of years following the prior acts. The admission of the evidence did not consume an undue amount of time, and there was little chance the jury would have been confused and would have punished appellant for his prior offenses. Therefore, the trial court did not abuse its discretion by allowing admission of the evidence.

**[19.A.1.] *People v. Mobley* (D027985, 5/28/99)
72 Cal.App.4th 761 (DCA 4, Div. 1) ****Review denied 9/1/99******

The trial court did not err in admitting Mobley's statements regarding his preference for young boys because the statements were relevant and not more prejudicial than probative. The statements were relevant to the issue of Mobley's knowledge that the victims had mental disabilities which made them more like "boys." There was no prejudice caused by the admission of the statements because the evidence against Mobley was abundant, the statements were not sensationalized, and the jury was cautioned regarding the limitations on the use of the statements as admissions.

**[19.A.1.] *People v. Guzman* (A079259, 6/28/99)
73 Cal.App.4th 103 (DCA 1, Div. 3) ****Review denied 10/20/99 and****

DEPUBLISHED**

The trial court did not abuse its discretion under Evidence Code section 352 in admitting evidence that Guzman had killed people in El Salvador. The probative value outweighed its prejudicial effect where it was used to show the basis for the children's fear, and where the jury was instructed to consider the fact only for its effect on the children and not to consider whether it was true.

[19.A.1.] *People v. Smithey* (S011206, 7/1/99)
20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

The trial court did not abuse its discretion under Evidence Code section 352 in admitting, over appellant's objection, the testimony of a store clerk with whom appellant flirted after he had committed the sex offenses and the murder. The trial court impliedly found the probative value outweighed the prejudicial effect. Penalty phase issues were not summarized.

[19.A.1.] *People v. Rubalcava* (D030483, 7/27/99)
73 Cal.App.4th 956 (DCA 4, Div. 1) ****Review granted 10/27/99 (S081209)****

The trial court did not err in allowing testimony on rebuttal concerning the condition of the knife blade, which showed that it had been sharpened. The testimony was proper as rebuttal because appellant testified that the knife was merely a letter opener.

[19.A.1.] *United States v. Pino-Noriega* (8/31/99)
189 F.3d 1089 (9th Cir.)

It was not an abuse of discretion for the trial court to have allowed the opinion of a police officer that appellant's testimony "did not make sense."

[19.A.1.] *People v. Van Winkle* (F030661, 9/24/99)
75 Cal.App.4th 133 (DCA5) ****Review denied 12/15/99****

CALJIC 2.50.01 and 2.50.1 did not impermissibly lessen the state's burden of proof by permitting the admission of prior sexual offenses to show that appellant committed the charged sex crimes. CALJIC 2.50.01 is based on Evidence Code section 1108, and permits the jury to consider uncharged sex offenses as evidence that a defendant had a disposition to commit such offenses. CALJIC 2.50.1 instructs the jury that the prosecution need only prove the uncharged offenses by a preponderance of evidence. The constitutional attack on Evidence Code section 1108 was already rejected in *People v. Fitch* (1997) 55 Cal. App. 4th 172. The burden of proof is not lessened because the evidence admitted under that section is simply an additional evidentiary fact to be considered along with all the other evidence, and ultimately the prosecution must prove its case beyond a reasonable doubt. The jury instructions contain permissive and not mandatory inferences, and are therefore constitutionally permitted.

[19.A.1.] *People v. Falsetta* (S071521, 11/1/99)
21 Cal.4th 903

In a prosecution for multiple sex offenses, the admission of uncharged rapes for the purpose of showing a propensity to commit such crimes pursuant to Evidence Code section 1108 was not error. Section 1108 is not an unconstitutional violation of due process. The Legislature's principal justification for adoption of section 1108 was a "practical" one because the jury is

provided with the opportunity to learn of the defendant's possible disposition to commit such crimes. Defendants are not unduly burdened because of the limitations and restrictions inherent in the statute. Courts are not unduly burdened because the evidence may still be excluded under section 352. The "careful weighing" process of section 352 also guards against undue prejudice, and "saves" section 1108 from a due process challenge. Section 1108 does not impermissibly lessen the prosecution's burden of proving guilt beyond a reasonable doubt because CALJIC 2.50.01 helps assure that the defendant will not be convicted of the charged offense merely because of the evidence of his other offenses.

[19.A.1.] *People v. Vichroy* (B127891, 11/4/99)
76 Cal.App.4th 92 (DCA 2) ****Petition for review filed 12/14/99****

It was not an abuse of discretion for the trial court to have permitted admission of prior uncharged sexual misconduct in a prosecution for lewd acts on a child. Evidence Code section 1108 is not unconstitutional, and the prejudicial effect of the evidence did not outweigh the probative value.

[19.A.1.] *People v. Carpenter* (S006547)
21 Cal.4th 1016 ****Time for granting or denying rehearing extended to 2/25/00****

The trial court properly allowed a witness to testify that around the time of the killings, she saw appellant with wire and a gun similar to that used in the killings. The record as a whole demonstrates that the court was aware of, and performed, its duty to exclude prejudicial evidence.

The penalty phase issues were not summarized.

[19.A.1.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ****Time for granting or denying rehearing extended to 4/5/00****

Appellant was not prejudiced by the admission of a prosecution witness's testimony because he was granted immunity from prosecution for perjury. The grant of immunity applied only to prior acts of perjury, not future perjury during the trial. Even if the immunity agreement was ambiguous, appellant failed to object or seek clarification at trial, so the claim was waived on appeal.

[19.A.1.] *People v. Brown* (A083896, 2/1/00)
77 Cal.App.4th 1324 (DCA 1, Div. 2)

Admission of appellant's prior acts of domestic violence was not an abuse of discretion. Pursuant to Evidence Code section 352, the trial court carefully weighed the probative value of the evidence against its possible prejudice, and correctly found that it was more probative than prejudicial, was not inflammatory, and would cause no risk of confusion. The prior acts were not remote, and admitting the evidence about them did not consume much time.

[19.A.1.] *People v. Han* (G023433, 2/25/00)
Cal.App.4th (DCA 4, Div. 3)

It was not an abuse of discretion to reject the defense's request to access the medical records of the victim regarding a suicide attempt made during the trial. The records were not relevant, the victim's trial testimony was not materially different from her statements and preliminary hearing

testimony, and the defense had the opportunity to cross-examine the victim concerning the suicide attempt.

[19.A.1.] *People v. Han* (G023433, 2/25/00)
Cal.App.4th (DCA 4, Div. 3)

It was not error for the trial court to have admitted a bullet and shell casing found inside a rental car, because there had been no objection to the testimony regarding the evidence. Further, there could have been no prejudice, because the loaded gun with the safety off was the “tiger in the tent,” and the bullet and shell casing merely the “mosquitoes on the netting outside.”

[19.A.1.] *People v. Regalado* (G023383, 1/31/00)
Cal.App.4th (DCA 4, Div. 3)

The admission of a prior act of digital penetration of a five-year-old boy was admissible in a prosecution for lewd acts on another five-year-old boy. Evidence Code section 1108 permits the introduction of evidence of prior sexual offenses, and has been held to be constitutional by the California Supreme Court in *People v. Falsetta* (1999) 21 Cal. 4th 903. The record here demonstrated that the trial court applied the appropriate balancing test under section 352.

[19.A.1.] *United States v. Takahashi* (3/6/00)
F.3d (9th Cir.)

The admission of expert testimony of gang affiliation was not an abuse of discretion where the evidence was relevant to establish bias, and the trial court had taken steps to minimize undue prejudice. Here, appellant had called an exculpatory witness who admitted gang affiliation but denied that any oaths of loyalty were involved. The Government then introduced expert testimony that members of this gang do indeed swear oaths of loyalty and had been known to “take the blame” for other members. The district court offered a limiting instruction, and restricted the prosecution’s evidence to exclude photographs of appellant’s tattoos. Because the oaths of total loyalty were directly relevant to the issue of bias, and the district court sought to prevent undue prejudice, there was no error.

Federal sentencing issues not summarized here.

[19.A.1.] *People v. Jacobs* (A079608, 3/16/00)
Cal.App.4th (DCA 1, Div. 3)

In a prosecution for receiving stolen property, the trial court did not err in admitting appellant’s prior convictions to attack his credibility, even though appellant did not testify. An exculpatory statement appellant had made to police officers, explaining how he came into possession of the stolen items, was admitted at his own request. The prosecution then sought and received permission to impeach appellant’s hearsay statement by introducing evidence of several prior felony theft-related convictions. The appellate court affirmed. Evidence Code sections 1202 and 788 taken together provide that prior felony convictions are admissible to attack the credibility of a hearsay declarant, at least where the declarant is the defendant himself. Even if those sections did not exist, the state constitution, as amended by the “Victims’ Bill of Rights” mandates that any prior felony conviction may be used without limitation for purposes of impeachment, subject to the limitations of section 352. Because the trial court clearly weighed the substantial probative value of the evidence against the potential prejudice, there was no abuse of discretion.

[19.A.1.a.] *People v. Harris* (1/6/98)
60 Cal.App.4th 727 (DCA 3) ****Review denied 4/15/98****

Evidence admitted under Evidence Code section 1108, to show bad conduct to prove predisposition to commit sex crimes, is subject to Evidence Code section 352, to provide a safeguard that the presumption of innocence and other characteristics of due process are not weakened by the unfair use of past acts. Here, the evidence was remote, inflammatory and nearly irrelevant. It was likely to confuse the jury and distract it from the consideration of the charged offenses, and was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818 because it is reasonably probable the jury would have acquitted the defendant absent evidence of a 23-year-old-act of unexplained sexual violence. The only factor favoring the admission of this evidence was that it did not consume much time.

[19.A.1.a.] *People v. Dennis* (S007210, 2/19/98)
17 Cal.4th 468 ****Rehearing denied 4/15/98****

Neither of the two photographs to which appellant objected were likely to produce a prejudicial impact, and were probative.

[19.A.1.a.] *People v. Bryden* (A075154, 4/16/98)
63 Cal.App.4th 159 (DCA 1) ****Review denied 8/12/98****

The record demonstrates that the trial court did assess the probative value of the photographs and weigh that against their prejudicial effect, and any error in this weighing process was harmless because the photographs were no more inflammatory than the coroner's testimony.

[19.A.1.a.] *People v. Bolin* (S019786, 6/18/98)
18 Cal.4th 297

Appellant's failure to object to the use of police and autopsy photographs waived the issue for appeal.

[19.A.1.a.] *People v. Kipp* (S004784, 6/22/98)
18 Cal.4th 349

Where trial counsel did not object to the admissibility of a photograph of the victim under Evidence Code section 352, the issue is waived on appeal, and trial counsel was not ineffective for failing to object because the photograph was not inflammatory. The evidence of appellant's guilt of the charged offenses was strong, so that it was not reasonably probable that a more favorable verdict would have been obtained.

[19.A.1.a.] *People v. Murphy* (C0252452, 11/18/98)
67 Cal.App.4th 1205 (DCA 3) ****Review granted 2/24/99 (S075263)****

The trial court did not abuse its discretion, under Evidence Code section 352, in admitting prior offense evidence under Evidence Code section 1108, where there was little risk of misuse of the prior offense evidence, and the prior offense evidence was not stronger than the evidence of the current offenses.

[19.A.1.a.] *People v. Welch* (S011323, 6/1/99)
20 Cal.4th 701 ****Rehearing denied 8/18/99****

The trial court did not abuse its discretion in admitting some of the autopsy photos, because the probative value of the photos admitted outweighed their prejudicial effect. Penalty phase issues not summarized.

[19.A.1.a.] *People v. Hart* (S005970, 6/1/99)
20 Cal.4th 546 ****Rehearing denied 7/21/99****

The admission of sixteen slides and three photographs depicting Diane's body, and a videotape depicting the route to the crime scene, was not error. The photographic testimony had great probative value because it corroborated the testimony by prosecution witnesses regarding evidence found at the crime scene and events which transpired on the day of the incident. The evidence was clearly probative of the planning and deliberation with which the crimes were committed. The amount of evidence admitted was not excessive, in view of the particular facts of the case. Therefore, the trial court reasonably determined that the probative value outweighed any potentially prejudicial effect. Penalty phase issues not summarized.

[19.A.1.a.] *People v. Smithey* (S011206, 7/1/99)
20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

The trial court did not abuse its discretion under Evidence Code section 352 in admitting two photographs of the victim's body as it was discovered after the crime as the trial court properly found the probative value outweighed the prejudicial effect. The photographs demonstrated malice, use of a deadly weapon, presence of semen stains and the location of the wallet, which was relevant to the murder charge, the attempted rape charge, and the robbery charge, and further corroborated the testimony of the witnesses. Penalty phase issues were not summarized.

[19.A.1.a.] *People v. Smithey* (S011206, 7/1/99)
20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

Admission of a blood-stained identification card of the victim was not irrelevant and prejudicial insofar as the court failed to order it redacted to remove a photograph of the victim while alive. The trial court did not abuse its discretion in admitting the ID card into evidence. It was not prejudicial to appellant simply because it included a photograph of the victim alive. Penalty phase issues were not summarized.

[19.A.2.] *People v. Jones* (1/29/98)
17 Cal.4th 279 ****Rehearing denied 3/18/98****

Evidence tendered by appellant of the prosecution witness's past criminal activity (who was also the co-perpetrator who was being tried separately) was properly excluded under Evidence code section 352 because it would have required an undue consumption of time and would have misled the jury. This ruling did not deprive appellant's of his right to present witnesses in his own defense because appellant was not precluded from attempting to prove the co-perpetrator was the actual shooter. He was merely precluded from proving it with time-consuming hearsay and character evidence that was not particularly probative on the question. The fact that the prosecutor was able to use this evidence in the trial of the co-perpetrator has no bearing on the propriety of the ruling in this case.

[19.A.2.] *People v. Contreras* (B111222, 9/15/98)
66 Cal.App.4th 842 (DCA 2, Div. 4) ****Review denied 1/13/99 and
DEPUBLISHED****

The trial court erred in excluding, pursuant to Evidence Code section 352, testimony from an expert witness regarding the incident which triggered appellant's post traumatic stress disorder. The court's ruling placed the expert in the position of expressing her opinion of appellant's mental condition without being able to explain how she arrived at that opinion. The error, standing alone, might be harmless if not for the misconduct of the prosecutor, who repeatedly capitalized on the exclusion of the evidence by ridiculing, during cross examination and argument, the doctor's opinion as without foundation.

[19.A.2.] *People v. Ochoa* (S009522, 11/5/98)
19 Cal.4th 353 ****Rehearing denied 1/27/99****

The trial court did not err in sustaining an objection to defense counsel's question to a prosecution witness regarding the name of the witness's cocaine supplier. The witness admitted his drug use, and further inquiry was not relevant.

Penalty phase issues not summarized.

[19.A.2.] *People v. Hart* (S005970, 6/1/99)
20 Cal.4th 546 ****Rehearing denied 7/21/99****

The trial court's exclusion of evidence concerning a civil suit filed against investigating officers by the chief prosecution witness, Amy, was not error. Even if the proffered evidence had some relevance to Amy's credibility, the probative value did not outweigh the potential prejudice of undue consumption of time and a substantial danger of confusing the issues and misleading the jurors. Even if the trial court had erred in excluding this evidence, it was not prejudicial. Appellant's sexual assault on Amy was firmly established. Appellant's defense focused upon the nature of the sexual misconduct on Diane, the murder victim. Under any prejudicial error standard, the asserted error was harmless. Penalty phase issues not summarized.

[19.A.2.] *People v. Pelayo* (D030198, 1/5/99)
69 Cal.App.4th 115 (DCA 2, Div. 6) ****Review denied 4/14/99****

It was not error to exclude the school records of one of the victims. The records were extensive and lengthy, and contained differing opinions about the victim's personality. The risk that the records would confuse or mislead the jury outweighed their probative value.

[19.A.2.] *People v. Romero* (F027273, 1/29/99)
69 Cal.App.4th 846 (DCA 5) ****Review denied 4/28/99****

Expert testimony about street violence in Hispanic culture is irrelevant to a self-defense argument in a murder case. The murder in this case began with an incident of "road rage" when one driver cut too close to another, causing him to quickly brake. An argument ensued, resulting in the victim dying from a knife wound to his heart. The defense attempted to introduce expert testimony by a sociology professor and author of a book on the sociology of poverty and the role of honor, paternalism, and street fighters in the Hispanic culture. The trial court excluded the testimony as irrelevant. The Fifth District Court of Appeal affirmed, holding that the testimony

was irrelevant to whether the defendant actually believed he was in imminent danger of death or great bodily injury and whether such a belief was objectively reasonable. The court refused to sanction a “reasonable street fighter” standard. No sociological expert could have provided the missing element of Romero’s actual subjective state of mind at the time of the stabbing. Therefore, even if he could provide relevant testimony about culture and street fighting, the exclusion of the testimony was harmless. Absent evidence that Romero was in fear of imminent death or injury, the jury had no evidentiary basis from which to conclude that he subjectively had an unreasonable fear, which negated malice. It is therefore not reasonably probable that but for the exclusion of the evidence, Romero would have received a more favorable result.

[19.A.2.] *People v. Rodriguez* (S066848, 2/25/99)
20 Cal.4th 1

The trial court did not abuse its discretion in excluding evidence which would have impeached an eyewitness’s testimony, where the evidence offered was irrelevant and collateral. The eyewitness to the murder claimed that he had witnessed the murder from the roof of a building where he was walking his dog. The eyewitness claimed that the manager allowed residents to take their dogs up to the roof to avoid dangerous activity on the street. The defense sought to introduce evidence that the manager had not given such permission, and that there was no residue from animals on the roof. The court here held that the impeachment evidence was properly excluded. The relevant issue was whether the eyewitness actually was on the roof, not whether he had permission to be there. Because the testimony was irrelevant, there was no abuse of discretion.

Justice Kennard would have upheld the decision of the Court of Appeal to reverse. She noted the relevance of the defense impeachment evidence because the identity of the killer was the “ultimate fact” and the proffered evidence called into question the veracity of the eyewitness testimony. It was reasonably probable that had the jury heard the testimony, they might also have disbelieved the eyewitness’s testimony.

[19.A.2.] *Spivey v. Rocha* (10/22/99)
194 F.3d 971 (9th Cir.)

The exclusion of evidence of gang affiliation of two prosecution witnesses did not render Spivey’s trial fundamentally unfair. Evidence of gang association was not necessary to show bias, and it did not lead to inferences which supported the self-defense theory. Also, because the theory that another rival gang may have committed the murder was merely speculation, and there was no suspect or actual motive shown, it was not erroneous to have excluded the gang membership evidence.

[19.A.2.] *People v. Phillips* (S025880, 1/24/00)
22 Cal.4th 226

The trial court properly excluded evidence that a key prosecution witness, appellant’s girlfriend, was a prostitute and had gone to Fresno at the time of the offense to engage in prostitution. Although prostitution activities might have some relevance to a witness’s credibility, the court properly excluded the evidence under Evidence Code section 352 because it had the potential for embarrassing and unfairly discrediting the witness.

Penalty issues are not summarized here.

[19.A.2.] *Lajoie v. Thompson* (1/31/00)
201 F.3d 1166 (9th Cir.)

A conviction for rape and sexual abuse of a minor was reversed where the trial court had excluded evidence of prior sexual abuse of the minor victim by others pursuant to Oregon's rape shield law. Appellant sought to introduce uncontested evidence that the ten-year-old victim had been sexually abused by several others, and had been raped by one man in unrelated incidents, but he had failed to give the 15-day notice of intent to introduce the evidence as the statute required. The appellate court held that here the interest of the victim in "eight extra days of repose" and the risk of surprise to the prosecutor was minimal when compared to the probativeness of the excluded evidence. The evidence could have explained the medical evidence of injuries to the victim's hymen, and would have showed that the victim could have learned about sexual acts and male genitalia from sources other than the rape charged in this case. The exclusion of this evidence violated appellant's Sixth Amendment rights because the exclusion of the evidence was "arbitrary and disproportionate" to the purposes of the 15-day notice requirement. Appellant's defense was seriously undermined because the jury heard only the part of the story that implicated him, and was not permitted to hear highly probative exculpatory evidence. Reversal was therefore required.

[19.A.3.] *People v. Dennis* (S007210, 2/19/98)
17 Cal.4th 468 ****Rehearing denied 4/15/98****

The admission into evidence of a neighbor's statements to the police may have been erroneously admitted without a proper foundation, but defense counsel did not object so the issues is not preserved, and in any event, the admission was not unduly prejudicial.

[19.A.4.] *People v. Harris* (1/6/98)
60 Cal.App.4th 727 (DCA 3) ****Review denied 4/15/98****

Evidence admitted under Evidence Code section 1108, to show bad conduct to prove predisposition to commit sex crimes, is subject to Evidence Code section 352, to provide a safeguard that the presumption of innocence and other characteristics of due process are not weakened by the unfair use of past acts. Here, the evidence was remote, inflammatory and nearly irrelevant. It was likely to confuse the jury and distract it from the consideration of the charged offenses, and was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818 because it is reasonably probable the jury would have acquitted the defendant absent evidence of a 23-year-old-act of unexplained sexual violence. The only factor favoring the admission of this evidence was that it did not consume much time.

[19.A.4.] *People v. Bryden* (A075154, 4/16/98)
63 Cal.App.4th 159 (DCA 1) ****Review denied 8/12/98****

The admitting into evidence of photographs of the victim's bloated decomposing head and body were relevant to establish identity and intent, and the corroboration of the prosecution's witness' testimony justified admission of the photographs as relevant within the meaning of Evidence Code section 210.

[19.A.4.] *People v. Walker* (E018940, 5/22/98)
64 Cal.App.4th 1062 (DCA 4, Div. 2) ****Review denied 8/26/98****

The trial court did not abuse its discretion in permitting witness Murrell to testify about a

threatening phone call she received, because evidence that a witness has been threatened is relevant to the witness's credibility, whatever the source of the threat.

[19.A.4.] *People v. Lucero* (B110574, 6/15/98)
64 Cal.App.4th 1107 (DCA 2, Div. 7)

The officer's testimony that a witness told him the robber left a shoe print on the counter was inadmissible because it was hearsay; moreover, even if it was offered for a nonhearsay purpose, it was irrelevant. Nonetheless, the error was harmless because the shoe print evidence was not the critical evidence.

[19.A.4.] *People v. Shymanovitz* (8/31/98)
-- F.3d -- (9th Cir.)

The admission of sexually explicit gay adult magazines found in the residence of appellant, who was tried on charges of unlawful sexual activity with minors, constituted prejudicial error and reversal was required. While the prosecutor maintained that the articles demonstrated that appellant intentionally engaged in the conduct of which he was accused, that is immaterial to the offense. Moreover, reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct and thus fails to meet the test of relevancy. And to the extent the material indicates an interest in the subject matter, a defendant must be tried on what he did, not who he is. Finally, the evidence does not qualify as a bad act.

[19.A.4.] *United States v. Serang* (9/1/98)
156 F.3d 910 (9th Cir.)

The district court did not err in admitting evidence of a sham marriage of the owner of the restaurant burned and appellant's aunt, when admitted for the purpose of providing the context in which the charged crime occurred. Since appellant had no financial gain to be made from the arson of the restaurant, appellant's tie to the owner explained the context of the crime.

[19.A.4.] *United States v. Mitchell* (3/26/99)
172 F.3d 1104 (9th Cir.)

Evidence of appellant's poverty is inadmissible under Federal Rule of Evidence 404(b) because that rule speaks only to evidence of other crimes, wrongs, or acts, and being poor is not a crime, wrong, or act. Here, the poverty evidence was of negligible probative value, but produced a high danger of unfair prejudice, rendering the court's discretion an abuse. The appellate court was in equipoise about whether the error was harmless, and as a result, the government did not establish harmlessness. The conviction was reversed and the case was remanded for a new trial.

[19.A.4.] *People v. Bolden* (B118740, 4/26/99)
71 Cal.App.4th 730 (DCA 2, Div. 1) ****Review granted 8/11/99 (S079196),
further action deferred pending disposition in *People v. Tillman* (S077360)****

The trial court properly excluded a witness's observations that appellant, who lived with the murder victim, had suffered bruises while living with him. There were many explanations for bruises, and the fact that appellant had them did not support an inference that the victim had inflicted them. The evidence was properly excluded as irrelevant.

[19.B.] *People v. Granderson* (C026311, 10/30/98)

67 Cal.App.4th 703 (DCA 3) ****Review denied 2/17/99****

It was not error for the court to take judicial notice of a booking photograph because it did not reduce the prosecution's burden of proof.

[19.D.] *People v. Dennis* (S007210, 2/19/98)

17 Cal.4th 468 ****Rehearing denied 4/15/98****

The four-year-old who witnessed the crimes was properly found competent to testify.

[19.D.] *People v. Ervin* (S021331, 1/6/00)

22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

Failure to object to, or suggest further editing of, the redacted testimony of a witness at trial precluded raising the issue on appeal. Furthermore, the unredacted references to appellant were harmless in light of the substantial incriminating evidence in the case. It was not ineffective assistance of counsel to have failed to object to the testimony.

[19.D.2.] *People v. Rios* (D025621, 5/21/98)

63 Cal.App.4th 1501 ****Review granted 9/2/98 (S055790)****

There was no prejudice where the prosecutor asked if appellant used drugs on the day of the shooting, appellant denied it, and the matter went no further.

[19.D.2.] *People v. Frye* (7/30/98, S007198)

18 Cal.4th 894 ****Modification of opinion at 19 Cal.4th 253d; Rehearing denied 9/23/98****

The curtailment of Dr. Thornton's testimony on the inadequacy of the crime scene investigation was proper under Evidence Code section 352 as it was of limited probative value, the trial court could have reasonably found it to be potentially confusing, and it was irrelevant or cumulative. Frye's cross-examination of witness Wilson was not relevant to any disputed fact of consequence, to the question of Frye's guilt of the charged crimes, or to Wilson's veracity, and the trial court did not abuse its discretion in curtailing it or the cross-examination of other witnesses where the evidence was lacking in relevance and in some cases potentially prejudicial. Moreover, Frye did not establish that the prohibited cross-examination might reasonably have produced a significantly different impression of the witnesses' credibility.

Penalty phase issues were not summarized.

[19.D.2.] *People v. Haynes* (A078379, 5/20/99)

72 Cal.App.4th 337 (DCA 1, Div. 4) ****Modification of opinion on denial of rehearing 73 Cal.App.4th 41h; review granted 9/1/99 (S080149); further action deferred pending *People v. Duarte* (S068162)****

An unavailable witness's taped statements were admissible for the truth of the matter asserted under Evidence Code section 1294. Haynes sold drugs out of a motel in Oakland, and would beat up or kill his competitors who attempted to use the same motel. Haynes learned that the victims in this case were smoking crack in room 16 of the motel. One of the victims testified that someone with a semiautomatic weapon fired shots into the room, killing one person and injuring

others. Sylvia Gregory, a witness to the shooting, gave a taped statement to the police identifying Haynes as the shooter. A tape of Gregory's statement was played at the preliminary hearing. Prior to the preliminary hearing, Gregory changed her story and said that she was not sure Haynes was the shooter. Gregory testified at the preliminary hearing, but was unavailable at the time of the trial. Gregory's taped statements were admitted at trial, and Haynes was convicted and sentenced to 25 years to life for the murder, two indeterminate terms, and 38 years for a number of other offenses. On appeal, Haynes challenged the admission of the taped statements, arguing that they were inadmissible hearsay. The appellate court affirmed. The statements were admissible under recently-enacted Evidence Code section 1294, which permits prior inconsistent statements of a witness to be properly admitted in a trial if the witness is unavailable and if the former testimony of the witness is admitted pursuant to Evidence Code section 1291. The statute specifies that a transcript of a preliminary hearing or other prior hearing containing the statements may be admitted. Here, Gregory's recorded statements were played at the preliminary hearing, and therefore the transcript of the hearing "contained" those statements. The statute took effect on January 1, 1997, and thus was in effect when the jury was sworn on January 7, 1997. The admissibility of evidence is determined at the time the evidence is offered, not when the trial commences. Appellant had the opportunity to cross-examine Gregory at the preliminary hearing about her taped statements, and his motive and interest to do so were similar to those he would have had had she testified at trial. The Sixth Amendment was therefore satisfied, and appellant's right to confrontation was not violated.

[19.D.2.] *Lilly v. Virginia* (6/10/99)
527 U.S. --- [144 L.Ed.2d 117]

The admission of a nontestifying accomplice's confession violated an accused's Sixth Amendment right to confrontation. Petitioner, his brother Mark, and Barker were arrested following a crime spree which included theft of alcohol and guns, and the abduction of the victim, who was later killed. Following police questioning, Mark admitted the theft of the alcohol, but claimed that petitioner and Barker had stolen the guns and that petitioner shot the victim. When he was called as a witness against petitioner at trial, he invoked his Fifth Amendment privilege. The trial court then admitted his earlier statements as declarations against penal interest. Petitioner was convicted, and the conviction was affirmed by the Virginia Supreme Court. The United States Supreme Court reversed. The admission of Mark's untested confession violated petitioner's confrontation clause rights. Case law has consistently viewed an accomplice's statements that shift or spread the blame to a criminal defendant as falling outside the realm of trustworthy hearsay exceptions. The absence of an express promise of leniency to Mark did not enhance the reliability of his statements to the level necessary for their untested admission. Mark was in custody for his own participation in the crimes, and was primarily responding to the officers' leading questions, which were asked without cross-examination. Mark had a natural motive to exculpate himself as much as possible. The judgment of the Virginia Supreme Court was reversed and the case was remanded to determine whether the error was harmless beyond a reasonable doubt.

[19.D.3.] *People v. Martinez* (F026595, 4/9/98)
62 Cal.App.4th 1454 (DCA 5) ****Review denied 7/8/98****

Evidence Code section 788, which authorizes a witness to be impeached by showing that s/he has been convicted of a felony, applies to a felony driving-under-the-influence conviction even though

it is a wobbler, and even though sentence has not yet been imposed.

[19.D.3.] *People v. Bryden* (A075154, 4/16/98)
63 Cal.App.4th 159 (DCA 1) ****Review denied 8/24/98****

The trial court did not abuse its discretion in admitting evidence of a defense witness's alleged involvement in another murder involving a decapitation because no implication was made that either codefendant was a participant in the prior murder, and the evidence was admitted only to impeach one witness and bolster the credibility of another. For the same reason, if it was error, it was harmless because it did not implicate a codefendant.

[19.D.3.] *People v. Milwee* (S014755, 5/18/98)
18 Cal.4th 96 ****Rehearing denied 6/26/98****

The erroneous denial of appellant's in limine motion to preclude use of a racial epithet is not cognizable on appeal where the prosecution did not introduce the evidence, but appellant did.

Sufficiency of the evidence as to the special circumstances, and penalty phase issues, are not summarized here.

[19.D.3.] *People v. Vera* (H017420, 2/8/99)
69 Cal.App.4th 1100 (DCA 6) ****Review denied 5/12/99****

A violation of Health and Safety Code section 11366 (maintaining a place for the purpose of unlawful drug sales or use) is a crime of moral turpitude, and was therefore admissible for impeachment purposes. While simple possession of heroin does not necessarily involve moral turpitude, possession for sale does. The trait involved is not dishonesty, but rather the intent to corrupt others. Section 11366 may be committed by opening or maintaining either a place for using drugs or a place for selling drugs. However, regardless of which of those prohibited purposes is actually involved, the place is intended to be provided to others for a prohibited purpose. The offense therefore involves moral turpitude because it involves the intent to corrupt others.

[19.D.3.] *United States v. Bensimon* (4/13/99)
--- F. Supp. --- (C.D. Cal.) ****Citation not available****

The district court erred in allowing the government to impeach a defendant charged with possession of cocaine with a seventeen-year-old prior fraud conviction. Federal Rule of Evidence 609(b) provides that a prior conviction more than ten years old is not admissible for impeachment purposes unless the court determines the probative value of the conviction substantially outweighs its prejudicial effect. Here, Bensimon had not attempted to portray himself as a "law abiding citizen" and his credibility was not central to the prosecution's case. The district court also indicated that the prior conviction would likely not be admitted if Bensimon testified. Bensimon would not have testified had he known that he would be impeached with the prior conviction. Further, the codefendant who did not testify was acquitted. Given the low probative value of the seventeen-year-old conviction, and the added prejudice of the reversal of the court's earlier ruling, the error made here cannot be said to be harmless.

[19.D.3.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

The admission of the prior testimony of a codefendant's girlfriend who had a deliberate "memory loss" at trial was proper impeachment.

[19.D.3.] *People v. Ervin* (S021331, 1/6/00)

22 Cal.4th 48 *Time for granting or denying rehearing extended to 4/5/00**

The testimony of a "snitch," who was rewarded with money and reduced charges or "pardons" for his own criminal conduct, was properly admitted. The benefits to the "snitch" were disclosed to the defense for impeachment purposes, and did not amount to "outrageous" conduct which would justify suppression.

[19.D.3.] *United States v. Ortega* (2/1/00)

F.3d (9th Cir.)

An Immigration and Naturalization Service (INS) agent violated appellant's Sixth Amendment rights when outside the presence of Ortega's counsel he obtained Ortega's statements regarding the firearm used during his charged offenses. Ortega had been appointed counsel nine days before the INS agent questioned him about his immigration status, and possible immigration-related offenses. Ortega discussed with the agent the source of the gun used during a drug transaction. Although counsel had been appointed based on the charged drug offenses, and the right to counsel is offense-specific, this situation fell within an exception to the offense-specific requirement. Here, the drug and gun offenses arose from exactly the same facts and circumstances, and were "inextricably intertwined." The discussion therefore blatantly violated the Sixth Amendment, and the statements could therefore not be used in the government's case-in-chief. However, these statements could be used to impeach appellant's inconsistent testimony.

[19.D.3.] *People v. Gadlin* (B127987, 2/24/00)

Cal.App.4th (DCA 2)

In a prosecution for assault with a deadly weapon, it was not error for the trial court to admit expert testimony on the effects of domestic battery on a victim, even though the victim of the assault did not recant her testimony. Both the defense and prosecution sought the admission of testimony concerning a prior attack on the victim, which the victim later recanted. The defense intended to attack the victim's credibility based on her written recantation of the earlier incident, and her decision to reunite with appellant after he had served time for that attack. The admission of the expert testimony regarding battered women's syndrome (BWS) was probative because it spoke directly to both the recantation and the reunion, and therefore directly reflected on the victim's credibility. The expert testimony was properly limited to the victim's state of mind which explained her actions.

[19.D.3.b.] *People v. Hurd* (B093741, 3/3/98)

62 Cal.App.4th 1084 (DCA 2) **Review denied 6/10/98**

Once a defendant has elected to speak after receiving a *Miranda* warning, his refusal to answer questions may be used for impeachment purposes absent any indication that such refusal is an invocation of *Miranda* rights without committing error under *Doyle v. Ohio* (1976) 426 U.S. 610.

[19.D.3.b.] *People v. Ruiz* (B110548, 3/18/98)

62 Cal.App.4th 234 (DCA 2)

The trial court did not abuse its discretion in permitting the prosecution to introduce expert

witness testimony as evidence, for purposes of impeaching the confession, that appellant and the person who confessed to the crime were both members of the same criminal street gang, as the probative value outweighed the prejudicial effect under Evidence Code section 352.

[19.D.3.b.] *United States v. James* (3/19/98)
139 F.3d 703 (9th Cir.)

A letter of reprimand demonstrating evidence of racial animus by the testifying FBI agent against a fellow FBI agent was excluded for impeachment purposes. The evidence was relevant because it makes it more probable that one who engaged in this type of behavior is racially biased, but its probativeness was negligible, so its exclusion was harmless beyond a reasonable doubt and did not violate appellant's right to confrontation under the Sixth Amendment.

[19.D.3.b.] *People v. Branscombe* (C023375, 3/23/98)
62 Cal.App.4th 444 (DCA 3) ****Review denied and DEPUBLISHED 6/24/98****

Acknowledging that the issue is currently pending the California Supreme Court in *People v. Peevy* (S056734), the Third District held that trial counsel did not render ineffective assistance of counsel she failed to make a motion to suppress rebuttal evidence consisting of statements taken by peace officers in deliberate violation of *Miranda v. Arizona* (1966) 384 U.S. 436. Even if this evidence was inadmissible, its admission was harmless beyond a reasonable doubt.

[19.D.3.b.] *People v. Rios* (D025621, 5/21/98)
63 Cal.App.4th 1501 ****Review granted 9/2/98 (S055790)****

Other crimes evidence was properly admitted as impeachment here where appellant testified that he had never been in trouble before. The fact that appellant regularly carried a concealed weapon without a permit, and knew it required a permit, was relevant to impeach appellant's testimony that he was a law-abiding citizen.

[19.D.3.b.] *People v. Tillis* (S060909, 6/18/98)
18 Cal.4th 284

The mid-trial revelation of impeachment evidence concerning the defense expert witness did not violate Proposition 115, as embodied in Penal Code section 1054.1, because impeachment evidence falls outside the scope of the statute requiring the prosecutor to disclose to the defense the names and addresses, along with any relevant written or recorded statements, of all witnesses it "intends to call at trial" and because the record here did not establish the existence of undisclosed evidence properly discoverable under the statute.

Justice Mosk concurred, accepting for present purposes that Proposition 115's discovery scheme is valid.

[19.D.3.b.] *United States v. Castillo* (6/30/99)
181 F.3d 1129 (9th Cir.)

Distinguishing between impeachment under Federal Rule of Evidence 608, which prohibits the admission of extrinsic evidence of conduct to impeach a witness' credibility, and impeachment by contradiction under Federal Rule of Evidence 607, the appellate court held that the district court did not abuse its discretion in admitting the evidence of appellant's 1997 cocaine arrest. Here, the district court admitted evidence of appellant's arrest because appellant expansively and

unequivocally denied involvement with drugs on direct examination. What the case law prohibits is the use of extrinsic evidence to impeach testimony invited by questions posed during cross-examination.

[19.D.3.b.] *United States v. Castillo* (6/30/99)
181 F.3d 1129 (9th Cir.)

The trial court did not abuse its discretion in admitting evidence of appellant's 1995 conviction for possession of 240 pounds of marijuana because it satisfied Federal Rule of Evidence 404 in that the evidence was material, not too remote in time, was sufficient to support a finding that appellant had committed that act, and that act was similar to the offense charged here, importation and possession of marijuana with intent to distribute. This evidence also satisfied Rule 403 of the Federal Rules of Evidence in that the probative value of the conviction was not outweighed by any unfairly prejudicial effect.

[19.E.] *People v. Ruiz* (B110548, 3/18/98)
62 Cal.App.4th 234 (DCA 2)

The trial court did not abuse its discretion in permitting the prosecution to introduce expert witness testimony as evidence, for purposes of impeaching the confession, that appellant and the person who confessed to the crime were both members of the same criminal street gang, as the probative value outweighed the prejudicial effect under Evidence Code section 352.

[19.E.] *People v. Venegas* (S044870, 5/14/98)
18 Cal.4th 47

Appellant's conviction for rape was properly reversed by the appellate court where the methodology used by the FBI in performing its DNA analysis failed to comply with procedures recommended by the National Research Council for determining the statistical probability of a random match. However, the court disagreed with the appellant's court's finding that prosecution should have been required to prove anew that the relevant scientific community accepts the reliability of the FBI's RFLP methodology, or considers it the same as the methodology used by Cellmark lab and upheld in *People v. Axtell* (1991) 235 Cal.App.3d 836. The RFLP methodology used here is indistinguishable from that used in *Axtell*, and the appellate court could have relied on *Axtell* to establish the scientific reliability on the RFLP methodology used in this case.

[19.E.] *People v. Rios* (D025621, 5/21/98)
63 Cal.App.4th 1501 ****Review granted 9/2/98 (S055790)****

The trial court properly admitted expert testimony regarding inferences to be drawn from the position of the body at death, and the matters raised by appellant go to weight rather than admissibility.

[19.E.] *People v. Lucero* (B110574, 6/15/98)
64 Cal.App.4th 1107 (DCA 2, Div. 7)

The officer's testimony that in his opinion, the print taken from the counter matched appellant's shoe was admissible, but even if his opinion should have been excluded, the error was harmless because it was not critical evidence.

[19.E.] *People v. Bolin* (S019786, 6/18/98)
18 Cal.4th 297

Appellant's claim on appeal that the criminalist's testimony was improperly admitted is waived because he failed to object to it at trial, and the failure to object was not ineffective because the witness was fully qualified.

[19.E.] *United States v. Plunk* (8/28/98)
153 F.3d 1011 (9th Cir.)

The district court was well within the bounds of its discretion when it found Detective Speziale qualified as an expert and allowed him to testify regarding the cryptic codes and jargon of narcotics dealers in this drug smuggling conspiracy, and the prejudicial effect of this evidence did not outweigh its probative value under rule 403 of the Federal Rules of Evidence.

Issues related to administrative subpoenas under federal law and federal sentencing issues were not summarized.

[19.E.] *People v. Ochoa* (S009522, 11/5/98)
19 Cal.4th 353 ****Rehearing denied 1/27/99****

Appellant did not preserve his claim regarding the scientific reliability of blood tests because he did not object on *Kelly/Frye* grounds to the admission. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (1923) 293 F. 1013.)

Penalty phase issues not summarized.

[19.E.] *People v. Romero* (F027273, 1/29/99)
69 Cal.App.4th 846 (DCA 5) ****Review denied 4/28/99****

Expert testimony about street violence in Hispanic culture is irrelevant to a self-defense argument in a murder case. The murder in this case began with an incident of "road rage" when one driver cut too close to another, causing him to quickly brake. An argument ensued, resulting in the victim dying from a knife wound to his heart. The defense attempted to introduce expert testimony by a sociology professor and author of a book on the sociology of poverty and the role of honor, paternalism, and street fighters in the Hispanic culture. The trial court excluded the testimony as irrelevant. The Fifth District Court of Appeal affirmed, holding that the testimony was irrelevant to whether the defendant actually believed he was in imminent danger of death or great bodily injury and whether such a belief was objectively reasonable. The court refused to sanction a "reasonable street fighter" standard. No sociological expert could have provided the missing element of Romero's actual subjective state of mind at the time of the stabbing. Therefore, even if he could provide relevant testimony about culture and street fighting, the exclusion of the testimony was harmless. Absent evidence that Romero was in fear of imminent death or injury, the jury had no evidentiary basis from which to conclude that he subjectively had an unreasonable fear, which negated malice. It is therefore not reasonably probable that but for the exclusion of the evidence, Romero would have received a more favorable result.

[19.E.] *People v. Manriquez* (G021452, 2/24/99)

70 Cal.App.4th 1040 (DCA 4, Div. 3) ****Review granted 6/3/99 (S077853); cause transferred to DCA with directions to vacate its decision; subsequent opinion at 72 Cal.App.4th 1486; review denied 10/20/99****

The trial court did not abuse its discretion, or deny Manriquez due process, by admitting expert opinion concerning Manriquez's gang membership where Manriquez's participation in the drive-by shooting was "sufficiently revealing" to support an inference of association with the group. Therefore, while gang membership may not have been positively confirmed by virtue of his participating in the drive-by shooting, the circumstances of the shooting were sufficient to permit the expert to opine on the matter to the trial court.

[19.E.] *People v. Ward* (E020993, 4/13/99)

71 Cal.App.4th 368 (DCA 4, Div. 2) ****Review denied 7/28/99****

Psychiatric and psychological testimony admitted for the purpose of a sexually violent predator (SVP) hearing pursuant to Welfare and Institutions Code section 6600, et seq., is not scientific evidence subject to a *Kelly-Frye* analysis. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (1923) 293 F. 213.) California law distinguishes between expert medical opinion and scientific evidence. *Kelly-Frye* analysis applies to cases involving novel devices or processes, not to expert testimony such as a psychiatrist's prediction of future dangerousness. The law permits such expert testimony in a number of other contexts, such as insanity and mentally disordered offender commitments. These other situations cannot reasonably be distinguished from expert testimony in SVP commitment proceedings. Therefore, the trial court did not abuse its discretion in this case when it admitted expert testimony regarding the likelihood that appellant was a sexually violent predator and was likely to reoffend.

[19.E.] *People v. Manriquez* (G021452, 6/23/99)

72 Cal.App.4th 1486 (DCA 4, Div. 3) ****Review denied 10/20/99****

[Editor's Note: This was the Court of Appeal's second opinion in this case. It was issued after the case was transferred back to it from the California Supreme Court. The Court directed that it be rewritten in light of the fact that opinion had relied on *People v. Moreno* (1999) 69 Cal.App.4th 1198, which had been superseded by the California Supreme Court's grant of review in that case. Although its reliance on *Moreno* was eliminated, the disposition remained the same.]

The trial court did not abuse its discretion, or deny Manriquez due process, by admitting expert opinion concerning Manriquez's gang membership where Manriquez's participation in the drive-by shooting was "sufficiently revealing" to support an inference of association with the group. Therefore, while gang membership may not have been positively confirmed by virtue of his participating in the drive-by shooting, the circumstances of the shooting were sufficient to permit the expert to opine on the matter to the trial court.

[19.E.] *People v. Smithey* (S011206, 7/1/99)

20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

Although defendant's failure to object to Dr. Coleman's testimony, which was an attack on forensic psychiatry generally, waived the issue, the California Supreme Court reached the issue anyway, because defendant claimed his counsel was ineffective for failing to object to it. The

Court found Dr. Coleman's testimony was admissible. Defendant's claim that Dr. Coleman's testimony prevented the jury from considering his defense failed because Dr. Coleman's testimony went to the weight rather than admissibility of the defense forensic psychiatric evidence and was therefore not prejudicial. Penalty phase issues were not summarized.

[19.E.] *People v. Smithey* (S011206, 7/1/99)

20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

Dr. Coleman's testimony that was not likely to mislead the jury into believing that if an individual performed an act, he or she intended to perform that act, which would lessen the prosecution's burden of proof by creating an unconstitutional presumption of intent. Moreover, there was nothing to suggest the jury would have considered itself bound to accept Dr. Coleman's testimony. Penalty phase issues were not summarized.

[19.E.] *People v. Soto* (S044043, 8/23/99)

21 Cal.4th 512

The "unmodified product rule," as applied in DNA forensic analysis, is generally accepted in the scientific community, and calculations made using that rule meet the standards for admissibility articulated in *People v. Kelly* (1976) 17 Cal.3d 24. Although the court in *People v. Barney* (1992) 8 Cal.App.4th 798 held that acceptance of the unmodified product rule was precluded because of an ongoing dispute over its reliability in the scientific community, the evidence, scientific commentary, and national judicial authority developed since that time demonstrate that the use of the unmodified product rule in DNA analysis has gained general acceptance in the scientific community. Therefore, admission of forensic evidence and expert testimony matching appellant's DNA profile with semen stains found in the victim's bedroom was proper, and appellant's conviction for rape was affirmed.

[19.E.] *People v. Soto* (S044043, 8/23/99)

21 Cal.4th 512

The "unmodified product rule," as applied in DNA forensic analysis, is generally accepted in the scientific community, and calculations made using that rule meet the standards for admissibility articulated in *People v. Kelly* (1976) 17 Cal.3d 24. Although the court in *People v. Barney* (1992) 8 Cal.App.4th 798 held that acceptance of the unmodified product rule was precluded because of an ongoing dispute over its reliability in the scientific community, the evidence, scientific commentary, and national judicial authority developed since that time demonstrate that the use of the unmodified product rule in DNA analysis has gained general acceptance in the scientific community. Therefore, admission of forensic evidence and expert testimony matching appellant's DNA profile with semen stains found in the victim's bedroom was proper, and appellant's conviction for rape was affirmed.

[19.E.] *People v. Butler* (B126847, 8/24/99)

74 Cal.App.4th 557 (DCA 2, Div. 6)

Appellant's withdrawal of his objection to the admission of certain psychiatric testimony precluded him from challenging its admissibility on appeal. The expert testimony was sufficient to show that appellant had a severe mental disorder as required by the statute.

[19.E.] *People v. McFarland* (B128007, 2/24/00)
Cal.App.4th (DCA 2, Div. 6)

Reversal of a conviction for sexual molestation of a child was required where the prosecution introduced expert testimony of a psychiatrist who testified about prior molestations and his opinion that appellant had a sexual disorder involving children from which he was unlikely to recover. Evidence Code section 1108 does not allow testimony about the accused's sexual proclivities during the prosecution's case-in-chief. Under sections 1101, subdivision (a), and 1102, opinion evidence about a criminal defendant's character may only be offered in rebuttal to similar evidence presented by the defense. Because appellant presented no character evidence, the psychiatrist's opinion was inadmissible. The opinion testimony regarding character was not made admissible under section 1108 because it was not limited to evidence of specific acts. Because the effect of the testimony was to portray appellant as a dangerous and untreatable sexual deviant, and established the requisite mental state, the admission of the evidence was highly prejudicial.

[19.E.] *People v. Gadlin* (B127987, 2/24/00)
Cal.App.4th (DCA 2)

In a prosecution for assault with a deadly weapon, it was not error for the trial court to admit expert testimony on the effects of domestic battery on a victim, even though the victim of the assault did not recant her testimony. Both the defense and prosecution sought the admission of testimony concerning a prior attack on the victim, which the victim later recanted. The defense intended to attack the victim's credibility based on her written recantation of the earlier incident, and her decision to reunite with appellant after he had served time for that attack. The admission of the expert testimony regarding battered women's syndrome (BWS) was probative because it spoke directly to both the recantation and the reunion, and therefore directly reflected on the victim's credibility. The expert testimony was properly limited to the victim's state of mind which explained her actions.

[19.E.] *United States v. Takahashi* (3/6/00)
F.3d (9th Cir.)

The admission of expert testimony of gang affiliation was not an abuse of discretion where the evidence was relevant to establish bias, and the trial court had taken steps to minimize undue prejudice. Here, appellant had called an exculpatory witness who admitted gang affiliation but denied that any oaths of loyalty were involved. The Government then introduced expert testimony that members of this gang do indeed swear oaths of loyalty and had been known to "take the blame" for other members. The district court offered a limiting instruction, and restricted the prosecution's evidence to exclude photographs of appellant's tattoos. Because the oaths of total loyalty were directly relevant to the issue of bias, and the district court sought to prevent undue prejudice, there was no error.

Federal sentencing issues not summarized here.

[19.E.] *People v. Williams* (B130147, 3/6/00)
Cal.App.4th (DCA 2, Div. 4)

The trial court properly admitted the testimony of a domestic violence abuse counselor concerning battered woman syndrome. Although the defense failed to object below on the grounds that the testimony was irrelevant because there were no prior incidents of abuse, the

appellate court addressed the issue here to forestall a habeas petition based on ineffective assistance of counsel. Evidence Code section 1107 expressly authorizes this type of expert testimony if it is relevant and the expert is qualified. Here, it was relevant because it helped explain why the victim allowed her husband to return to the residence after the alleged attack, and it explained various inconsistent statements. Section 1107 does not require that there be prior incidents of abuse.

[19.E.] *People v. Son* (D032612, 3/21/00)
Cal.App.4th (DCA 4, Div. 1)

At trial, the prosecution introduced taped confessions made by appellant. Appellant sought to introduce expert testimony on the subject of false confessions. The trial court refused to admit the testimony. The appellate court here held that the expert testimony was unnecessary. Because there was no evidence that appellant had confessed falsely due to police promises, the testimony was irrelevant. Furthermore, appellant's claim concerning the police promises was easily understood by a juror without expertise. The trial court therefore acted within its discretion in refusing to admit the testimony.

[19.F.] *Ainsworth v. Calderon* (3/10/98)
138 F.3d 787 (9th Cir.)

In admitting the testimony of a psychiatrist as expert credibility testimony favorable to the co-defendant's defense, due process was not violated under the law at that time and such a rule would not implicate fundamental fairness and accuracy of the criminal proceedings.

[19.F.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

Appellant was not prejudiced by the admission of a prosecution witness's testimony because he was granted immunity from prosecution for perjury. The grant of immunity applied only to prior acts of perjury, not future perjury during the trial. Even if the immunity agreement was ambiguous, appellant failed to object or seek clarification at trial, so the claim was waived on appeal.

[19.F.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

Because appellant did not object at trial to the testimony of another witness who was promised leniency in return for his testimony, the issue is waived on appeal. The court did not err in failing to instruct the jury on the effect of coercion on the reliability of a witness's statement, because as a practical matter, most jurors would realize that coercion might affect a witness's statements. Further, the court did instruct the jury that they could consider the existence of a bias or motive to lie.

[19.F.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

The testimony of a "snitch," who was rewarded with money and reduced charges or "pardons" for his own criminal conduct, was properly admitted. The benefits to the "snitch" were disclosed to the defense for impeachment purposes, and did not amount to "outrageous" conduct which would justify suppression.

[19.F.] *United States v. Whitehead* (1/11/00)
200 F.3d 634 (9th Cir.)

The district court did not err in refusing to order the government to grant use immunity to Whitehead's brother, who could testify that Whitehead did not know about the presence of marijuana in the car. Although the testimony would have been relevant, the government did nothing to discourage the testimony, nor did it grant immunity to other witnesses.

[19.G.2.] *People v. Barnett* (S008113, 5/4/98)
17 Cal.4th 1044 ****Rehearing denied 7/8/98****

Appellant's disclosure of the location of methamphetamine oil without asserting attorney-client privilege was an effective waiver of the privilege, and trial counsel was not ineffective for failing to object to appellant giving this testimony because the record sheds no light on the reasons for counsel's conduct, and there are tactical reasons which could justify the failure to object.

[19.G.2.] *People v. Barnett* (S008113, 5/4/98)
17 Cal.4th 1044 ****Rehearing denied 7/8/98****

Appellant cannot assert the attorney-client privilege of a witness because the witness is the sole holder of the privilege, and the witness waived the privilege under Evidence Code section 912, subdivision (a).

[19.G.2.] *People v. Hayes* (S004725, 12/23/99)
21 Cal.4th 1211

The trial court did not err in quashing a subpoena to compel an accomplice's attorney to testify to impeach the accomplice. Here there was no evidence in the record that the client had authorized her attorney to discuss certain conversations with appellant's trial counsel or that the client had an opportunity to assert the privilege.

Justices Mosk, Kennard and Werdegar dissented on the jury misconduct issue.

[19.G.4.] *People v. Dacayana* (B122454, 12/13/99)
76 Cal.App.4th 1334 (DCA 2, Div. 6)

Dr. Paladino's testimony at appellant's trial under the Sexually Violent Predators Act was properly admitted and did not violate the patient-psychotherapist privilege under Evidence Code section 1012. Evidence Code section 1024 permits treating psychotherapists to disclose otherwise confidential communications to prevent the danger posed by the prisoner's release, just as it permitted similar disclosures under the Mentally Disordered Sexual Offenders law. *People v. Wharton* (1991) 53 Cal.3d 522 does not require that a warning, pursuant to *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 442, be given before the disclosure can be made under Evidence Code section 1024, nor does it limit the disclosure of otherwise privileged communications to the *Tarasoff* warning itself. *Wharton* was a criminal prosecution.

[19.H.] *People v. Barnett* (S008113, 5/4/98)
17 Cal.4th 1044 ****Rehearing denied 7/8/98****

The trial court did not abuse its discretion in admitting evidence of prior acts of violence and vandalism where the evidence shed light on motive rather than for an improper purpose under Evidence Code section 1101, subdivision (b), and where the probative value outweighed the

prejudicial effect under Evidence Code section 352, particularly in light of the minimization of any prejudice achieved through cautionary jury instructions.

[19.H.] *People v. Hoover* (E020011, 6/23/98)
64 Cal.App.4th 1422 (DCA 4, Div. 2)

The standard of proof for proving past conduct is by a preponderance of the evidence, not beyond a reasonable doubt, so that the evidence of appellant's past conduct was sufficiently established here.

[19.H.] *People v. Acosta* (H017642, 5/3/99)
71 Cal.App.4th 1206 (DCA 6) ****Review granted 8/18/99 (S079731); further action deferred pending disposition in *People v. Falsetta* (S071521)****

The trial court's admission of evidence of prior acts of domestic violence under Evidence Code section 1109 did not violate due process or equal protection. Police officers responded to a call from Acosta's girlfriend that Acosta had threatened to kill her, and had brought home a gun and ammunition. Appellant was arrested, and tested positive for methamphetamine. He was charged with threatening to commit a crime resulting in death or great bodily injury, and possession of the firearm and ammunition. The trial court admitted evidence of Acosta's prior acts of domestic violence against his girlfriend. On appeal, appellant argued that Evidence Code section 1109, which allows admission of prior acts of domestic violence in order to prove the disposition to commit such acts, was unconstitutional. Citing *People v. Fitch* (1997) 55 Cal.App.4th 172, the appellate court rejected the argument that section 1109 denied appellant due process and equal protection. Although the court acknowledged that it was not required to follow the Third District's opinion in *Fitch*, it held that the analysis and conclusions of that opinion were sound, persuasive, and equally applicable to appellant's challenge.

[19.H.] *People v. Acosta* (H017642, 5/3/99)
71 Cal.App.4th 1206 (DCA 6) ****Review granted 8/18/99 (S079731); further action deferred pending disposition in *People v. Falsetta* (S071521)****

Trial counsel's failure to request a limiting instruction regarding the propensity evidence permitted under Evidence Code section 1109, which did not apply to additional counts charging firearm possession and resisting arrest, did not amount to ineffective assistance of counsel. Although section 1109 permitted the use of prior acts only to prove domestic violence, counsel may have concluded that the jury would not be confused about the counts to which an inference of propensity might apply. Also, the prosecutor discussed the prior acts only in connection with the domestic violence charge.

[19.H.] *United States v. Martinez* (7/12/99)
182 F.3d 1107 (9th Cir.)

In a drug smuggling case, evidence of a prior conviction for importing drugs was admissible to show appellant's knowledge of the drug trade. Appellant was charged with smuggling methamphetamine from San Francisco into Hawaii. The prosecution introduced evidence of a prior conviction for importing heroin. On appeal, appellant argued that the evidence should have been excluded because the prior conviction was ten years old and involved heroin rather than methamphetamine. The appellate court found no abuse of discretion and affirmed, holding that the prior conviction was probative on the element of appellant's knowledge of the drug

importation scheme. The probative value of the evidence, in a case where the defense was that appellant did not know that the drugs were going to be delivered, outweighed any potential prejudice. The fact that methamphetamine was a different drug than heroin, though similar in composition, did not alter the balance. “There must be a lot of knowledge of smuggling that would carry over from one compact, relatively odorless, extremely expensive, illegal powder to another.”

[19.H.1.] *People v. Harris* (1/6/98)
60 Cal.App.4th 727 (DCA 3) ****Review denied 4/15/98****

Evidence admitted under Evidence Code section 1108, to show bad conduct to prove predisposition to commit sex crimes, is subject to Evidence Code section 352, to provide a safeguard that the presumption of innocence and other characteristics of due process are not weakened by the unfair use of past acts. Here, the evidence was remote, inflammatory and nearly irrelevant. It was likely to confuse the jury and distract it from the consideration of the charged offenses, and was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818 because it is reasonably probable the jury would have acquitted the defendant absent evidence of a 23-year-old act of unexplained sexual violence. The only factor favoring the admission of this evidence was that it did not consume much time.

[19.H.1.] *People v. Falsetta* (A077116, 5/28/98)
64 Cal.App.4th 291 (DCA 1) ****Review granted 8/12/98 (S071521)****

Adopting the view expressed by the Third District in *People v. Fitch* (1997) 55 Cal.App.4th 172, the court held that Evidence Code section 1108, which permits the introduction of other sex crimes to prove a defendant’s disposition to commit the charged sexual offenses, does not violate the right to fair trial under the due process clause, because evidence admissible under section 1108 is still subject to the balancing process required under Evidence Code section 352, and its probative value must be found to outweigh its prejudicial effect.

[19.H.1.] *People v. Soto* (F026644, 6/11/98)
64 Cal.App.4th 966 (DCA 5)

The prosecution complied with the 30-day notice requirement of Evidence Code section 1101, subdivision (b), when it notified appellant at the preliminary examination (which was held more than 30 days before the trial) that the people would seek to introduce evidence of appellant’s prior sexual conduct based on the statements of the witnesses contained in Deputy Hansen’s reports which had been provided in discovery. As a result, no due process problem was created.

[19.H.1.] *People v. Soto* (F026644, 6/11/98)
64 Cal.App.4th 966 (DCA 5)

The trial court did not abuse its discretion in admitting the testimony of Linda and Raquel under Evidence Code section 1108, where its prejudicial nature was far outweighed by its probative value under Evidence Code section 352. Because section 1108 was intended to supersede Evidence Code section 1101, appellant’s contention that the evidence was inadmissible under section 1101 was not reached.

[19.H.1.] *People v. Kipp* (S004784, 6/22/98)
18 Cal.4th 349

The trial court did not abuse its discretion when it ruled that, based on the number and distinctiveness of the shared characteristics of the charged crime with other uncharged crimes, the offenses displayed a pattern so unusual and distinctive as to support an inference that the same person committed both within the meaning of Evidence Code section 1101. The trial court did not abuse its discretion when it ruled that the charged and uncharged offenses were sufficiently similar to support an inference that appellant harbored the same intents, and the danger of prejudice in admitting this evidence was outweighed by the probative value.

[19.H.1.] *People v. Baker* (C024609, 8/12/98)
65 Cal.App.4th 1452 (DCA 3) ****Review granted 11/24/98 (S073543), deferred pending *People v. Falsetta* (S071521) and *People v. Ritson* (S071200)****

The trial court did not err in admitting evidence of appellant's prior sexual offenses under Evidence Code section 1108, despite the fact that appellant had been previously tried and acquitted of one of those offenses. Appellant's constitutional claims of violations of due process, equal protection, double jeopardy and the presumption of innocence, were all rejected under *People v. Fitch* (1997) 55 Cal.App.4th 172, and the court found no basis on which *Fitch* should be reconsidered. An acquittal is not a finding of innocence.

[19.H.1.] *People v. Murphy* (C0252452, 11/18/98)
67 Cal.App.4th 1205 (DCA 3) ****Review granted 2/24/99 (S075263)****

Appellant waived his objection to the admission of two prior convictions for child molestation. Even though appellant was not advised of the penal consequences of the prior convictions when he admitted them, he failed to raise the objection at or before sentencing.

[19.H.1.] *People v. Murphy* (C0252452, 11/18/98)
67 Cal.App.4th 1205 (DCA 3) ****Review granted 2/24/99 (S075263)****

The trial court did not abuse its discretion, under Evidence Code section 352, in admitting prior offense evidence under Evidence Code section 1108, where there was little risk of misuse of the prior offense evidence, and the prior offense evidence was not stronger than the evidence of the current offenses.

[19.H.1.] *People v. Yovanov* (G020955, 1/20/99)
69 Cal.App.4th 392 (DCA 4, Div. 3) ****Review denied 4/14/99****

Evidence of uncharged sexual misconduct was admissible at trial because evidence of uncharged sexual offenses is so uniquely probative in sex crime prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101. The only restrictions on the admissibility of such evidence are contained in Evidence Code section 352. Here, the uncharged acts had great probative value, and the jury already knew that appellant had been convicted of many of the uncharged acts. There was no abuse of discretion in their admission at trial.

[19.H.1.] *People v. Davis* (E021991, 5/11/99)
71 Cal.App.4th 1492 (DCA 4, Div. 2) ****Review granted 8/25/99 (S079736);
further action deferred pending disposition in *People v. Falsetta* (S071521)
and *People v. Murphy* (S075263)****

The trial court did not err in admitting prior uncharged acts in a child molestation trial. Davis was convicted of committing a lewd act on a child under the age of 14. On appeal, Davis argued that the trial court erred in admitting evidence of prior uncharged sexual acts with his stepchildren, who were also under 14. The appellate court held that the evidence was properly admitted under Evidence Code section 1108. That section makes admissible evidence of another sexual offense of the accused, limited only by the trial court's discretion under Evidence Code section 352. Section 1108 created a presumption of admissibility of prior sexual offenses when applying section 352. Here, although the prior offenses were inflammatory because they were more violent than the present incident, they were probative and relevant because they demonstrated a pattern of molestation of children of like ages to the victim. The offenses were not too remote, because Davis had not led a "blameless life" for a period of years following the prior acts. The admission of the evidence did not consume an undue amount of time, and there was little chance the jury would have been confused and would have punished appellant for his prior offenses. Therefore, the trial court did not abuse its discretion by allowing admission of the evidence.

[19.H.1.] *People v. Pierce* (F027577, 6/21/99)
72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and
further action deferred pending *People v. Falsetta* (S071521)****

Evidence of a prior sexual offense was properly admitted under Evidence Code section 1108.

[19.H.1.] *People v. Pierce* (F027577, 6/21/99)
72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and
further action deferred pending *People v. Falsetta* (S071521)****

Evidence Code section 1108 does not offend the due process clause because, due to the exclusion factors applicable under Evidence Code section 352, there is no risk that the jury will rest its verdict solely on proof of prior crimes.

[19.H.1.] *People v. Pierce* (F027577, 6/21/99)
72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and
further action deferred pending *People v. Falsetta* (S071521)****

Evidence Code section 1108 does not offend the equal protection clause because the state has a rational interest in justifying the use of prior crimes evidence. The secret nature of sex offenses makes the proof of those cases difficult. There is also a concern created when the credibility of the victim is routinely pitted against the alleged perpetrator at trial.

[19.H.1.] *People v. Pierce* (F027577, 6/21/99)
72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and
further action deferred pending *People v. Falsetta* (S071521)****

Even though Evidence Code section 1108 was not in effect at the time of the first trial, its application here in a subsequent trial did not raise ex post facto concerns because Evidence Code section 1108 did not alter the definition of a crime, increase the punishment, or eliminate a defense. Even though the admission of the evidence of the prior sex offense here was excluded at

the first trial, the enactment of Evidence Code section 1108, and its effective date, predating the second trial, made its admission proper.

[19.H.1.] *People v. Pierce* (F027577, 6/21/99)
72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and
further action deferred pending *People v. Falsetta* (S071521)****

As there is no authority for applying the double jeopardy ban to evidentiary rulings, the admission of evidence of prior sex crimes under Evidence Code section 1108 in a subsequent prosecution did not offend the double jeopardy clause.

[19.H.1.] *People v. Van Winkle* (F030661, 9/24/99)
75 Cal.App.4th 133 (DCA5) ****Review denied 12/15/99****

CALJIC 2.50.01 and 2.50.1 did not impermissibly lessen the state's burden of proof by permitting the admission of prior sexual offenses to show that appellant committed the charged sex crimes. CALJIC 2.50.01 is based on Evidence Code section 1108, and permits the jury to consider uncharged sex offenses as evidence that a defendant had a disposition to commit such offenses. CALJIC 2.50.1 instructs the jury that the prosecution need only prove the uncharged offenses by a preponderance of evidence. The constitutional attack on Evidence Code section 1108 was already rejected in *People v. Fitch* (1997) 55 Cal. App. 4th 172. The burden of proof is not lessened because the evidence admitted under that section is simply an additional evidentiary fact to be considered along with all the other evidence, and ultimately the prosecution must prove its case beyond a reasonable doubt. The jury instructions contain permissive and not mandatory inferences, and are therefore constitutionally permitted.

[19.H.1.] *People v. Falsetta* (S071521, 11/1/99)
21 Cal.4th 903

In a prosecution for multiple sex offenses, the admission of uncharged rapes for the purpose of showing a propensity to commit such crimes pursuant to Evidence Code section 1108 was not error. Section 1108 is not an unconstitutional violation of due process. The Legislature's principal justification for adoption of section 1108 was a "practical" one because the jury is provided with the opportunity to learn of the defendant's possible disposition to commit such crimes. Defendants are not unduly burdened because of the limitations and restrictions inherent in the statute. Courts are not unduly burdened because the evidence may still be excluded under section 352. The "careful weighing" process of section 352 also guards against undue prejudice, and "saves" section 1108 from a due process challenge. Section 1108 does not impermissibly lessen the prosecution's burden of proving guilt beyond a reasonable doubt because CALJIC 2.50.01 helps assure that the defendant will not be convicted of the charged offense merely because of the evidence of his other offenses.

[19.H.1.] *People v. Vichroy* (B127891, 11/4/99)
76 Cal.App.4th 92 (DCA 2) ****Petition for review filed 12/14/99****

It was not an abuse of discretion for the trial court to have permitted admission of prior uncharged sexual misconduct in a prosecution for lewd acts on a child. Evidence Code section 1108 is not unconstitutional, and the prejudicial effect of the evidence did not outweigh the probative value.

[19.H.1.] *People v. Johnson* (C028945, 1/5/00)
77 Cal.App.4th 410 (DCA 3) ****Petition for review filed 2/14/00****

Evidence Code section 1109, which allows evidence of a defendant's prior acts of domestic violence in a prosecution for a current offense involving domestic violence, does not violate a defendant's right to due process. In *People v. Falsetta* (1999) 21 Cal.4th 903, the California Supreme Court held that the admission of prior sex offenses does not violate due process. The same reasoning applies to section 1109, because the two statutes are virtually identical except for the offenses involved. The legislative history of section 1109 recognizes the special nature of the offense, and the policy considerations favoring the admission of prior acts evidence. The trial court's discretion to exclude prior acts evidence under Evidence Code section 352 insulates section 1109 from a due process challenge. Citing *People v. Fitch* (1997) 55 Cal.App.4th 172, the court also rejected a challenge based on the prohibition against cruel and unusual punishment. Furthermore, the jury instructions adequately instructed the jury not to convict appellant based on status.

[19.H.1.] *People v. McFarland* (B128007, 2/24/00)
Cal.App.4th (DCA 2, Div. 6)

Reversal of a conviction for sexual molestation of a child was required where the prosecution introduced expert testimony of a psychiatrist who testified about prior molestations and his opinion that appellant had a sexual disorder involving children from which he was unlikely to recover. Evidence Code section 1108 does not allow testimony about the accused's sexual proclivities during the prosecution's case-in-chief. Under sections 1101, subdivision (a), and 1102, opinion evidence about a criminal defendant's character may only be offered in rebuttal to similar evidence presented by the defense. Because appellant presented no character evidence, the psychiatrist's opinion was inadmissible. The opinion testimony regarding character was not made admissible under section 1108 because it was not limited to evidence of specific acts. Because the effect of the testimony was to portray appellant as a dangerous and untreatable sexual deviant, and established the requisite mental state, the admission of the evidence was highly prejudicial.

[19.H.1.] *People v. Regalado* (G023383, 1/31/00)
Cal.App.4th (DCA 4, Div. 3)

The admission of a prior act of digital penetration of a five-year-old boy was admissible in a prosecution for lewd acts on another five-year-old boy. Evidence Code section 1108 permits the introduction of evidence of prior sexual offenses, and has been held to be constitutional by the California Supreme Court in *People v. Falsetta* (1999) 21 Cal. 4th 903. The record here demonstrated that the trial court applied the appropriate balancing test under section 352.

[19.H.2.] *People v. Erving* (B111324, 4/29/98)
63 Cal.App.4th 652 (DCA 2) ****Review denied 8/12/98****

The trial court here did not err in admitting evidence, under Evidence Code section 1101, subdivision (b), of 40 fires that occurred in neighborhoods in which appellant lived, to prove the identity and intent of the arsonist. Here the fires were set in the neighborhood where appellant lived, either at her home or within easy walking distance of it, and that is sufficient to support admissibility because it constitutes her "signature." The trial court here properly relied on the "doctrine of chances" to justify admission of the uncharged acts evidence under Evidence Code section 1101, subdivision (b), where it was admitted to show both identity and intent. It is

extremely unlikely that through bad luck or coincidence an innocent person would live near so many arson fires, occurring so frequently, in so many different neighborhoods. Evidence of the uncharged fires did not amount to evidence that appellant fit a criminal “profile” because there was substantial evidence linking appellant to both the charged and uncharged fires.

[19.H.2.] *United States v. Serang* (9/1/98)
156 F.3d 910 (9th Cir.)

Two previous attempts to burn the restaurant were properly admitted into evidence as “inextricably intertwined” with the underlying offenses of arson and conspiracy under Federal Rule of Evidence 404(b).

[19.H.2.] *People v. Scheer* (B118534, 12/22/98)
68 Cal.App.4th 1009 (DCA 2, Div. 4)

The evidence of appellant’s prior flight offense did not establish motive, intent, or prior plan or design within the meaning of Evidence Code section 1101, subdivision (b), and the admission of this evidence was erroneous. The court concluded, however, that the admission of the prior flight evidence did not result in a miscarriage of justice which would compel reversal of his convictions for felony hit and run. Moreover, any prejudicial impact was nullified by the court’s limiting instruction directing the jury that it could not consider such evidence for the purpose of finding propensity.

[19.H.2.] *People v. Johnson* (C028945, 1/5/00)
77 Cal.App.4th 410 (DCA 3) ****Petition for review filed 2/14/00****

Evidence Code section 1109, which allows evidence of a defendant’s prior acts of domestic violence in a prosecution for a current offense involving domestic violence, does not violate a defendant’s right to due process. In *People v. Falsetta* (1999) 21 Cal.4th 903, the California Supreme Court held that the admission of prior sex offenses does not violate due process. The same reasoning applies to section 1109, because the two statutes are virtually identical except for the offenses involved. The legislative history of section 1109 recognizes the special nature of the offense, and the policy considerations favoring the admission of prior acts evidence. The trial court’s discretion to exclude prior acts evidence under Evidence Code section 352 insulates section 1109 from a due process challenge. Citing *People v. Fitch* (1997) 55 Cal.App.4th 172, the court also rejected a challenge based on the prohibition against cruel and unusual punishment. Furthermore, the jury instructions adequately instructed the jury not to convict appellant based on status.

[19.H.2.] *People v. Hoover* (E020011, 1/27/00)
77 Cal.App.4th 1020 (DCA 4, Div. 2)

Evidence Code section 1109, which allows the admission of prior bad acts of domestic violence against a victim in a domestic violence prosecution, is not unconstitutional. The same reasoning used by the California Supreme Court in deciding the constitutionality of section 1108 in *People v. Falsetta* (1999) 21 Cal. 4th 903, applies in the case of domestic violence. The legislative history of section 1109 recognizes the special nature of domestic violence, and justifies the different treatment of character evidence.

[19.H.2.] *People v. Hoover* (E020011, 1/27/00)
77 Cal.App.4th 1020 (DCA 4, Div. 2)

Evidence Code section 1109 does not violate due process by reducing the proof necessary to prove the offense beyond a reasonable doubt. The jury was properly instructed regarding the requisite proof, and the evidence of uncharged conduct did not lessen the prosecution's burden. Further, Evidence Code section 352 guards against the use of such evidence resulting in a fundamentally unfair trial.

[19.H.2.] *People v. Brown* (A083896, 2/1/00)
77 Cal.App.4th 1324 (DCA 1, Div. 2)

Evidence Code section 1109, which permits the admission of prior acts of domestic violence to prove propensity to commit offenses of the same type, is not unconstitutional. The argument that section 1109 reduces the prosecution's burden of proof, and thereby violates a defendant's right to due process, has been "eclipsed" by the California Supreme Court decision in *People v. Falsetta* (1999) 21 Cal.4th 903. *Falsetta* rejected the same arguments concerning the constitutionality of section 1108, which mirrors section 1109 except that it permits the admission of past sex crimes in like prosecutions. The reasoning of *Falsetta* applies to this case as well, and sections 1108 and 1109 can be read together as complementary portions of the same statutory scheme.

[19.H.2.] *People v. Gadlin* (B127987, 2/24/00)
Cal.App.4th (DCA 2)

In a prosecution for assault with a deadly weapon, it was not error for the trial court to admit expert testimony on the effects of domestic battery on a victim, even though the victim of the assault did not recant her testimony. Both the defense and prosecution sought the admission of testimony concerning a prior attack on the victim, which the victim later recanted. The defense intended to attack the victim's credibility based on her written recantation of the earlier incident, and her decision to reunite with appellant after he had served time for that attack. The admission of the expert testimony regarding battered women's syndrome (BWS) was probative because it spoke directly to both the recantation and the reunion, and therefore directly reflected on the victim's credibility. The expert testimony was properly limited to the victim's state of mind which explained her actions.

[19.H.2.] *People v. Williams* (B130147, 3/6/00)
Cal.App.4th (DCA 2, Div. 4)

The trial court properly admitted the testimony of a domestic violence abuse counselor concerning battered woman syndrome. Although the defense failed to object below on the grounds that the testimony was irrelevant because there were no prior incidents of abuse, the appellate court addressed the issue here to forestall a habeas petition based on ineffective assistance of counsel. Evidence Code section 1107 expressly authorizes this type of expert testimony if it is relevant and the expert is qualified. Here, it was relevant because it helped explain why the victim allowed her husband to return to the residence after the alleged attack, and it explained various inconsistent statements. Section 1107 does not require that there be prior incidents of abuse.

[19.H.3.] *People v. Felix* (G022098, 2/26/99)
70 Cal.App.4th 426 (DCA 4, Div. 3)

The “Truth in Evidence” clause did not abrogate Evidence Code section 1101’s criteria for the admission of character evidence. In a prosecution for possession of cocaine base, it was error for the trial court to have admitted appellant’s prior drug-related conviction to rebut defense testimony that appellant only used heroin. The California Constitution’s “Truth in Evidence” clause (Cal. Const., art. I, § 28, subd. (d), hereafter, “Section 28(d)”), which states that relevant evidence shall not be excluded in a criminal proceeding, did not abrogate the Evidence Code’s foundational criteria for the admission of character evidence. Prior cases have held that section 28(d) preserved Evidence Code section 1101 by implication. Because Evidence Code section 1101 refers to section 1102 as an exception, the latter statute also survives intact. Section 1102 permits character evidence only in the form of reputation or opinion. The admission of the prior conviction to prove character was therefore error. Given the weight of evidence in the case, the “feeble”(ness) of the defense that the police planted the cocaine, and the fact that character witnesses could have opined concerning appellant’s drug use, the erroneous admission of the prior conviction did not prejudice appellant.

[19.H.3.] *People v. Beuer* (B132060, 2/7/00)
77 Cal.App.4th 1433 (DCA 2, Div. 6)

It was not error for the trial court to have admitted evidence illegally obtained from a 1996 arrest to establish appellant’s knowledge of narcotics and his intent to transport drugs for sale in the instant offense. In 1996, appellant was arrested for possession of controlled substances. The evidence in that case was suppressed pursuant to Penal Code section 1538.5. In 1997, he was arrested for possession of methamphetamine. The prosecution sought to introduced the 1996 arrest under Penal Code section 1101, subdivision (b). The trial court allowed the admission of the evidence, and the appellate court here affirmed. Absent a connection or nexus between the prior and instant offenses, evidence from that search could be used under section 1101, subdivision (b), for purposes of showing knowledge and intent. Here, where the offenses were five months apart, and involved separate police agencies, the evidence was admissible in the second prosecution.

[19.H.5.] *People v. Jones* (1/29/98)
17 Cal.4th 279 ****Rehearing denied 3/18/98****

The display of tears on the witness stand, even assuming that it is character evidence, does not necessarily open the door to any and all bad character evidence the prosecution can generate. However here, appellant testified that he felt remorse during the interrogations, and the prosecution’s rebuttal witness testified that he saw no sense of remorse at that time or later.

[19.H.5.] *United States v. James* (3/24/98)
139 F.3d 748 (9th Cir.)

The trial court did not abuse its discretion in refusing to permit the defense to introduce evidence of the victim’s violent propensities because the issue was the reasonableness of the defendant’s fear of violence, and only what the defendant knew had any relevance.

Justice Noonan dissented, finding that this ruling deprive appellant of her right to present a

defense.

[19.H.5.] *People v. Rios* (D025621, 5/21/98)
63 Cal.App.4th 1501 ****Review granted 9/2/98 (S055790)****

“Have you heard” questions are valid to test the witness’s opinion of a person’s character, and the failure to object on the ground raised on appeal, as well as on the remoteness of the incidents, waives the issue for appeal.

[19.H.5.] *People v. Hoover* (E020011, 6/23/98)
64 Cal.App.4th 1422 (DCA 4, Div. 2)

Adopting the reasoning of *People v. Fritch* (1997) 55 Cal.App.4th 172, the Second District held that Evidence Code section 1109, which permits the admission of character evidence to prove disposition to commit a criminal act of domestic violence, subject only to the restrictions of Evidence Code section 352, and which supplants the ban against use of character evidence to prove a defendant’s conduct on a specific occasion contained in Evidence Code section 1101, does not violate the due process clause and is constitutional on its face and as applied.

[19.H.5.] *People v. Hoover* (E020011, 6/23/98)
64 Cal.App.4th 1422 (Div.2, DCA 4)

While the jury was not instructed at all regarding the use of the evidence permitted under Evidence Code section 1109, the court’s response to the jury’s note regarding its proper use adequately supports assuming that the jury properly followed instructions.

[19.H.5.] *United States v. Mitchell* (3/26/99)
172 F.3d 1104 (9th Cir.)

Evidence of appellant’s poverty is inadmissible under Federal Rule of Evidence 404(b) because that rule speaks only to evidence of other crimes, wrongs, or acts, and being poor is not a crime, wrong, or act. Here, the poverty evidence was of negligible probative value, but produced a high danger of unfair prejudice, rendering the court’s discretion an abuse. The appellate court was in equipoise about whether the error was harmless, and as a result, the government did not establish harmlessness. The conviction was reversed and the case was remanded for a new trial.

[19.H.5.] *People v. Callahan* (F021824, 8/18/99)
74 Cal.App.4th 356 (DCA 5) ****Review denied 11/17/99****

The trial court erred when it precluded appellant from introducing specific instances of his good behavior when the state introduced evidence of his prior bad acts under Evidence Code section 1108. Where, at trial, appellant had denied sexually abusing his daughter, and the prosecutor introduced testimony of a family friend who claimed to have been sexually abused by appellant when she was 12 years old, the court should also have allowed appellant to introduce testimony of a child who would have testified that appellant would never abuse children. Although the trial court erred, the error did not warrant reversal because it was not reasonably probable that the result would have been more favorable to appellant in the absence of the error.

[19.H.5.] *People v. Hoover* (E020011, 1/27/00)

77 Cal.App.4th 1020 (DCA 4, Div. 2)

Evidence Code section 1109, which allows the admission of prior bad acts of domestic violence against a victim in a domestic violence prosecution, is not unconstitutional. The same reasoning used by the California Supreme Court in deciding the constitutionality of section 1108 in *People v. Falsetta* (1999) 21 Cal. 4th 903, applies in the case of domestic violence. The legislative history of section 1109 recognizes the special nature of domestic violence, and justifies the different treatment of character evidence.

[19.H.5.] *People v. Brown* (A083896, 2/1/00)

77 Cal.App.4th 1324 (DCA 1, Div. 2)

Evidence Code section 1109, which permits the admission of prior acts of domestic violence to prove propensity to commit offenses of the same type, is not unconstitutional. The argument that section 1109 reduces the prosecution's burden of proof, and thereby violates a defendant's right to due process, has been "eclipsed" by the California Supreme Court decision in *People v. Falsetta* (1999) 21 Cal.4th 903. *Falsetta* rejected the same arguments concerning the constitutionality of section 1108, which mirrors section 1109 except that it permits the admission of past sex crimes in like prosecutions. The reasoning of *Falsetta* applies to this case as well, and sections 1108 and 1109 can be read together as complementary portions of the same statutory scheme.

[19.H.5.] *People v. McFarland* (B128007, 2/24/00)

Cal.App.4th (DCA 2, Div. 6)

Reversal of a conviction for sexual molestation of a child was required where the prosecution introduced expert testimony of a psychiatrist who testified about prior molestations and his opinion that appellant had a sexual disorder involving children from which he was unlikely to recover. Evidence Code section 1108 does not allow testimony about the accused's sexual proclivities during the prosecution's case-in-chief. Under sections 1101, subdivision (a), and 1102, opinion evidence about a criminal defendant's character may only be offered in rebuttal to similar evidence presented by the defense. Because appellant presented no character evidence, the psychiatrist's opinion was inadmissible. The opinion testimony regarding character was not made admissible under section 1108 because it was not limited to evidence of specific acts. Because the effect of the testimony was to portray appellant as a dangerous and untreatable sexual deviant, and established the requisite mental state, the admission of the evidence was highly prejudicial.

[19.I.] *People v. Barnett* (S008113, 5/4/98)

17 Cal.4th 1044 ****Rehearing denied 7/8/98****

Relying on *People v. Lang* (1989) 49 Cal.3d 991, the trial court properly allowed a defense witness to be impeached with two felony convictions for nonviolent escape under Penal Code section 4532. The evidence of a threat to a witness tendered as rehabilitation evidence was properly excluded following impeachment by the prosecution with an escape conviction because there was no prejudice to the witness's credibility as she had already been impeached with a welfare fraud conviction.

[19.I.] *People v. Ritson* (C026168, 5/14/98)

63 Cal.App.4th 1276 (DCA 3) ****Review granted 8/12/98 (S071200)****

Evidence of appellant's prior crimes was properly admitted under Evidence Code section 1108

because the trial court did not abuse its discretion in finding that the evidence was not unduly prejudicial under Evidence Code section 352.

[19.I.] *People v. Sims* (6/30/98)
65 Cal.App.4th 304 (DCA 3)

Where the trial court properly allowed appellant to impeach a prosecution witness with his prior felony convictions for vehicle theft, it was not error to have refused to allow him to call the victim of the vehicle theft as a witness to testify about the facts of the crime. In enacting Evidence Code section 788, which permits the impeachment of a witness with evidence of the witness's prior conviction involving moral turpitude, the Legislature has determined that it is the fact of the conviction itself which tends to prove the disputed fact (the witness's readiness to lie) regardless of the way in which the felony was committed. Consequently, the circumstances of the witness's commission of the crime are not relevant, and therefore not admissible.

[19.I.] *People v. Sims* (C026124, 6/30/98)
65 Cal.App.4th 304 (DCA 3) ****Review denied 10/14/98, DEPUBLISHED****

Where the trial court properly allowed appellant to impeach a prosecution witness with the witness's prior felony convictions for vehicle theft, it was not error to have refused to allow appellant to call the victim of the vehicle theft as a witness to testify about the facts of the crime. In enacting Evidence Code section 788, which permits the impeachment of a witness with evidence of the witness's prior conviction involving moral turpitude, the Legislature has determined that it is the fact of the conviction itself which tends to prove the disputed fact (the witness's readiness to lie) regardless of the way in which the felony was committed. Consequently, the circumstances of the witness's commission of the crime are not relevant, and therefore are not admissible.

[19.I.] *People v. Williams* (D031496, 6/16/99)
72 Cal.App.4th 1460 (DCA 4, Div. 1) ****Review denied 10/6/99****

The trial court did not abuse its discretion in admitting, for impeachment purposes, evidence of appellant's conviction for a violation of Penal Code section 69, attempting, by means of threat or violence, to prevent an executive officer from discharging his duties. Ruling on this question of first impression, the Court of Appeal analogized this offense to the offense of resisting a police officer in violation of Penal Code section 148, and held that a violation of Penal Code section 69 is a crime of moral turpitude and therefore one which could properly be used to impeach.

[19.I.] *United States v. Castillo* (6/30/99)
181 F.3d 1129 (9th Cir.)

The trial court did not abuse its discretion in admitting evidence of appellant's 1995 conviction for possession of 240 pounds of marijuana because it satisfied Federal Rule of Evidence 404 in that the evidence was material, not too remote in time, was sufficient to support a finding that appellant had committed that act, and that act was similar to the offense charged here, importation and possession of marijuana with intent to distribute. This evidence also satisfied Rule 403 of the Federal Rules of Evidence in that the probative value of the conviction was not outweighed by any unfairly prejudicial effect.

[19.I.] *United States v. Martinez* (7/12/99)
182 F.3d 1107 (9th Cir.)

In a drug smuggling case, evidence of a prior conviction for importing drugs was admissible to show appellant's knowledge of the drug trade. Appellant was charged with smuggling methamphetamine from San Francisco into Hawaii. The prosecution introduced evidence of a prior conviction for importing heroin. On appeal, appellant argued that the evidence should have been excluded because the prior conviction was ten years old and involved heroin rather than methamphetamine. The appellate court found no abuse of discretion and affirmed, holding that the prior conviction was probative on the element of appellant's knowledge of the drug importation scheme. The probative value of the evidence, in a case where the defense was that appellant did not know that the drugs were going to be delivered, outweighed any potential prejudice. The fact that methamphetamine was a different drug than heroin, though similar in composition, did not alter the balance. "There must be a lot of knowledge of smuggling that would carry over from one compact, relatively odorless, extremely expensive, illegal powder to another."

[19.I.] *United States v. Esparza-Ponce* (10/19/99)
193 F.3d 1133 (9th Cir.)

In a federal prosecution for unlawful reentry of a deported citizen and making a false claim of U.S. citizenship, appellant collaterally attacked the deportation procedures, claiming he had been deprived of an opportunity to show his petty theft conviction was not a crime of moral turpitude. However, the Ninth Circuit noted that even at the time of appellant's deportation, it had determined theft to be a crime of moral turpitude for the purposes of deportation laws. Here, the Ninth Circuit extended that holding, finding that because the elements of petty theft are the same as for theft in general, the element of moral turpitude is present whether the theft is petty or grand.

[**Editor's Note:** Effective January 1, 2000, Penal Code section 834c will take effect. This statute codifies this requirements of the Vienna Convention, so that a defendant claiming a violation of this statute will probably be held to the same prejudice standard as the defendant was here, although that should be litigated.]

[19.I.] *People v. Carpenter* (S006547)
21 Cal.4th 1016 ****Time for granting or denying rehearing extended to 2/25/00****

The admission of appellant's prior convictions was not error because they were not remote and were clearly relevant to appellant's veracity. The penalty phase issues were not summarized.

[19.I.] *People v. Mendoza* (E025276, 2/28/00)
Cal.App.4th (DCA 4, Div. 2)

In a prosecution for murder, appellant testified and admitted prior convictions for armed robbery, burglary, and theft. He then argued on appeal that trial counsel was ineffective for failing to challenge the admission of those prior convictions, and for bringing them up on direct examination. The appellate court held that counsel was not ineffective for failing to make an objection that would have been likely overruled. The prior convictions were probative, they were not remote, and were not similar to the current gang-related first degree murder charge. Because

appellant chose to testify, there clearly was no adverse impact on his right to testify. Trial counsel's decision to voluntarily bring the priors out before the jury was a reasonable tactical choice designed to demonstrate candor and honesty.

[19.I.] *People v. Jacobs* (A079608, 3/16/00)
Cal.App.4th (DCA 1, Div. 3)

In a prosecution for receiving stolen property, the trial court did not err in admitting appellant's prior convictions to attack his credibility, even though appellant did not testify. An exculpatory statement appellant had made to police officers, explaining how he came into possession of the stolen items, was admitted at his own request. The prosecution then sought and received permission to impeach appellant's hearsay statement by introducing evidence of several prior felony theft-related convictions. The appellate court affirmed. Evidence Code sections 1202 and 788 taken together provide that prior felony convictions are admissible to attack the credibility of a hearsay declarant, at least where the declarant is the defendant himself. Even if those sections did not exist, the state constitution, as amended by the "Victims' Bill of Rights" mandates that any prior felony conviction may be used without limitation for purposes of impeachment, subject to the limitations of section 352. Because the trial court clearly weighed the substantial probative value of the evidence against the potential prejudice, there was no abuse of discretion.

[19.J.] *In re Parker* (1/22/98)
60 Cal.App.4th 1453 (DCA 4) ****Review denied 4/29/98****

This petition for writ of habeas corpus was granted because the trial court, over petitioner's objection, determined there was probable cause to believe petitioner likely to engage in sexually violent predatory criminal behavior upon his release, under Welfare and Institutions Code section 6602 (Sexually Violent Predators Act), without holding a hearing, and based on inadmissible hearsay to which petitioner objected. Section 6602 is ambiguous regarding the scope of a probable cause hearing, and the legislative history lends little assistance. However, other provisions of the statute, as well as its general purpose, evidence an intent to provide an SVP with more than a "paper review." The SVP should have an opportunity to be fully heard on the issue of probable cause at the section 6602 hearing by cross-examining the hearsay declarants, and the failure to do so deprived appellant of due process of law.

[19.J.] *People v. Dennis* (S007210, 2/19/98)
17 Cal.4th 468 ****Rehearing denied 4/15/98****

The admission of extrajudicial statements by the child-witness were properly admissible, so defense counsel was not ineffective for failing to object.

[19.J.] *People v. Lucero* (B110574, 6/15/98)
64 Cal.App.4th 1107 (DCA 2, Div. 7)

The officer's testimony that a witness told him the robber left a shoe print on the counter was inadmissible because it was hearsay; moreover, even if it was offered for a nonhearsay purpose, it was irrelevant. Nonetheless, the error was harmless because the shoe print evidence was not the critical evidence.

[19.J.] *People v. Roybal* (S029453, 11/12/98)
19 Cal.4th 481 ****Modification of opinion 19 Cal.4th 1231a; rehearing denied 1/13/99****

It was not error to admit a 911 recording in which the victim's husband described the scene and said it appeared that his wife had been murdered. The statements were made spontaneously while the husband was under stress or excitement, and thus fall into an exception to the hearsay rule. The tapes' relevance to repel any suggestion that the husband was not involved in the murder far outweighed any potential prejudice to appellant.

Penalty phase issues not summarized.

[19.J.] *United States v. Ortega* (2/1/00)
F.3d (9th Cir.)

It was not error for the trial court to have excluded appellant's non-inculpatory statements even though it allowed the admission of the inculpatory statements as impeachment. The inculpatory statements were admissions, and therefore exceptions to the hearsay rule. The exculpatory statements were not. A court may impose reasonable restrictions on cross-examination without violating the Confrontation Clause. Precluding appellant from admitting hearsay statements on cross-examination was reasonable, and prevented the admission of the testimony through the "back door" without subjecting appellant to cross-examination.

[19.J.1.] *People v. Woodell* (S060180, 2/11/98)
17 Cal.4th 448 ****Rehearing denied 4/1/98, opinion modified 17 Cal.4th 969b****

Appellant's "hearsay" objection to the use of the appellate opinion is sufficient to preserve the argument that the use of statements of another contained in the opinion are hearsay.

[19.J.1.] *United States v. Shannon* (3/2/98)
137 F.3d 1112 (9th Cir.)

The admission of a letter to appellant did not constitute hearsay because it was not offered to prove the truth of the matter asserted, but rather to prove appellant's knowledge of the threat letter because she received a warning in the letter.

[19.J.1.] *People v. Torres* (C028359, 4/26/99)
71 Cal.App.4th 704 (DCA 3) ****Review granted 8/11/99 (S079575)****

In a hearing to determine whether appellant was a sexually violent predator (SVP), the trial court committed reversible error when it admitted uncertified documents to prove the prior out-of-state convictions. Torres had waived his right to a jury determination on two prior Texas convictions and a prior California conviction for sex offenses. In a bifurcated proceeding, the trial court admitted, over appellant's objection, several uncertified documents from Texas purporting to prove appellant's prior convictions in that state. The trial court rejected appellant's argument that the uncertified documents were inadmissible hearsay, and held that the Sexually Violent Predator Act (SVPA), Welfare and Institutions Code section 6600, subdivision (a), allows admission of a broader range of documents and does not expressly require the documents to be certified. The court then found the priors to be true. The appellate court reversed the judgment. Although section 6600, subdivision (a), allows the introduction of a broader range of documents, it does not

relieve the proponents of the documents from compliance with Evidence Code sections 1530 and 1531. The Evidence Code applies to every action in California except as otherwise provided by statute. Nothing on the face of Welfare and Institutions Code section 6600, subdivision (a), suggests an exception or a legislative intent to create an exception. Public policy reasons, such as assurances that documents are authentic and assurance that the right to confrontation and cross-examination is protected, further support the conclusion that the Legislature could not have intended to abrogate those Evidence Code sections. Because a person's liberty interest is at stake in a civil commitment proceeding, he or she has the right to confrontation and cross-examination.

Without the safeguard of certification, the Texas documents were not sufficiently trustworthy to be admitted and used against appellant. Therefore, because only the California conviction remained, and a minimum of two prior victims were required to satisfy the SVPA, the conviction was reversed and the matter remanded to the trial court for retrial only on the issue of whether appellant sustained the prior Texas convictions.

The court also held that had the documentation been certified, there was sufficient evidence to prove the prior convictions. The SVPA does not require proof that the prior convictions were predatory.

[19.J.1.] *People v. Duke* (E021252, 8/10/99)
74 Cal.App.4th 23 (DCA 4, Div. 2) ****Review denied 11/17/99****

The admission of out of court statements made by Hann, a coparticipant in a robbery-murder, to a friend, which implicated the codefendant, was not a violation of the confrontation clause. Hann's statements were made voluntarily and spontaneously to his friend, within hours of the crime, before Hann was a suspect and had a motive to lie. They therefore passed the "residual trustworthiness" test as set forth in *Lilly v. Virginia* (1999) 527 U.S. --- [144 L.Ed.2d 117]. Further, the trial court properly admonished the jury that it could consider that Duke was not able to cross-examine Hann about his statements, which took the "sting" out of the court's ruling.

[19.J.1.] *People v. Hayes* (S004725, 12/23/99)
21 Cal.4th 1211

Appellant's confrontation clause and due process rights were not violated by the accomplice's testimony that an aider and abetter had been convicted in federal court of transporting firearms. The trial court sustained the hearsay objection and appellant was afforded the opportunity to confront and cross-examine the accomplice. The California Supreme Court saw no possibility of prejudice. Instead, it found that any error was clearly harmless and did not result in a miscarriage of justice.

Justices Mosk, Kennard and Werdegar dissented on the jury misconduct issue.

[19.J.1.] *People v. Phillips* (S025880, 1/24/00)
22 Cal.4th 226

The exclusion of the hearsay evidence did not violate appellant's rights to due process and to present mitigating evidence, because those rights have not been abrogated by the California Evidence Code.

Penalty issues are not summarized here.

[19.J.2.] *People v. Hernandez* (E021166, 10/21/98)
67 Cal.App.4th 397 (DCA 4, Div. 2) ****Review granted 2/17/99 (S075045);
transferred to Court of Appeal to vacate its decision in light of *Idaho v. Wright* (1990) 497 U.S. 805****

Evidence Code section 1370, the “threats of harm” hearsay exception, involves sufficient indicia of reliability and therefore does not violate the confrontation clause. Therefore, the victim’s statements that her cohabitant had “tripped out,” accused her of having an affair, and then threw her to the ground and hit her, were admissible. Evidence Code section 1370 is similar to the hearsay exception for spontaneous statements, which is not unconstitutional. It also contains certain guarantees of trustworthiness by requiring that, in order to be admissible, the statement be made by a witness to the incident at or near the time of the incident, under circumstances which indicate its trustworthiness.

[19.J.2.] *People v. Hernandez* (E021166, 4/14/99)
67 Cal.App.4th 397 (DCA 4, Div. 2) ****Review granted 2/17/99 (S075045) and
cause transferred to DCA with directions to vacate decision in light of *Idaho v. Wright* (1990) 497 U.S. 805 [110 S.Ct. 3139, 111 L.Ed.2d 638]. Subsequent
opinion 71 Cal.App.4th 417; review denied 7/21/99****

Evidence Code section 1370, which in specific situations permits the admission of hearsay statements of an unavailable declarant which describe the infliction or threat of physical injury, does not violate confrontation or due process rights. In this case, Hernandez was convicted of inflicting corporal injury on his spouse. The spouse victim’s statements to police officers were admitted pursuant to Evidence Code section 1370. Hernandez argued on appeal that the statute denied him due process because it did not provide reciprocity. The Court of Appeal not only found the issue was waived, but also found it to be meritless. Nothing in the statute limits the exception to inculpatory evidence; both the prosecution and defense may introduce evidence under the exception set forth in section 1370.

[19.J.2.] *People v. Hernandez* (E021166, 4/14/99)
67 Cal.App.4th 397 (DCA 4, Div. 2) ****Review granted 2/17/99 (S075045) and
cause transferred to DCA with directions to vacate decision in light of *Idaho v. Wright* (1990) 497 U.S. 805 [110 S.Ct. 3139, 111 L.Ed.2d 638]. Subsequent
opinion 71 Cal.App.4th 417; review denied 7/21/99****

The trial court did not deny appellant his right to confront witnesses by admitting the victim’s statements to police officers under Evidence Code section 1370, because that section contains sufficient and particularized guarantees of trustworthiness and adequate indicia of reliability. The trial court did not abuse its discretion by admitting the victim’s statements in this situation.

[19.J.2.] *People v. Gutierrez* (B122687, 2/10/00)
Cal.App.4th (DCA 2, Div. 3)

In a robbery conviction, the trial court did not err in admitting into evidence the piece of paper which purported to contain the license plate number of the van used in the commission of the offense. Within minutes after the robber fled, an unidentified man who seemed upset handed the victim of a robbery the piece of paper with the license number. The piece of paper was therefore admissible as a spontaneous declaration. It was reasonable to infer that the unidentified man had witnessed the robbery, and had written the number of the license plate down during the few

minutes before handing it to the victim. The act of reducing an observation to writing, a short time after an “exciting event,” (i.e. witnessing a robbery), made the statement no less reliable than an identical oral statement made under the same circumstances.

[19.J.2.a.] *Gray v. Maryland* (3/9/98)
523 U.S. ---, 140 L.Ed.2d 294

Bruton v. United States (1968) 391 U.S. 123, forbids the use of one co-defendant’s confession, which names the other co-defendant, in a joint trial, even when a limiting instruction is given, because it is such a powerfully incriminating extrajudicial statement that its introduction into evidence violated the Sixth Amendment Confrontation Clause. Here, the United States Supreme Court addressed the question left open in *Richardson v. Marsh* (1987) 481 U.S. 200, and held that *Bruton* also forbids the use of a confession in a joint trial where the confession was redacted by substituting a blank space or the word “deleted” in the confession, and where the prosecution immediately followed the reading of the confession by the detective with the question: “after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?”

Justices Scalia, Kennedy and Thomas dissented, finding that *Richardson* controls.

[19.J.2.a.] *People v. Mobley* (D027985, 5/28/99)
72 Cal.App.4th 761 (DCA 4, Div. 1) ****Review denied 9/1/99****

The trial court did not err in admitting Mobley’s statements regarding his preference for young boys because the statements were relevant and not more prejudicial than probative. The statements were relevant to the issue of Mobley’s knowledge that the victims had mental disabilities which made them more like “boys.” There was no prejudice caused by the admission of the statements because the evidence against Mobley was abundant, the statements were not sensationalized, and the jury was cautioned regarding the limitations on the use of the statements as admissions.

[19.J.2.a.] *People v. Hampton* (B120730, 7/20/99)
73 Cal.App.4th 710 (DCA 2, Div. 4) ****Review denied 11/10/99****

The admission of a codefendant’s confession during a joint trial did not violate appellant’s right to confrontation, where the confession was redacted to omit all the references to appellant.

Hampton and Williams were tried together for a robbery. The trial court admitted Hampton’s confession, but instructed the jury that they were not to consider the confession against Williams.

All references to Williams were omitted. However, there was a reference to Hampton having retrieved a ski mask and gun from the trunk of a car which, according to other evidence, Williams had been driving. The appellate court held that admission of the confession did not violate Williams’ right to confrontation because all references in the confession to Williams were deleted, the references to the car only indirectly and inferentially implicated Williams, and the jury was instructed not to consider the confession against Williams. The prosecution is not required to delete statements that refer generally to other perpetrators and require inference and linkage to other evidence in order to implicate another codefendant.

[19.J.2.b.] *People v. Duarte* (1/13/98)

60 Cal.App.4th 1027 (DCA 2) ****Review granted 4/15/98 (S068162)****

The introduction of a co-defendant accomplice's confession violated appellant's constitutional right to confrontation, even though the statement was redacted to exclude reference to anyone other than the declarant, and where the codefendant was tried separately, because the declarant was not available for cross-examination, and where no limiting instruction was given. Here, the statement did not satisfy the reliability requirement of Evidence Code section 1230, declaration against interest, but even if it did, it would have still violated the confrontation clause because even though redacted, the evidence was offered against appellant. The Court specifically disagreed with *People v. Wilson* (1993) 17 Cal.App.4th 271 because Evidence Code section 1230 is not such a firmly rooted exception to the hearsay rule that no confrontation clause analysis is ever required for any statement that falls within its ambit. The error here was not harmless beyond a reasonable doubt. Without these statements, no physical evidenced tied appellant to the residence. Appellant made no incriminating statements. Appellant's roommate testified that he heard appellant at his residence near the time of the shooting, and that in their 2 years as roommates, he had never seen a SKS assault weapon in the house. The only direct testimony was from Knox, who was impeached and who, the prosecution conceded, required corroboration. The accomplice's confession was the only corroboration.

Justice Yegan dissented finding that the statements were trustworthy, were properly admitted into evidence, and did not violate appellant's confrontation clause rights.

[19.J.2.b.] *People v. Fuentes* (F026032, 2/25/98)

61 Cal.App.4th 956 (DCA 5)

The admission of extrajudicial statements of coparticipants under Evidence Code section 1230 did not deny appellant his rights under the confrontation clause of the Sixth Amendment to the United States Constitution where the witnesses were unavailable, where the statements constituted declarations against interest, and where these facts are distinguishable from those in *Bruton v. United States* (1968) 391 U.S. 123. To the extent *People v. Cable* (1976) 65 Cal.App.3d 187 can be read as imposing a restriction on the admission of evidence which is not required to satisfy the confrontation clause, *Cable* was wrongly decided.

[19.J.2.b.] *People v. Gonzalez* (B103203, B116738 5/26/98)

64 Cal.App.4th 432 (DCA 2) ****Review denied 9/23/98****

Admitting evidence of an extra-judicial admission of involvement in one of the robberies was not error where it qualified as a declaration against penal interest, and where it was not prejudicial unless the confession to which it related should have been suppressed, which was not the case.

[19.J.2.b.] *People v. Hayes* (S004725, 12/23/99)

21 Cal.4th 1211

The trial court did not abuse its discretion in failing to conduct an evidentiary hearing. When the trial court excluded the evidence as hearsay, it impliedly ruled that the hearsay exception for statements against penal interest did not render the statements admissible. As a result, there was no reason for an evidentiary hearing, and even if an adoptive admission could render a hearsay statement admissible, none was made here.

Justices Mosk, Kennard and Werdegar dissented on the jury misconduct issue.

[19.J.2.b.] *People v. Phillips* (S025880, 1/24/00)
22 Cal.4th 226

The trial court properly excluded testimony by Tamara Nichols about a statement made to her by Richard Graybill, an acquaintance of appellant's who had died by the time of his retrial. The statement was not admissible as a spontaneous statement because the declarant did not perceive it personally. Assuming the statement made to Nichols was otherwise spontaneous, its admissibility turned on whether Graybill was relating events he saw himself, or repeating what he had heard from another source. Because Graybill's statement to Nichols did not demonstrate that he had personally observed the events, the evidence was properly excluded. The statement made to Nichols was not admissible as a statement against Graybill's penal interest under Evidence Code section 1230 because it was against appellant's penal interest, but not Graybill's.

Penalty issues are not summarized here.

[19.J.2.c.] *People v. Rios* (D025621, 5/21/98)
63 Cal.App.4th 1501 ****Review granted 9/2/98 (S055790)****

The prosecutor was entitled to introduce evidence of a witness's prior consistent statement, made before her trial testimony on the night of the shooting, to rebut the inference that her trial testimony was the result of fabrication or imagination rather than the result of her witnessing the shooting itself.

[19.J.2.c.] *People v. Bolin* (S019786, 6/18/98)
18 Cal.4th 297

The trial court correctly admitted the testimony of Patricia Islas as a prior inconsistent statement qualifying as an exception to the hearsay rule under Evidence Code section 791, subdivision (b).

[19.J.2.d.] *People v. Pierce* (F027577, 6/21/99)
72 Cal.App.4th 1448 (DCA 5) ****Review granted 10/6/99 (S081047) and further action deferred pending *People v. Falsetta* (S071521)****

The testimony of doctors, nurses, and detectives, concerning what the kidnap/rape victim told them concerning the report and the circumstances surrounding making the report was properly admitted for nonhearsay purposes under *People v. Brown* (1994) 8 Cal.4th 746.

[19.J.2.d.] *People v. Smithey* (S011206, 7/1/99)
20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

The hearsay statement of the victim, introduced through the testimony of a third party, that she believed appellant had stolen a welder from her was admissible for the nonhearsay purpose of showing her state of mind. This evidence was offered to rebut appellant's claim that he and the victim were friends and that she had invited him to the property. Because the statement was not offered to prove the truth of the matter asserted, it was not made under circumstances indicating a lack of trustworthiness. Finally, because the testimony to which appellant objected on redirect essentially restated the third party's testimony elicited by appellant on cross-examination, which appellant did not move to strike, any error would have been harmless. Penalty phase issues were

not summarized.

[19.J.2.d.] *People v. Han* (G023433, 2/25/00)
Cal.App.4th (DCA 4, Div. 3)

It was not error to admit Jeen Han's statements made prior to the day of the home invasion in which she expressed her desire to have her sister murdered. The jury was correctly instructed that the statements made by an alleged conspirator before proof of the formation of the conspiracy could not be used against the other alleged conspirators. However, the statements were clearly admissible under Evidence Code section 1250 to show the state of mind of the declarant as well as her confederates. Although under *People v. Howard* (1988) 44 Cal. 3d 375, appellant may have been entitled to a limiting instruction informing the jury that they could consider the statements only to explain the later actions, such an amplifying instruction was not requested, probably for sound tactical reasons. The issue was therefore waived.

[19.J.2.d.] *People v. Sakarias* (S024349, 3/27/00)
Cal.4th

The admission of the victim's earlier statement that she feared appellant was not error. The statements were relevant to show that the victim did not voluntarily turn over her property to the defendants. The jury was instructed to consider them only to show the victim's state of mind at the time the statements were made. Even if admission of the statement were error, it was harmless because there was no reasonable probability that it affected the verdicts. There was substantial evidence of intent to kill, and appellant conceded intent to kill in his argument to the jury.

Penalty phase issues not summarized here.

[19.J.2.e.] *People v. Jones* (1/29/98)
17 Cal.4th 279 ****Rehearing denied 3/18/98****

Bank record evidence that someone tried to use the victim's bank card to withdraw funds after the crime was committed was properly admitted as a business record and qualified as an exception to the best evidence rule. There was no error of state law, nor was there a confrontation clause violation under the Sixth Amendment here.

[19.J.2.f.] *United States v. Santos-Pinon* (5/17/98)
146 F.3d 734 (9th Cir.)

The use of videotaped depositions of deported alien witnesses, pursuant to 18 U.S. C. §1324(d), without first establishing their unavailability, did not violate the Confrontation Clause of the Sixth Amendment, because appellant failed to raise, in the district court, whether their deportation rendered the witnesses unavailable. Similarly, appellant has waived the argument that his confrontational rights were violated because the government rendered the witnesses unavailable through deportation because he did not raise it below.

[19.J.2.f.] *United States v. Medjuck* (9/3/98)
156 F.3d 916 (9th Cir.)

The prosecution's use of videotaped depositions of three Canadian witnesses complied with Federal Rule of Evidence 804(b) and did not violate appellant's right to confront the witnesses,

where the witnesses were beyond the subpoena power of the court and would not appear voluntarily, and where there was no mechanism to transport appellant to the Canadian border and have him taken into Canadian custody. Here, appellant was allowed to participate in the deposition live by video feed, and to communicate with his attorneys by private telephone connection during the depositions.

[19.J.2.f.] *People v. Jones* (E019322, 9/9/98)
66 Cal.App.4th 760 (DCA 2, Div. 4) ****Review denied 12/22/98****

The violation of a defendant's right to represent himself in a previous trial does not require the exclusion of testimony from that trial if the defendant had a reasonable opportunity to cross-examine through counsel. Appellant's petition for writ of habeas corpus was granted on the ground that the trial court had erroneously denied his request to represent himself pursuant to *Faretta v. California* (1975) 422 U.S. 806. He was retried and permitted to represent himself. He was again convicted of murder and argued on appeal that because he was denied the right to represent himself at the first trial, the testimony of witnesses who had since become unavailable was not admissible under the former testimony exception to the hearsay rule. The crucial point for both the former testimony exception and the confrontation clause is whether the prior cross-examination was effective. In this case, the constitutional defect in the prior proceeding was not directly related to the effectiveness of the cross-examination. In fact, counsel's cross-examination can be presumed more effective than that of a self-represented defendant. The right to represent oneself is for the purpose of upholding a defendant's dignity, and does not further any other interest of the defendant or the state. Although convictions after the denial of that right are reversible per se, a denial does not merit a rule that would exclude prior testimony. The inability of a defendant to personally cross-examine the witnesses is not itself a denial of the right of self-representation. The issue is whether the statements have sufficient indicia of reliability to be admissible. Since the first trial was not a nullity, and the defendant, through his counsel, had an opportunity to cross-examine the witnesses, their testimony was admissible.

[19.J.2.f.] *L & B Real Estate v. Superior Court (Schwab)* (B121437, 11/23/98)
67 Cal.App.4th 1342 (DCA 2, Div. 2) ****Review denied 1/13/99****

Testimony from a criminal trial may not be used to support a motion for summary judgment filed in a civil case when the testimony is subject to an objection pursuant to Evidence Code section 1292, that the declarants of the prior testimony have not been shown to be unavailable, and such an objection was lodged by the real party in interest.

[19.J.2.f.] *People v. Haynes* (A078379, 5/20/99)
72 Cal.App.4th 337 (DCA 1, Div. 4) ****Modification of opinion on denial of rehearing 73 Cal.App.4th 41h; review granted 9/1/99 (S080149); further action deferred pending *People v. Duarte* (S068162)****

An unavailable witness's taped statements were admissible for the truth of the matter asserted under Evidence Code section 1294. Haynes sold drugs out of a motel in Oakland, and would beat up or kill his competitors who attempted to use the same motel. Haynes learned that the victims in this case were smoking crack in room 16 of the motel. One of the victims testified that someone with a semiautomatic weapon fired shots into the room, killing one person and injuring others. Sylvia Gregory, a witness to the shooting, gave a taped statement to the police identifying Haynes as the shooter. A tape of Gregory's statement was played at the preliminary hearing.

Prior to the preliminary hearing, Gregory changed her story and said that she was not sure Haynes was the shooter. Gregory testified at the preliminary hearing, but was unavailable at the time of the trial. Gregory's taped statements were admitted at trial, and Haynes was convicted and sentenced to 25 years to life for the murder, two indeterminate terms, and 38 years for a number of other offenses. On appeal, Haynes challenged the admission of the taped statements, arguing that they were inadmissible hearsay. The appellate court affirmed. The statements were admissible under recently-enacted Evidence Code section 1294, which permits prior inconsistent statements of a witness to be properly admitted in a trial if the witness is unavailable and if the former testimony of the witness is admitted pursuant to Evidence Code section 1291. The statute specifies that a transcript of a preliminary hearing or other prior hearing containing the statements may be admitted. Here, Gregory's recorded statements were played at the preliminary hearing, and therefore the transcript of the hearing "contained" those statements. The statute took effect on January 1, 1997, and thus was in effect when the jury was sworn on January 7, 1997. The admissibility of evidence is determined at the time the evidence is offered, not when the trial commences. Appellant had the opportunity to cross-examine Gregory at the preliminary hearing about her taped statements, and his motive and interest to do so were similar to those he would have had had she testified at trial. The Sixth Amendment was therefore satisfied, and appellant's right to confrontation was not violated.

[19.J.2.f.] *People v. Haynes* (A078379, 5/20/99)
72 Cal.App.4th 337 (DCA 1, Div. 4) ****Modification of opinion on denial of rehearing 73 Cal.App.4th 41h; review granted 9/1/99 (S080149); further action deferred pending *People v. Duarte* (S068162)****

The legislative history of Evidence Code section 1294 shows that the admission of prior inconsistent statements of unavailable witnesses was intended to be an exception to the hearsay rule, and to permit the introduction of such evidence for its truth. The appellate court rejected appellant's argument that Evidence Code section 1295 was not intended to supplant the rule that prior inconsistent statements of hearsay declarants are admissible only for impeachment, and not for their truth. The statute was intended to permit prior inconsistent statements to bear on the merits of the case, if the defendant has the opportunity to cross-examine the declarant as to those statements. Because appellant had that opportunity at the preliminary hearing, the prosecution was entitled to introduce the taped statements.

[19.J.2.f.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

The admission of the prior testimony of a codefendant's girlfriend who had a deliberate "memory loss" at trial was proper impeachment.

[19.J.2.g.] *People v. Han* (G023433, 2/25/00)
Cal.App.4th (DCA 4, Div. 3)

It was not error to admit Jeen Han's statements made prior to the day of the home invasion in which she expressed her desire to have her sister murdered. The jury was correctly instructed that the statements made by an alleged conspirator before proof of the formation of the conspiracy could not be used against the other alleged conspirators. However, the statements were clearly admissible under Evidence Code section 1250 to show the state of mind of the declarant as well as her confederates. Although under *People v. Howard* (1988) 44 Cal. 3d 375, appellant may

have been entitled to a limiting instruction informing the jury that they could consider the statements only to explain the later actions, such an amplifying instruction was not requested, probably for sound tactical reasons. The issue was therefore waived.

[19.J.2.h.] *People v. Brodit* (A079648, 3/5/98)

61 Cal.App.4th 1312 (DCA 1) ****Review denied 6/10/98****

Evidence Code sections 1253 and 1360 do not violate the due process clause because they do not benefit only the prosecution. The hearsay authorized by these two sections can be used by any party, and thus confer reciprocal benefits. Moreover, even if it did favor only the prosecution, these statutes add two exceptions to the hearsay rule, and defendants retain the benefit of the other exceptions to the hearsay rule.

[19.J.2.h.] *People v. Brodit* (A079648, 3/5/98)

61 Cal.App.4th 1312 (DCA 1) ****Review denied 6/10/98****

The application of Evidence Code sections 1253 and 1360 to acts committed before the effective date of the statutes do not violate the ex post facto clause because they do not alter the definition of a crime, increase the punishment or eliminate a defense.

[19.J.2.h.] *People v. Brodit* (A079648, 3/5/98)

61 Cal.App.4th 1312 (DCA 1) ****Review denied 6/10/98****

The trial court properly admitted the hearsay evidence under Evidence Code section 1253 because the statements made to the nurse and to the therapist identifying the perpetrator were necessary for her treatment, and it is not limited to medical treatment.

[19.J.2.h.] *People v. Brodit* (A079648, 3/5/98)

61 Cal.App.4th 1312 (DCA 1) ****Review denied 6/10/98****

The hearsay statements the victim made to a social worker and to a detective were admissible under Evidence Code section 1360 because there was sufficient indicia of reliability.

[19.J.2.i.] *Shea v. Department of Motor Vehicles* (G019924, 3/31/98)

62 Cal.App.4th 1057 (DCA 4) ****Review denied 6/17/98****

The trial court properly set aside appellant's license suspension based on the forensic report admitted at the administrative per se hearing because the forensic alcohol report on which the suspension was based prepared by a trainee. A trainee does not fall within the public employee exception to the hearsay rule contained in Evidence Code section 1280 where there is no evidence that the trainees were supervised. Moreover, the trainees were not qualified to represent that title 17 of the Code of Regulations was complied with, and the trainee's attestation to the report falsely certified that the trainees were analysts. The presumption of proper performance does not apply to the work of a trainee, since a trainee has no official duty to report the test results.

[19.J.2.i.] *People v. Martinez* (S062266, 1/10/00)

22 Cal.4th 106

The trial court did not err when it admitted uncertified computer printouts of appellant's criminal history as evidence that appellant was a habitual offender under Penal Code section 667.7. At a

court trial on appellant's prior convictions, the court judicially noticed the relevant superior court case files, which contained probation reports and identity information. Certified prison records were also admitted, including copies of abstracts of judgment. The certified records did not contain a photograph or fingerprint card, and the prosecution offered uncertified computer printouts of criminal history information obtained by the District Attorney's office from the Department of Justice (DOJ) and the Sheriff's Department in order to establish the identification link. A paralegal in the District Attorney's office testified that the records were obtained at the time of appellant's arrest, and the trial court admitted them into evidence. The California Supreme Court upheld the admission of the records because they fell within the official documents exception to the hearsay rule. Evidence Code section 969b does not limit the prosecution to using certified copies of prison records to establish proof of a prior prison term. Moreover, because statutory and recording duties of law enforcement personnel are presumed to have been regularly performed, and because DOJ and the Sheriff's Department followed strict guidelines in collecting and reporting criminal history information, it could be presumed that both agencies met the requirements in this case. Because Martinez offered no evidence which attacked the trial court's finding of trustworthiness, the trial court did not abuse its discretion in admitting the evidence as exceptions to the hearsay rule.

Justice Werdegar dissented. Neither document in question qualified as an official record excepted from the hearsay rule because the prosecution did not show that the writing was "made at or near the time of the act, condition, or event." The majority has provided an unwarranted shortcut around a specific method of proving prior convictions authorized by section 969b.

[19.J.2.j.] *People v. Gatson* (12/22/97)
60 Cal.App.4th 1020 (DCA 2)

The trial court did not abuse its discretion in finding that the trial court properly admitted, as a dying declaration, the victim's statements that she was robbed, kicked and beaten and shot by appellant and his accomplice. The victim's use of the term "robbed" was part of a comprehensive description of what caused her injuries and ultimate death, and the statements were made upon personal knowledge and under a sense of immediately impending death as required under Evidence Code section 1242.

[19.J.3.] *People v. Fields* (B112055, 2/27/98)
61 Cal.App.4th 1063 (DCA 2)

A phone number which appeared on appellant's pager at the time of arrest, which was the telephone number of the public phone in a parking lot from which a drug dealer had contacted appellant to make a buy on behalf of undisclosed undercover officers, was not inadmissible hearsay because it was evidence of a person's nonassertive conduct outside of court. It is admissible nonassertive conduct because it is evidence of a relationship or indicative of the purpose for which it was used.

[19.J.3.] *People v. Hatfield* (A077239, 12/4/98)
68 Cal.App.4th 594 (DCA 1, Div.1) ****Petition for review filed 1/11/99****

A defendant's right to confrontation is not violated by the admission of documentary evidence of prior convictions to establish his qualification, under Welfare and Institutions Code section 6600, as a sexually violent predator. Appellant maintained his rights under the statutory scheme to

obtain and contest the reports upon which the evaluations of experts were based, to cross-examine the experts on the basis of the information at their disposal, and to present conflicting testimony of his own. The documentary evidence of the prior convictions had sufficient indicia of reliability to satisfy due process standards. Insistence on proof of the nature and details of prior convictions without reliance on hearsay evidence would impose an unreasonable burden on the prosecution.

[19.J.3.] *People v. Haynes* (A078379, 5/20/99)
72 Cal.App.4th 337 (DCA 1, Div. 4) ****Modification of opinion on denial of rehearing 73 Cal.App.4th 41h; review granted 9/1/99 (S080149); further action deferred pending *People v. Duarte* (S068162)****

An unavailable witness's taped statements were admissible for the truth of the matter asserted under Evidence Code section 1294. Haynes sold drugs out of a motel in Oakland, and would beat up or kill his competitors who attempted to use the same motel. Haynes learned that the victims in this case were smoking crack in room 16 of the motel. One of the victims testified that someone with a semiautomatic weapon fired shots into the room, killing one person and injuring others. Sylvia Gregory, a witness to the shooting, gave a taped statement to the police identifying Haynes as the shooter. A tape of Gregory's statement was played at the preliminary hearing. Prior to the preliminary hearing, Gregory changed her story and said that she was not sure Haynes was the shooter. Gregory testified at the preliminary hearing, but was unavailable at the time of the trial. Gregory's taped statements were admitted at trial, and Haynes was convicted and sentenced to 25 years to life for the murder, two indeterminate terms, and 38 years for a number of other offenses. On appeal, Haynes challenged the admission of the taped statements, arguing that they were inadmissible hearsay. The appellate court affirmed. The statements were admissible under recently-enacted Evidence Code section 1294, which permits prior inconsistent statements of a witness to be properly admitted in a trial if the witness is unavailable and if the former testimony of the witness is admitted pursuant to Evidence Code section 1291. The statute specifies that a transcript of a preliminary hearing or other prior hearing containing the statements may be admitted. Here, Gregory's recorded statements were played at the preliminary hearing, and therefore the transcript of the hearing "contained" those statements. The statute took effect on January 1, 1997, and thus was in effect when the jury was sworn on January 7, 1997. The admissibility of evidence is determined at the time the evidence is offered, not when the trial commences. Appellant had the opportunity to cross-examine Gregory at the preliminary hearing about her taped statements, and his motive and interest to do so were similar to those he would have had had she testified at trial. The Sixth Amendment was therefore satisfied, and appellant's right to confrontation was not violated.

[19.J.3.] *People v. Haynes* (A078379, 5/20/99)
72 Cal.App.4th 337 (DCA 1, Div. 4) ****Modification of opinion on denial of rehearing 73 Cal.App.4th 41h; review granted 9/1/99 (S080149); further action deferred pending *People v. Duarte* (S068162)****

The legislative history of Evidence Code section 1294 shows that the admission of prior inconsistent statements of unavailable witnesses was intended to be an exception to the hearsay rule, and to permit the introduction of such evidence for its truth. The appellate court rejected appellant's argument that Evidence Code section 1295 was not intended to supplant the rule that prior inconsistent statements of hearsay declarants are admissible only for impeachment, and not

for their truth. The statute was intended to permit prior inconsistent statements to bear on the merits of the case, if the defendant has the opportunity to cross-examine the declarant as to those statements. Because appellant had that opportunity at the preliminary hearing, the prosecution was entitled to introduce the taped statements.

[19.J.3.] *People v. Phillips* (S025880, 1/24/00)
22 Cal.4th 226

The trial court properly excluded testimony by Tamara Nichols about a statement made to her by Richard Graybill, an acquaintance of appellant's who had died by the time of his retrial. The statement was not admissible as a spontaneous statement because the declarant did not perceive it personally. Assuming the statement made to Nichols was otherwise spontaneous, its admissibility turned on whether Graybill was relating events he saw himself, or repeating what he had heard from another source. Because Graybill's statement to Nichols did not demonstrate that he had personally observed the events, the evidence was properly excluded. The statement made to Nichols was not admissible as a statement against Graybill's penal interest under Evidence Code section 1230 because it was against appellant's penal interest, but not Graybill's.

Penalty issues are not summarized here.

[19.J.3.] *People v. Bourquin* (D032477, 2/10/00)
Cal.App.4th (DCA 4, Div. 1)

This appeal was dismissed as moot. Appellant appealed the revocation of his probation following a plea of guilty to the offense for which his probation was revoked. Appellant was originally charged with making a terrorist threat against his wife. Following the preliminary hearing, appellant pleaded guilty to a lesser-included misdemeanor offense. At a probation violation hearing, the transcript of the preliminary hearing was relied upon as evidence of the probation violation. Bourquin argued that the hearsay evidence contained in the preliminary hearing failed to meet the preponderance of evidence standard required for a probation revocation. Citing *People v. Arreola* (1994) 7 Cal.4th 1144, the appellate court here held that where the evidence supporting revocation was impermissible hearsay, any questions regarding the propriety of the parole revocation are rendered moot by a subsequent conviction for the offense leading to the revocation. The fact that the guilty plea was to a less serious offense than that charged made no difference because the judge who heard the probation revocation proceedings specified that the violation was based only on the fact that appellant had not remained law-abiding.

[19.J.4.] *People v. Woodell* (S060180, 2/11/98)
17 Cal.4th 448 ****Rehearing denied 4/1/98, opinion modified 17 Cal.4th 969b****

Appellant's "hearsay" objection to the use of the appellate opinion is sufficient to preserve the argument that the use of statements of another contained in the opinion are hearsay.

[19.J.4.] *People v. Milwee* (S014755, 5/18/98)
18 Cal.4th 96 ****Rehearing denied 6/26/98****

The trial court did not abuse its discretion in allowing the prosecution to introduce evidence in rebuttal, and subject to a special instruction describing the limited purpose for which the evidence was admitted, of appellant's mother's fear of him which was relevant to assessing appellant's credibility and version of events leading up to killing her, and objections to this hearsay testimony were waived for failing to timely object.

[19.J.4.] *People v. Majors* (S019708, 6/22/98)
18 Cal.4th 385

Trial counsel was not ineffective for failing to object to hearsay statements of the deceased which were admissible under Evidence Code section 1250, subdivision (a)(2), as statements of intent to do a future act, and because the statements were properly admitted under the state-of-mind exception to the hearsay rule, the federal confrontation clause permits admission of such evidence.

As to hearsay evidence which does not fall within the exception, the record fails to establish either prejudice or lack of a rational tactical purpose for failing to object.

Justice Mosk concurred separately, and dissented in part.

[19.J.4.] *People v. Torres* (C028359, 4/26/99)
71 Cal.App.4th 704 (DCA 3) ****Review granted 8/11/99 (S079575)****

Appellant's claim that his statements to examining doctors were inadmissible to prove his prior predatory acts was not raised below and was therefore waived on appeal. Even if the issue had been preserved, it would have failed on the merits because the judicially declared rule of use immunity applies only in a criminal proceeding, and hearings under the Sexually Violent Predator Act (SVPA) are civil in nature.

[19.J.4.] *People v. Smithey* (S011206, 7/1/99)
20 Cal.4th 936 ****Modification of opinion 21 Cal.4th 845a; rehearing denied 9/15/99****

The hearsay statement of the victim, introduced through the testimony of a third party, that she believed appellant had stolen a welder from her was admissible for the nonhearsay purpose of showing her state of mind. This evidence was offered to rebut appellant's claim that he and the victim were friends and that she had invited him to the property. Because the statement was not offered to prove the truth of the matter asserted, it was not made under circumstances indicating a lack of trustworthiness. Finally, because the testimony to which appellant objected on redirect essentially restated the third party's testimony elicited by appellant on cross-examination, which appellant did not move to strike, any error would have been harmless. Penalty phase issues were not summarized.

[19.K.] *People v. Jones* (1/29/98)
17 Cal.4th 279 ****Rehearing denied 3/18/98****

Bank record evidence that someone tried to use the victim's bank card to withdraw funds after the crime was committed was properly admitted as a business record and qualified as an exception to the best evidence rule. There was no error of state law, nor was there a confrontation clause

violation under the Sixth Amendment here.

[19.K.] *In re Kirk* (A087145, 9/10/99)

74 Cal.App.4th 1066 (DCA 1, Div. 5) ****Review denied 11/17/99****

A new hearing to determine probable cause to hold a petitioner for trial as a sexually violent predator (SVP) was required where the court relied on uncertified psychological evaluations as evidence of a petitioner's mental disorder. The certification requirements of Evidence Code sections 1530 and 1531 apply to SVP probable cause hearings, and help ensure that the hearsay which is admissible in SVP hearings is sufficiently trustworthy to form the basis of the probable cause finding.

[19.L.1.] *Kerollis v. Department of Motor Vehicles* (A083415, 10/29/99)

75 Cal.App.4th 1299 (DCA 1, Div. 2) ****Petition for review filed 12/2/99****

The State Department of Motor Vehicles (DMV) may suspend driving privileges pursuant to Vehicle Code section 13353.2 based upon a breath-alcohol concentration. Section 23152 was amended in 1990 to add a reference to measurement of blood alcohol by a breath measurement determination. Since nothing in the legislative history of the statute indicates that the Legislature intended to impose different proof for administrative hearings, the amended definition applies to administrative hearings as well as criminal proceedings.

[19.L.2.] *Shea v. Department of Motor Vehicles* (G019924, 3/31/98)

62 Cal.App.4th 1057 (DCA 4) ****Review denied 6/17/98****

Although the trial court had the arresting officer's report which listed objective signs of intoxication, this is insufficient to prove a blood alcohol level of 0.08 percent. The trial court revoked the license revocation even though the arresting officer's report was before it, so the trial court necessarily found it was insufficient to establish Shea had a blood alcohol concentration in excess of the legal limit, so the appellate court affirmed.

[19.L.2.] *People v. Ochoa* (S009522, 11/5/98)

19 Cal.4th 353 ****Rehearing denied 1/27/99****

Appellant did not preserve his claim regarding the scientific reliability of blood tests because he did not object on *Kelly/Frye* grounds to the admission. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (1923) 293 F. 1013.) Penalty phase issues not summarized.

[19.L.2.] *Kerollis v. Department of Motor Vehicles* (A083415, 10/29/99)

75 Cal.App.4th 1299 (DCA 1, Div. 2) ****Petition for review filed 12/2/99****

The State Department of Motor Vehicles (DMV) may suspend driving privileges pursuant to Vehicle Code section 13353.2 based upon a breath-alcohol concentration. Section 23152 was amended in 1990 to add a reference to measurement of blood alcohol by a breath measurement determination. Since nothing in the legislative history of the statute indicates that the Legislature intended to impose different proof for administrative hearings, the amended definition applies to administrative hearings as well as criminal proceedings.

[19.L.6.] *United States v. Scheffer* (3/31/98)

523 U.S. ---, 140 L.Ed.2d 413

Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial

proceedings, does not unconstitutionally abridge the right of accused members of the military to present a defense. It furthers the legitimate interest of the government in ensuring that reliable evidence is presented to the trier of fact, it preserves the jury's core function as the "lie detector," and avoids litigation over collateral matters. *Rock v. Arkansas* (1987) 483 U.S. 44, 55, *Chambers v. Mississippi* (1973) 410 U.S. 284, 295, and *Washington v. Texas* (1967) 388 U.S. 14, 22-23, do not support a right to introduce polygraph evidence even in very narrow circumstances.

Justices Kennedy, Souter, Breyer and Ginsberg, concur in part, but disagree that anything but a per se rule invades the jury's province.

Justice Stevens dissented, finding Rule 707 violates Article 36(a) of the Uniform Code of Military Justice, 10 U.S.C. § 836(a), and is unconstitutional, criticizing the Court's majority opinion for seriously undervaluing the importance of the citizen's constitutional right to present a defense, and an unrealistic appraisal of the importance of the governmental interests that undergird Rule 707.

[19.L.10.] *People v. Lucero* (B110574, 6/15/98)
64 Cal.App.4th 1107 (DCA 2, Div. 7)

The officer's testimony that in his opinion, the print taken from the counter matched appellant's shoe was admissible, but even if his opinion should have been excluded, the error was harmless because it was not critical evidence.

[19.L.11.] *People v. Wright* (A068667, 2/25/98)
62 Cal.App.4th 31 (DCA 1) ****Review denied 5/20/98****

Citing *People v. Morganti* (1996) 43 Cal.App.4th 643, the court found the PCR, (polymerase chain reaction) matching technique satisfied the standard for general scientific acceptance and admissibility stated in *People v. Kelly* (1976) 13 cal.3d 24, and *Frye v. United States* (D.C. Cir. 1923) 293 Fed. 1013, thereby rendering the DNA evidence admissible. The court also found the potential problems with DNA evidence derived from the RFLP (restrictive fragment length polymorphism) identified in *People v. Barney* (1992) 8 Cal.App.4th 798, did not apply here.

[19.L.11.] *People v. Venegas* (S044870, 5/14/98)
18 Cal.4th 47

Appellant's conviction for rape was properly reversed by the appellate court where the methodology used by the FBI in performing its DNA analysis failed to comply with procedures recommended by the National Research Council for determining the statistical probability of a random match. However, the court disagreed with the appellant's court's finding that prosecution should have been required to prove anew that the relevant scientific community accepts the reliability of the FBI's RFLP methodology, or considers it the same as the methodology used by Cellmark lab and upheld in *People v. Axtell* (1991) 235 Cal.App.3d 836. The RFLP methodology used here is indistinguishable from that used in *Axtell*, and the appellate court could have relied on *Axtell* to establish the scientific reliability on the RFLP methodology used in this case.

[19.L.11.] *People v. Roybal* (S029453, 11/12/98)
19 Cal.4th 481 ****Modification of opinion 19 Cal.4th 1231a; rehearing denied**

1/13/99**

It was not an abuse of discretion for the trial court to deny a motion for continuance where the defense requested one in order to obtain an expert, who was unavailable for two months, to review a report by the National Research Council (NRC) on the use of DNA evidence in court proceedings. Appellant failed to prove good cause because he merely “believed” his expert, who had not read the report, would testify that the report recommended a moratorium on the use of the PCR analysis of DNA. The trial court ruled correctly that the report in question did not make this claim. There was also no abuse of discretion for the court to have denied the continuance requested by the defense to obtain an expert to determine whether the laboratory in question had adopted correct procedures. The trial did not actually begin until after the date to which the continuance had been requested, and no such expert or evidence had been produced. Further, the DNA results admitted at trial were so inconclusive that they could not have harmed appellant’s case. Therefore, any error in denying a continuance was clearly harmless.

Penalty phase issues not summarized.

[19.L.11.] *People v. Allen* (B116141, 5/28/99)
72 Cal.App.4th 1093 (DCA 2, Div. 3) ****Review denied 9/22/99****

The trial court did not err in admitting DNA evidence obtained by short tandem repeats (STR) polymerase chain reaction testing, nor in finding that such tests are generally accepted in the scientific community. Allen was convicted of murder with special circumstances and sentenced to life in prison without possibility of parole. On appeal, he argued that the trial court erred by admitting DNA tests performed by STR polymerase chain reaction testing on blood and semen found at the scene. STR testing is used when there is only a limited supply of DNA available for testing. The microbiologist from Cellmark Labs who conducted the tests testified that Allen was the source of the semen stain “within a degree of scientific certainty.” The defense DNA expert concluded that although Allen *might be* the source of the semen, he could not say that Allen *was* the source. On appeal, Allen argued that the STR testing should have been completely excluded because it had not been shown to satisfy the test required by *People v. Kelly* (1976) 17 Cal.3d 24. The appellate court rejected that argument. The testimony by the director of Cellmark labs was competent evidence of general acceptance in the scientific community. Although there are no California decisions approving STR testing, out-of-state cases have approved it. There is no reason that only California cases should suffice for this purpose. There was no requirement that the scientific method must have been validated at the time of appellant’s trial. The only issue was whether the scientific method was considered valid. The STR method of DNA testing was a generally accepted method in the scientific community and the evidence was therefore admissible.

[19.M.] *People v. Fields* (B112055, 2/27/98)
61 Cal.App.4th 1063 (DCA 2)

The trial court did not abuse its discretion in admitting the telephone number of the parking lot verified on March 5, 1997, when the buy occurred on September 4, 1996, where there was no evidence to suggest the number had changed, and where common sense suggested the number had not changed.

[19.M.] *People v. Sanchez* (B108473, 3/23/98)
62 Cal.App.4th 460 (DCA 2) ****Review denied 6/17/98****

The trial court did not abuse its discretion in denying appellants' motion for a new trial on grounds of juror misconduct where the juror affidavits suggested deliberative error in the collective mental process in the form of confusion and a misunderstanding and misinterpretation of the law which are inadmissible under Evidence Code section 1150.

[19.M.] *People v. Williams* (B118817, 1/21/99)
Cal.App.4th (DCA 2, Div. 6) ****Review denied and DEPUBLISHED 4/28/99;
citation not available****

The trial court erred in admitting evidence that appellant had earlier entered, and then withdrawn, a guilty plea. Prior to trial, Williams entered a plea of no contest to one count of corporal injury on a cohabitant and one count of making a terrorist threat. He later withdrew his plea, and went to trial. At trial, the prosecutor questioned a probation officer who had written a report subsequent to the plea, and established that appellant had already entered a no contest plea to the offense. He raised the issue again while cross-examining Williams. Defense counsel objected on grounds of relevance. The jury was later instructed not to consider the information for any purpose other than to explain why the probation officer had interviewed the victim of the spousal abuse. Although the Attorney General conceded that the evidence of Williams' withdrawn plea was inadmissible, he argued that Williams waived the issue by failing to raise the proper ground for objection. The court here held that the objection was proper, and the only question was whether the error was harmless. Where no federal constitutional question arises, the test under *People v. Watson* (1956) 46 Cal.2d 818 is appropriate for measuring prejudice. Here, the jury was instructed not to take Williams' plea for what it was: an admission of guilt. It would have been extremely difficult for the jury to disregard this confession. Therefore, there is a reasonable probability that Williams would have obtained a more favorable result in the absence of the error.

[19.M.] *People v. Lopez* (G021872, 5/13/99)
71 Cal.App.4th 1550 (DCA 4, Div. 3) ****Review denied 8/25/99****

A gang member who claimed an improper privilege and refused to testify in the presence of the jury was properly held in contempt. Lopez was charged with numerous offenses, including street terrorism and assault with a firearm, for the benefit of the Southside criminal street gang. To help establish that the Southside gang was involved in a pattern of criminal gang activity, the prosecutor called Miranda to testify about a gang-related assault he had committed about a month before the assault in this case. At the time he was called as a witness, Miranda had already pled guilty to the assault charge. Sixty days had passed from the time of sentencing, and Miranda had not filed an appeal. Before Miranda took the witness stand, he made it clear that he did not wish to testify against Lopez. The court, outside the presence of the jury, appointed counsel to advise Miranda. Although Miranda was informed that he had no right to withhold testimony and had no Fifth Amendment privilege left to invoke, he refused to answer any questions. The court warned him that continued refusal would constitute contempt of court, but Miranda persisted in his refusal. The court then permitted the prosecutor to call Miranda as a witness anyway, ordered him to testify, and then, in front of the jury, held him in contempt for refusing to do so. The appellate court affirmed the contempt finding, holding that where a witness had no constitutional

or statutory right to refuse to testify, it was not improper to require him to invoke the Fifth Amendment privilege in front of a jury. Jurors are entitled to draw a negative inference when such a witness refuses to provide relevant testimony. Given that Miranda's decision was fully informed and willful, and in disobedience of a court order, the jury was entitled to consider his defiance against him and, to the extent it validated the gang expert's testimony, against Lopez. The trial court committed no error.

[19.M.] *United States v. Duran-Orozco* (9/21/99)
192 F.3d 1277 (9th Cir.)

Exclusion of the testimony concerning identification of appellants was not required despite the suggestive photo show-up. The testimony concerning the identification indicated that the officer had ample opportunity to observe the suspects and was positive in his identification.

[19.M.] *United States v. Duran-Orozco* (9/21/99)
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[19.M.] *People v. Ervin* (S021331, 1/6/00)
22 Cal.4th 48 ***Time for granting or denying rehearing extended to 4/5/00****

The testimony of a "snitch," who was rewarded with money and reduced charges or "pardons" for his own criminal conduct, was properly admitted. The benefits to the "snitch" were disclosed to the defense for impeachment purposes, and did not amount to "outrageous" conduct which would justify suppression.

[19.M.] *United States v. Whitehead* (1/11/00)
200 F.3d 634 (9th Cir.)

The district court erred when it admitted evidence of appellant's post-arrest, pre-*Miranda* silence following his detention and subsequent arrest for transportation of marijuana, and when it allowed the prosecutor to comment on the silence during closing argument. However, because appellant failed to meet his burden of showing that the error affected the outcome of the proceedings, reversal was not required. The evidence in question was a police officer's testimony regarding Whitehead's silence. The evidence was "scant." The officer also testified concerning evidence far more probative of guilt, such as the discovery of 54 pounds of marijuana under the bumper of the car. Moreover, three other witnesses did not comment on Whitehead's silence. Even though the prosecutor's improper comments weighed in favor of a finding of prejudice, the overwhelming physical evidence of guilt was determinative. The prosecutor's improper references to silence were not prejudicial enough to affect the outcome of the proceedings.

[19.Q.] *People v. McGavock* (A081145, 1/20/99)
69 Cal.App.4th 332 (DCA 1, Div. 5) ****Review denied 5/12/99****

The rule requiring corroboration of accomplice testimony does not extend to probation violation

hearings. Penal Code section 1111 specifies that a *conviction* cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence. The statute is designed to prevent lay jurors from arriving at a guilty verdict based solely on possibly tainted evidence. Experienced trial judges, unlike lay jurors, are familiar with the risks inherent in accomplice testimony. It cannot be said that a probation revocation results in a *conviction*, because the probationer has already been convicted and the filing of a revocation does not initiate another criminal proceeding. As a result, there would be no valid statutory purpose in extending the rule requiring corroboration to revocation proceedings.

[19.Q.] *People v. Miranda* (B112325 3/11/99)
70 Cal.App.4th 800 (DCA 2, Div. 3) ****Review granted 6/30/99 (S078243)****

Defendant Canela's confessions did not have to be corroborated to provide probable cause to hold defendant Miranda to answer. Even if the statements did require corroboration, there was sufficient evidence to hold Miranda to answer.

[19.Q.] *People v. Maldonado* (E021856, E021904, 5/26/99)
72 Cal.App.4th 588 (DCA 4, Div. 2) ****Review denied 9/1/99****

In a murder prosecution, the trial court did not err in admitting the testimony of an accomplice who received favorable sentencing treatment. In the published portion of this opinion, the appellate court addressed a contention that a former codefendant's testimony against him should not have been admitted because it was "bought" in exchange for lenient treatment, in violation of Penal Code section 132.5, subdivision (a). That section provides that a witness in a criminal prosecution may not accept or receive payment or benefit in consideration for providing information obtained as a result of witnessing the incident or having personal knowledge of the facts. Appellant Maldonado argued that Moreno, an accomplice in the charged murder and originally a codefendant in the case, received a "payment or benefit" because he provided testimony in exchange for leniency. (Moreno was allowed to plead guilty to manslaughter and received a twelve year sentence.) The appellate court held that the trial court did not err in admitting the testimony. Section 132.5 was enacted to stop the media frenzy for witnesses' stories in high profile cases. The Legislature did not intend to do away with the common, well-established practice of "plea bargaining in exchange for truthful testimony." Plea bargains can be construed as "lawful compensation provided to an informant" or "statutorily authorized rewards to a witness" which are specifically allowed under the statute. Even if the statute could not be so construed, reversal is not the remedy for a violation of section 132.5. The statute makes it a misdemeanor to accept money for information, and provides no other penalties for violation. It is not an exclusionary rule. Moreno's testimony was not within the scope of section 132.5, and was therefore properly admitted as part of a plea bargain in exchange for truthful testimony.

[19.R.] *People v. Ruiz* (B110548, 3/18/98)
62 Cal.App.4th 234 (DCA 2)

The trial court did not abuse its discretion in permitting the prosecution to introduce expert witness testimony as evidence, for purposes of impeaching the confession, that appellant and the person who confessed to the crime were both members of the same criminal street gang, as the probative value outweighed the prejudicial effect under Evidence Code section 352.

[19.R.] *United States v. Garcia* (8/25/98)

151 F.3d 1243 (9th Cir.)

Gang membership itself cannot establish guilt of a crime, and a general agreement, implicit or explicit, to support one another in gang fights does not provide substantial proof of the specific agreement required for a conviction of conspiracy to commit assault. A contrary result would allow courts to assume an ongoing conspiracy, universal among gangs and gang members, to commit any number of violent acts, rendering gang members automatically guilty of conspiracy for any improper conduct by any member. The conviction was reversed.

[Editor’s Note: A gang unit detective testified as an expert that generally gang members have a “basic agreement” to back each other up. Because this case was reversed without reaching the issue, the use of expert testimony on this issue was not considered here. However, in footnote 4, the Ninth Circuit cautioned that this testimony failed to identify a specific illegal objective, was not based on specific knowledge of the gang involved, and was not addressed specifically to the conduct of the gang involved, and therefore had little probative value with respect to the specific conspiracy alleged here.

Moreover, the court here noted that Ninth Circuit law establishes that membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation necessary to constitute aiding and abetting. To do so would constitute guilt by association.]

[19.R.] *United States v. Takahashi* (3/6/00)

F.3d (9th Cir.)

The admission of expert testimony of gang affiliation was not an abuse of discretion where the evidence was relevant to establish bias, and the trial court had taken steps to minimize undue prejudice. Here, appellant had called an exculpatory witness who admitted gang affiliation but denied that any oaths of loyalty were involved. The Government then introduced expert testimony that members of this gang do indeed swear oaths of loyalty and had been known to “take the blame” for other members. The district court offered a limiting instruction, and restricted the prosecution’s evidence to exclude photographs of appellant’s tattoos. Because the oaths of total loyalty were directly relevant to the issue of bias, and the district court sought to prevent undue prejudice, there was no error.

Federal sentencing issues not summarized here.

SVPA CASES – EVIDENCE ISSUES ONLY

[14.E.] CIVIL COMMITMENTS, Extended commitments for Sexually Violent Predators (Welfare & Institutions Code §6600, et. seq.)

[15.H.] AREAS OF CONSTITUTIONAL LAW, Right against self-incrimination

[14.E.] *In re Parker* (1/22/98)

60 Cal.App.4th 1453 (DCA 4) ****Review denied 4/29/98****

This petition for writ of habeas corpus was granted because the trial court, over petitioner's objection, determined there was probable cause to believe petitioner likely to engage in sexually violent predatory criminal behavior upon his release, under Welfare and Institutions Code section 6602 (Sexually Violent Predators Act), without holding a hearing, and based on inadmissible hearsay to which petitioner objected. Section 6602 is ambiguous regarding the scope of a probable cause hearing, and the legislative history lends little assistance. However, other provisions of the statute, as well as its general purpose, evidence an intent to provide an SVP with more than a "paper review." The SVP should have an opportunity to be fully heard on the issue of probable cause at the section 6602 hearing by cross-examining the hearsay declarants, and the failure to do so deprived appellant of due process of law.

[14.E.] *People v. Howard* (H018530, 2/22/99)

70 Cal.App.4th 136 (DCA 6) ****Modification of opinion at 71 Cal.App.4th 134b; review denied 6/3/99****

The Sexually Violent Predators Act (SVPA) specifically allows the People to prove that a defendant has committed sexually violent offenses through hearsay evidence. The admission of hearsay evidence at a probable cause hearing does not violate due process because the defendant has an opportunity to challenge the evidence. Howard, who had pleaded guilty in 1987 to a violation of Penal Code section 288a, subdivision (b)(2), and in 1991 to a violation of Penal Code section 288, subdivision (a), was not paroled in May of 1997. Instead, proceedings were begun under the SVPA. At the hearing on the SVPA petition, the court admitted four written evaluations of Howard which were submitted by psychologists who, in addition to examining Howard, had reviewed his record, including the probation reports. Howard's attorney called two of the psychologists as witnesses at the hearing, and cross-examined them regarding their opinions that Howard met the criteria of the statute. The court ruled that there was no probable cause to detain Howard under the SVPA because the proof that Howard's convictions constituted sexually violent offenses within the meaning of the statute consisted of inadmissible evidence, that is, the hearsay statements of the victims contained in the probation reports. The People petitioned for a writ of mandate. The court here held that the SVPA specifically provides that the existence of qualifying past conduct may be shown at the probable cause hearing by documentary evidence, including statements in a probation report. Due process under the SVPA is not measured by the rights accorded a defendant in criminal proceedings, but by the standard applicable to civil proceedings.

[14.E.] *People v. West* (F026945, 2/24/99)

70 Cal.App.4th 248 (DCA 5)

There was insufficient evidence that appellant was a sexually violent predator where there was no

evidence that he received a determinate term for his prior 1975 rape conviction. At the time of appellant's trial, the definition of "sexually violent predator" included a requirement that the defendant had been convicted of a sexually violent offense against two or more victims for which he or she received a determinate sentence. Although West stipulated that he was convicted of forcible rape in 1975, he contended that there was no evidence he received a determinate term for that offense. The court agreed, finding "no legal or practical solution to the express words of this statute that created the anomaly which inures to appellant's benefit." Subsequent amendments to the statute were not simply a clarification of existing law. The amendment did not affect appellant because it had not yet become law when appellant's trial took place. The judgment must be reversed because of "legislative oversight," despite appellant's egregious record and evident danger to the public.

[14.E.] *People v. Mercer* (E021569, 3/1/99)

70 Cal.App.4th 463 (DCA 4, Div. 2)

There was sufficient evidence to establish appellant as a sexually violent predator where the jury could reasonably have believed the evidence of prosecution witnesses and rejected that of the defense witness. Although no court has yet articulated the standard of review for considering the sufficiency of evidence to support a commitment under the Sexually Violent Predator Act, the class of offenders is similar to commitments under the Mentally Disordered Offender Law and extended commitments under Penal Code section 1026.5 for defendants acquitted by reason of insanity. Therefore, the standard of proof should be the same as that for reviewing a criminal conviction. Here, all three psychologists who testified at appellant's hearing to determine whether he was a sexually violent predator testified that he had pedophilia. The prosecution experts testified that appellant could not control his sexually violent behavior, while the defense expert testified that there was no evidence that he was unable to control his behavior. As all reasonable inferences must be drawn in favor of the judgment, there was sufficient evidence from which the jury could have determined that appellant could not control his behavior and would likely reoffend if released.

[14.E.] *People v. Ward* (E020993, 4/13/99)

71 Cal.App.4th 368 (DCA 4, Div. 2) ****Review denied 7/28/99****

Psychiatric and psychological testimony admitted for the purpose of a sexually violent predator (SVP) hearing pursuant to Welfare and Institutions Code section 6600, et seq., is not scientific evidence subject to a *Kelly-Frye* analysis. (*People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (1923) 293 F. 213.) California law distinguishes between expert medical opinion and scientific evidence. *Kelly-Frye* analysis applies to cases involving novel devices or processes, not to expert testimony such as a psychiatrist's prediction of future dangerousness. The law permits such expert testimony in a number of other contexts, such as insanity and mentally disordered offender commitments. These other situations cannot reasonably be distinguished from expert testimony in SVP commitment proceedings. Therefore, the trial court did not abuse its discretion in this case when it admitted expert testimony regarding the likelihood that appellant was a sexually violent predator and was likely to reoffend.

[14.E.] *People v. Torres* (C028359, 4/26/99)

71 Cal.App.4th 704 (DCA 3) ****Review granted 8/11/99 (S079575)****

In a hearing to determine whether appellant was a sexually violent predator (SVP), the trial court

committed reversible error when it admitted uncertified documents to prove the prior out-of-state convictions. Torres had waived his right to a jury determination on two prior Texas convictions and a prior California conviction for sex offenses. In a bifurcated proceeding, the trial court admitted, over appellant's objection, several uncertified documents from Texas purporting to prove appellant's prior convictions in that state. The trial court rejected appellant's argument that the uncertified documents were inadmissible hearsay, and held that the Sexually Violent Predator Act (SVPA), Welfare and Institutions Code section 6600, subdivision (a), allows admission of a broader range of documents and does not expressly require the documents to be certified. The court then found the priors to be true. The appellate court reversed the judgment. Although section 6600, subdivision (a), allows the introduction of a broader range of documents, it does not relieve the proponents of the documents from compliance with Evidence Code sections 1530 and 1531. The Evidence Code applies to every action in California except as otherwise provided by statute. Nothing on the face of Welfare and Institutions Code section 6600, subdivision (a), suggests an exception or a legislative intent to create an exception. Public policy reasons, such as assurances that documents are authentic and assurance that the right to confrontation and cross-examination is protected, further support the conclusion that the Legislature could not have intended to abrogate those Evidence Code sections. Because a person's liberty interest is at stake in a civil commitment proceeding, he or she has the right to confrontation and cross-examination. Without the safeguard of certification, the Texas documents were not sufficiently trustworthy to be admitted and used against appellant. Therefore, because only the California conviction remained, and a minimum of two prior victims were required to satisfy the SVPA, the conviction was reversed and the matter remanded to the trial court for retrial only on the issue of whether appellant sustained the prior Texas convictions.

The court also held that had the documentation been certified, there was sufficient evidence to prove the prior convictions. The SVPA does not require proof that the prior convictions were predatory.

[14.E.] *People v. Torres* (C028359, 4/26/99)

71 Cal.App.4th 704 (DCA 3) ****Review granted 8/11/99 (S079575)****

Appellant's claim that his statements to examining doctors were inadmissible to prove his prior predatory acts was not raised below and was therefore waived on appeal. Even if the issue had been preserved, it would have failed on the merits because the judicially declared rule of use immunity applies only in a criminal proceeding, and hearings under the Sexually Violent Predator Act (SVPA) are civil in nature.

[14.E.] *People v. Poe* (A083416, 8/30/99)

74 Cal.App.4th 826 (DCA 1, Div. 1)

There was sufficient evidence that an inmate was "likely" to engage in sexually violent conduct when released where two experts testified that the risk of appellant reoffending was higher than 50 percent, and their opinions were based on numerous factors in addition to appellant's prior offenses. The fact that appellant was young when he committed his first sexual offense, he continued to use drugs and alcohol, and he had a pattern of aggressive conduct over many years including during the time he was in prison, all supported the conclusion that he was likely to reoffend. Therefore, there was sufficient evidence to support the finding of the court that appellant was a sexually violent predator within the meaning of Welfare and Institutions Code

section 6600.

[14.E.] *In re Kirk* (A087145, 9/10/99)

74 Cal.App.4th 1066 (DCA 1, Div. 5) ****Review denied 11/17/99****

A new hearing to determine probable cause to hold a petitioner for trial as a sexually violent predator (SVP) was required where the court relied on uncertified psychological evaluations as evidence of a petitioner's mental disorder. The certification requirements of Evidence Code sections 1530 and 1531 apply to SVP probable cause hearings, and help ensure that the hearsay which is admissible in SVP hearings is sufficiently trustworthy to form the basis of the probable cause finding.

[14.E.] *People v. Cheek* (H019064, 9/28/99)

75 Cal.App.4th 282 (DCA 6) ****Review granted 12/15/99 (S083305)****

A trial court erred by precluding appellant from calling and cross-examining witnesses at his hearing for conditional release under Welfare and Institutions Code section 6608. Appellant had been committed to the State Department of Mental Health (DMH) under the Sexually Violent Predators Act (SVPA). Under the SVPA, a defendant is entitled to petition the court for conditional release after one year. If s/he does not affirmatively waive his or her right to petition, the court must hold a show cause hearing to determine whether facts exist that warrant a hearing on whether there has been a change in condition which warrants release. Here, appellant did not affirmatively waive his right to petition for a hearing because he refused to check the appropriate box on the form which advised him of his right to a hearing. While Welfare and Institutions Code section 6605 does not specifically provide for the right to call and cross-examine witnesses, it does provide a right to a hearing, which implies something more than just a review of an annual report prepared by the DMH. The absence of language in the statute limiting the hearing to the review of reports, combined with the specific restriction in other provisions of the SVPA, demonstrates that the Legislature intended to provide for a full hearing. Also, since DMH presented the testimony of experts through hearsay reports, "common sense and fairness" compel the conclusion that appellant should have been allowed to cross-examine the preparers of the reports.

[14.E.] *People v. Dacayana* (B122454, 12/13/99)

76 Cal.App.4th 1334 (DCA 2, Div. 6)

Dr. Paladino's testimony at appellant's trial under the Sexually Violent Predators Act was properly admitted and did not violate the patient-psychotherapist privilege under Evidence Code section 1012. Evidence Code section 1024 permits treating psychotherapists to disclose otherwise confidential communications to prevent the danger posed by the prisoner's release, just as it permitted similar disclosures under the Mentally Disordered Sexual Offenders law. *People v. Wharton* (1991) 53 Cal.3d 522 does not require that a warning, pursuant to *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 442, be given before the disclosure can be made under Evidence Code section 1024, nor does it limit the disclosure of otherwise privileged communications to the *Tarasoff* warning itself. *Wharton* was a criminal prosecution.

[14.E.] *People v. Dacayana* (B122454, 12/13/99)

76 Cal.App.4th 1334 (DCA 2, Div. 6)

The Court of Appeal rejected appellant's claim that he did not have two qualifying offenses as

required to trigger the application of the Sexually Violent Predators Act because the 1980 rape conviction resulted from a no-contest plea rather than a guilty plea. Because Penal Code section 1016, which was amended in 1982, provided that the legal effect of a no-contest plea would be the same as a plea of guilty for all purposes, and case law establishes that these convictions are admissible in subsequent civil actions, a person who enters a no-contest plea stands convicted just as though he had pleaded guilty.

[14.E.] *People v. Dacayana* (B122454, 12/13/99)

76 Cal.App.4th 1334 (DCA 2, Div. 6)

CALJIC 4.19, which defines the elements necessary for a Sexually Violent Predators Act conviction, and which does not require the jury to find the prior convictions “predatory,” accurately states the law. The predatory nature of the prior offenses is a factor in the prison screening process designed to identify potential SVPs. Welfare and Institutions Code section 6600, subdivision (a), permits prior convictions to be shown with documentary evidence, including the details underlying the offense and the predatory relationship with the victim. However, neither of these provisions transforms this factor into an element of the offense. As further evidence that the Legislature did not intend the predatory factor to become an element of the offense, the Court of Appeal pointed to the fact that forcible spousal rape under Penal Code section 262, subdivision (a)(1), is a qualifying SVP offense under Welfare and Institutions Code section 6600, subdivision (b), while few, if any, of such convictions will involve a predatory relationship.

[14.E.] *Albertson v. Superior Court* (B135604, 1/5/00)

77 Cal.App.4th 431 (DCA 2, Div. 6) ****Petition for review filed 2/14/00****

The Department of Mental Health cannot directly transmit mental health records to the district attorney in Sexually Violent Predator (SVP) hearings. The confidentiality provisions of Welfare and Institutions Code section 5328 prohibit such a transfer to the extent that the records are generated in the course of providing mental health services. Therefore, although mental health records generated during the time appellant was in state prison were not confidential, his post-prison confinement was premised upon “treatment,” and mental health records generated after the SVP initial evaluations must be deemed as “services provided” under section 5328. A writ of mandate was therefore issued which ordered the respondent court to set aside its orders requiring additional mental health examinations, and allowing the district attorney direct access to the records.

[14.E.] *People v. Leonard* (C027404, 2/28/00)

Cal.App.4th (DCA 3)

The court did not deny appellant the right to remain silent at his sexually violent predator (SVP) hearing by allowing the psychologists who testified as expert witnesses to rely on material from interviews he gave under duress, or by allowing the district attorney to call him as a witness in the proceeding. Because the SVP proceeding is civil, the privilege against self-incrimination does not apply.

[14.E.] *Butler v. Superior Court (People)* (H020240 and H020554, 3/7/00)

Cal.App.4th (DCA 6)

Butler and Cheek were found to be sexually violent predators under the Sexually Violent

Predators Act (SVPA) and were committed to the custody of the State Department of Mental Health (DMH) for two years. Before the two-year commitments expired, prosecutors filed petitions to commit each appellant for an additional two-year period. The petitions were each supported by one evaluation by a DMH psychologist. The court here held that the subsequent commitments had to be reversed because the SVPA requires a “full evaluation” which requires two evaluations of the person subject to commitment. The SVPA does not contain any explicit provisions regarding the process of recommitment. The fact that the Legislature did not provide any specific procedures for recommitment indicates that it intended the procedures to be the same for filing the initial commitment and for recommitment. This includes the requirement that two evaluations support the recommitment. The fact that the SVPA requires a new petition indicates that the evaluations performed at the initial stage would not reflect the current mental condition, and would be inadequate. As a result, the orders recommitting Butler and Cheek had to be vacated.

[15.H.] *People v. Leonard* (C027404, 2/28/00)
 Cal.App.4th (DCA 3)

The court did not deny appellant the right to remain silent at his sexually violent predator (SVP) hearing by allowing the psychologists who testified as expert witnesses to rely on material from interviews he gave under duress, or by allowing the district attorney to call him as a witness in the proceeding. Because the SVP proceeding is civil, the privilege against self-incrimination does not apply.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE THIRD APPELLATE DISTRICT

PEOPLE OF THE STATE)	
OF CALIFORNIA,)	
Plaintiff and Respondent,)	3 Crim C034141
)	
v.)	El Dorado County
)	No. WS98F00293
ANTHONY MATTHEW CONTINI,)	
)	
Defendant and Appellant.)	
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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

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

(Cal. Rules of Court, rule 13.)

STATEMENT OF THE CASE

On December 11, 1998, a four count information was filed against appellant Anthony Contini, charging him in Count One with wilfully inflicting corporal injury on his spouse, Maria Contini, on July 22, 1998, a felony violation of Penal Code section 273.5, subdivision (a); in Count Two with assault with a deadly weapon on July 22, 1998, a felony violation of Penal Code section 245, subdivision (a)(1); in Count Three, as amended¹, with committing a battery on July 28, 1998, a misdemeanor violation of Penal

¹ This count was amended on August 31, 1999, at trial. (RT 583.)

Code section 242; and in Count Four with being a felon in possession of a firearm on July 29, 1998. Attached to Counts One and Two were allegations that Mr. Contini personally used a deadly or dangerous weapon, a baseball bat, within the meaning of Penal Code section 12022, subdivision (b), and that the counts were serious felonies within the meaning of Penal Code section 1192.7, subdivision (c)(23). (CT 82-85.)²

On March 8, 1999, over defense counsel's objections, the court granted the prosecution's in limine motion to admit evidence of Mr. Contini's prior bad acts against his ex-wife Jenny Brown. (CT 133, 201-202.)

On August 24, 1999, Mr. Contini's jury trial began. (CT 235.) After continued objections by defense counsel, evidence of Mr. Contini's prior bad against his ex-wife were introduced on August 25, 1999. (CT 241.) After a five day jury trial, on August 31, 1999, at 3:10 p.m., the jury retired to deliberate. (CT 300.) At 5:20 p.m., the jury found Mr. Contini guilty on all counts and found true the two allegations attached to Counts One and Two. (CT 300-301, 303-305; RT 702-703.)

² As used herein, "CT" refers to the Clerk's Transcript on appeal. "RT" refers to the Reporter's Transcript on appeal. "ACT" refers to the Augmented Clerk's Transcript on appeal. "SCT" refers to the Supplemental Clerk's Transcript on appeal

On November 1, 1999, the court denied probation and sentenced appellant to four years and eight months in prison. The court imposed concurrent mid-terms of three years, with one year enhancements pursuant to Penal Code section 12022, subdivision (b) on both Counts One and Two. Count One was found to be the principal term and Count Two and the attached enhancement were stayed pursuant to Penal Code section 654. The court ordered Count Four to run consecutive to Count One, imposing an eight month term (one third the mid-term of two years.) A six month jail term was imposed on Count Three which was ordered to run concurrent to Count Four. The court awarded Mr. Contini 225 days of presentence custody credit. He was ordered to pay a \$4667 restitution fine pursuant to Penal Code section 1202.4 and a duplicate parole violation restitution fine, which was stayed, pursuant to Penal Code section 1202.45. (SCT 1-3; RT 733-736.)³

On November 10, 1999, Mr. Contini filed a timely notice of appeal. (CT 396.)

³ On the minute order from the judgment and sentencing and on the abstract of judgment, a no contact order was noted. (CT 391-395; SCT 3 ["Defendant ordered to have no direct or indirect contact with the Victim, Maria Contini, except for that which is necessary to facilitate visitation with the Defendant's children".]) However, such an order was not imposed at the sentencing hearing. (RT 709-738.)

STATEMENT OF THE FACTS

Introduction

The incidents surrounding the current charges involve two allegations of abuse against Maria Contini. (CT 82-85.) Appellant Anthony Contini and Maria Contini have been married for ten years and have two sons. (RT 416.) The Continis' neighbors are the Stammers. (RT 165.) Mr. Contini was previously married to Jenny Brown in 1988 for two years, and have one son, Anthony Jr.. (RT 188-189.) Ms. Brown and Maria Contini were friends who met each other while attending Heald college in 1989. (RT 203, 420.) The two women had continuing contact because the family court arranged for the pick up and drop off of Anthony Jr. through Maria Contini. (RT 285.) Following the incidents arising out of this case, Ms. Brown petitioned for and gained full custody of their son. Previous to the incidents allegedly perpetrated by Mr. Contini against Maria Contini, Mr. Contini and Ms. Brown shared equal custody of their son. (RT 266, 420.)

The Prosecution's Case Relating to the Current Charges

On July 28, 1998, in the late evening, Brett Stamer, one of appellant Anthony Contini's neighbors, heard a woman later identified as Maria Contini in his backyard yelling and screaming hysterically. (RT 154, 164.) Mr. Stamer turned on his outdoor lights and Mrs. Contini approached the house and he asked her what was wrong. (RT 158.) She replied, "my husband is going to kill me." (RT 160.) She also told him that her husband had hit her and she referred to an incident a few nights back with a baseball bat. (RT 171.)

Mr. Stamer and his wife persuaded Mrs. Contini to come into their house and to let them call 911. (RT 161.) When she came inside, Mr. Stamer noticed that Mrs. Contini had a black eye and some cuts and scrapes on her legs and knees. (RT 161.) The Stamers called 911 five minutes after Mrs. Contini entered their house. (RT 161.) When talking to the dispatchers on the phone, Mr. Stamer thought Mrs. Contini seemed upset. (RT 162.) About 10 to 15 minutes after the call to 911, police officers arrived at the Stamer house. (RT 165.)

Officer Erhart of the El Dorado County Sheriff's Department responded and approached Mrs. Contini who was crying and distraught and had bruises on the side of her face and around her eyes. (RT 105, 107-108.) Officer Erhart smelled the odor of alcohol on Mrs. Contini. (RT 133.) She told him that earlier that week she had spilled bleach in her house causing a fight between her and her husband. Her husband, Mr. Contini, punched her in the face, and struck her in the upper arms and three times in the thigh, and on the left side of her head with a baseball bat. (RT 109, 409-410.)⁴ Mr. Contini told her that he would have killed her had he not thrown out his back. (RT 109.) As a result of this incident, Mrs. Contini and her children went to a woman's shelter. (RT 114.) This evening, she had come back into her neighborhood to drop her kids off at the Stamer residence but she encountered Mr. Contini in her house's driveway. (RT 115.) The Continis started talking cordially at first, but then Mr. Contini became violent and grabbed

⁴ Officer Erhart observed injuries on Mrs. Contini's arm, leg, thigh, and eye. (RT 113-114.) He did not observe any injuries on her head. (RT 410.)

her arm so she fled across the street to the Stamer residence yelling for them to call 911. (RT 115.)

Mrs. Contini told Officer Erhart that presently her children and her husband were across the street at their house and that she was afraid for their lives and that if the officers did not take her husband to jail, he would either kill her or the kids. (RT 115.)

Officer Erhart and Officer Drayer, who was also present at this investigation, then went across the street to the Contini residence. (RT 115.) When they arrived, they saw Mr. Contini in the garage moving some tools and then Mr. Contini left and the officers were able to contact him through an open screen door. (RT 117-118.) At this point, the officers also saw two children in the house who appeared to be between the ages of three and five years. (RT 119, 137, 150.) The officers identified themselves and asked Mr. Contini to come outside and talk to them. After initially refusing, Mr. Contini unlocked the door and came outside. (RT 120.) Officer Erhart then arrested Mr. Contini for domestic violence and put him in the back of the patrol car. (RT 121.)

Officer Erhart then went into the Contini residence and took one or two of the children back to Mrs. Contini who was still at the Stamer residence. (RT 121.) Officer Erhart returned to the Contini house to search for weapons. (RT 121.) He found the baseball bat behind the master bedroom door as Mrs. Contini had reported and also found a pistol that Mrs. Contini correctly said would be in a shoebox in the master bedroom closet. (RT 121.) He reentered the house that same day and found two more baseball bats in the garage. (RT 126.)

About one week after the 911 incident, Deputy Erhart again contacted Maria Contini because he received a dispatch call that there was a distraught female at the Cameron Park Liquor Store. (RT 130-131.) When he arrived at the store, he encountered Mrs. Contini and Mr. Contini's ex-wife, Jenny Brown. (RT 131.) Maria Contini then returned to the Stamer residence where she made a phone call to a friend to pick her up and then she left 5 to 10 minutes later. (RT 166-167.) Mr. Stamer opined that Mrs. Contini appeared afraid, but not as hysterical as the day of the 911 incident. (RT 167.)

According to Mr. Stamer's testimony a few weeks after the 911 incident, Mr. Contini came to the Stamer residence and apologized for putting Mr. Stamer in the middle of the predicament. He told Mr. Stamer that he was undergoing counseling for anger management and that he wanted to get his wife back. (RT 165, 185.)

Also some time after the 911 incident, Mr. Contini came to Maria Contini's mother's house, Ester Reith, looking for Maria. (RT 300-301.) Mrs. Reith testified that Mr. Contini told her that he should not have hit Maria with a bat but he was under the influence of painkillers and that only a coward would hit a woman. (RT 301-303.) Mrs. Reith never saw Mr. Contini beat Maria at any time. (RT 327.) Mrs. Reith's husband, John Reith, also recalled hearing Mr. Contini state that only a coward would hit a woman but did not recall Mr. Contini mention a bat. (RT 340, 347, 358.) During this conversation, Mr. Reith also recalled Mr. Contini tell Mrs. Reith that he was not the bad person that she was making him out to be. (RT 348.)

The Prosecution's Case Relating to Prior Bad Acts Perpetrated by Appellant⁵

Jenny Brown met Mr. Contini in the Summer of 1987, married him in 1988, and has one son with him. (RT 188-189.) Ms. Brown knew Maria Contini because the two of them had gone to Heald College together in 1989. (RT 203.) Allegedly, the first acts of violence by Mr. Contini towards Ms. Brown were in November of 1988 and continued until two weeks before she left him in August of 1990. (RT 190-191.) Ms. Brown noted that her memory of all the incidents of domestic violence allegedly perpetrated by Mr. Contini was "poor" and was "blurred into one big episode of awfulness." (RT 248.)

The first act of violence occurred in late 1987 in Sacramento when Ms. Brown first found out she was pregnant with the couple's son. Mr. Contini slapped her because she said something about his brother. (RT 189-190.) According to Ms. Brown, Mr. Contini's brother and possibly his sister-in-law were there and saw Mr. Contini slap her but they did not react because that was their way of life. (RT 237-238.)

⁵ In addition to evidence presented about the baseball bat incident and the 911 incident, the prosecution presented evidence of prior bad acts that Mr. Contini allegedly perpetrated against his ex-wife, Jenny Brown, through the testimony of Ms. Brown. (RT 188-287, 551-559)

The abuse continued gradually and Mr. Contini "started doing more and more things as time went on." (RT 190.)⁶ After one unspecified incident in Sacramento, Ms. Brown recalled calling 911 and immediately Mr. Contini started saying he was sorry. When the police came, Ms. Brown told the police that a neighbor child had come over to their house, called 911 and hung up. She never called the police again and never made a report of the abuse. (RT 202.)

⁶ When asked about the next violent incident after the slapping, Ms. Brown testified: "I don't really have another specific incident." (RT 190.)

Sometime after their son was born, the couple moved to Wisconsin⁷. (RT 192.) In Wisconsin, Mr. Contini would hit her in the face, spray WD 40 and Windex in her mouth, and hit her with spoons and plungers. (RT 193.)

One Christmas morning⁸, the couple was fighting and Mr. Contini took the cinch off the bathrobe Ms. Brown was wearing and choked her with it, making it difficult for her to breathe. (RT 200.)

During one incident when the two were fighting, Ms. Brown told him, "I would rather be dead than with you." Mr. Contini got "very upset", dragged her up the stairs, and told her, "If you want to die, here." Mr. Contini then forced Ms. Brown to take a half bottle of aspirin⁹, and then he took her to the emergency room.¹⁰ He told her to tell the hospital staff that she tried to commit suicide, and to use a fake name and address. When the hospital staff suggested that they were going to allow her to see a psychiatrist, Mr. Contini forced her to leave the hospital. (RT 193, 236.) Ms. Brown could not recall whether the aspirin incident occurred on 1988, 1990, or 1991, could not recall the name

⁷ All Ms. Brown could concretely remember about the move to Wisconsin was that "we spent one Christmas there. And I don't remember whether we moved right after Christmas or after the first of the year." (RT 192.)

⁸ On direct examination, Ms. Brown testified that this incident occurred in Wisconsin. (RT 200.) However, on cross-examination, she testified that the incident occurred on Bradshaw Road in Sacramento. (RT 246.)

⁹ Ms. Brown could not recall whether she took the aspirin herself or whether Mr. Contini poured them down her mouth. (RT 234.)

¹⁰ Ms. Brown could not recall whether the WD 40 and Windex incident occurred on the same date as the aspirin incident. (RT 232.)

of the hospital, and could not recall whether in fact she used her name or a fake name when admitted to the hospital. (RT 228-229.)

Although her parents and sister were living in Wisconsin at the time, she did not tell any of them about the abuse and, in fact, hid it, because she was "young and ashamed and felt stupid." (RT 241-242.)

After living in Wisconsin, the couple moved back to California and the abuse continued. (RT 195.) During one incident, Ms. Brown was about to go to Heald college and she was wearing lipstick. (RT 196, 256.) Mr. Contini became upset because he thought she was trying to impress someone. He "thump[ed]" her in the head, and when she fought back, he held her down, slapped her face, tied things around her neck, and put pillows over her face. While holding her down, Mr. Contini asked her, "How am I going to kill you?"¹¹ (RT 196-197.)

Another incident occurred when Ms. Brown was watching one of Mr. Contini's movies in the VCR. Mr. Contini had been out late, and when he came home he was very upset that she was watching one of his movies so he hit her¹². (RT 198.)

¹¹ However, on cross-examination, Ms. Brown agreed that she could not really remember specifics about this incident such as where in the house the incident occurred. (RT 258.)

¹² On direct examination, Ms. Brown testified that during this incident, Mr. Contini hit her with an closed fist and open hand. (RT 198.) However, on cross-examination, she stated that she did not know whether he punched her but said that there was physical contact because "there always was" and admitted that she did not recall the actual fight, stating: "I don't recall the actual fight. But every time there was a fight, I would get hit with a closed hand and open hand. So if you are mentioning a specific fight, I knew. I mean, just because I don't remember, it always happened." (RT 253-

One time Ms. Brown was sitting on the couch and Mr. Contini took a writing pen and started scraping her legs until they bled. (RT 199.) Ms. Brown could not recall what caused this incident and did not state when it occurred. (RT 199.)

255.)

Another incident occurred when she was feeding their son baby food and Mr. Contini became upset about something. He started thumping her with his foot on the back of her head. She ignored him so he spit in her hair. (RT 200.) She stated that the reason Mr. Contini thumped her in the head was to get a "rise" out of her so that she would get upset and then he could do worse things to her. She stated she eventually became upset, and said then he did worse things. (RT 249.)¹³

One time in 1988 she showed some of the bruises inflicted by Mr. Contini to his friend Hayes Reed and told him: "This is what type of friend you have." (RT 216.) Ms. Brown did not remember how Mr. Contini inflicted those bruises on her. (RT 222.) Mr. Reed denied any such incident and stated he never saw any bruises on her body when Mr. Contini was married to her. (RT 397, 407.)

Sometime possibly in 1989¹⁴, Mr. Contini threatened Ms. Brown with a gun by placing the gun near her to scare her. He held her down and then said, "How am I going to kill you?" and "Here's a way I could do that." (RT 201.)

Close to the time she decided to leave Mr. Contini, Ms. Brown recalled an incident

¹³ However, when asked what those worse things were, she said she did not remember and but "that's how it would always be." (RT 249.)

¹⁴ Ms. Brown could not recall the date of this incident, but believed it occurred sometime in 1989. (RT 241-242.)

when she was asleep and Mr. Contini came home late at night and started hitting her in the face with a plunger, causing her nose to bleed. (RT 198.)

The incident that caused Ms. Brown to leave Mr. Contini occurred two weeks before she left in August 1990. During this incident, he beat her severely on the back and on her legs with a hose or stick from a fish tank, leaving black and blue marks. (RT 190, 265.)

When Ms. Brown petitioned for a divorce from Mr. Contini, she prepared a declaration that described Mr. Contini. (RT 260.) In the declaration, she did not mention the gun incident, the WD 40 incident, the Windex incident, the aspirin incident, the slapping when she was pregnant, the lipstick incident, the pen scratching incident, the spitting incident, or the choking with the bathrobe cinch. (RT 262-263.) Ms. Brown did not include all these incidents because her father was present when she was recounting to her attorney the incidents to put in the declaration and she was trying to forget them. (RT 264.)

Ms. Brown never sought medical attention for any of her injuries because she did not have access to the couple's car, she was locked in their house, and was not allowed to have friends. (RT 194.)

A few days after Ms. Brown found out about the baseball bat incident and the 911 incident underlying the present case, she filed for a change from split custody with Mr. Contini to full custody of their son. (RT 555, 558.)

The Prosecution's Evidence Relating to Battered Wife's Syndrome

At the conclusion of the prosecution's case-in-chief, Ms. Susan Huffstutler, the coordination counsel at El Dorado's Woman's Center, testified as an expert in battered woman's syndrome. (RT 368-369.) She explained that the typical battering cycle involves the build-up of tension, resulting in an explosion, which is then followed by a honeymoon stage when the abuser plays part of a wonderful loving partner. (RT 371.) The victim's denial of how bad the abuser is the center of the cycle that holds it all together. (RT 374.) The victim starts accepting responsibility for what happened and takes the blame for the abuse. (RT 374.) The victim starts focusing all of her energy on the abuser so that he will not hurt her again. (RT 375.) The abuser isolates his victim so he is in control and so she believes everything he says. (RT 376.) A victim of such abuse tends to minimize the abuse she is undergoing. (RT 379.) Ms. Huffstutler did not know Mr. or Mrs. Contini or Jenny Brown. (RT 383.)

The Defense's Case¹⁵

Maria and Anthony Contini have been married for ten years and have two children of their own. (RT 416.) In 1998, their marital relationship was going stale and Mrs. Contini began drinking. (RT 422-423.)

On July 22, 1998, the two had gone dancing and drinking and she had consumed five to six "Kamikazes" which she described as being a strong drink. (RT 423.) On the trip

¹⁵ These version of events were given by Maria Contini who was called as a defense witness. (RT 416.)

home they stopped at the grocery store. When they arrived home and started unloading groceries from the car's trunk, Mrs. Contini saw some pictures of Mr. Contini at a recent bachelor's party in the trunk which upset her and made her feel as if she was going to kill her husband. (RT 424.) She took a bat from the trunk and went into the house and hit Mr. Contini twice in the back. (RT 424.) Mr. Contini then jumped up, grabbed her, and a struggle ensued in which the bat hit her left eye. (RT 425-426.) She then fell back on the fireplace which caused bruises to the upper left part of her leg. (RT 426.) She had bruises on her arm, not from the bat, but from Mr. Contini grabbing her and from putting up poles when the Contini family had gone camping. (RT 427-428.)

After this incident, their marriage deteriorated further and she was staying at a hotel and a woman's shelter where she had sought advice about her marital problems. (RT 430, 472.) She was staying at the shelter and at the hotel because she did not want to be around Mr. Contini because they argued, and not because she was afraid for her safety. (RT 484.)

On July 28, 1998, she left the hotel because it was in an unsafe part of Placerville and her children were hungry. She dropped her kids off at the Contini house and went to Safeway alone where she drank three-fourths of a bottle of wine¹⁶. (RT 432.) About one and a half hours later, around midnight, she returned to the Contini house and she and Mr. Contini began arguing in her car in the driveway. Mr. Contini would not give her the

¹⁶ Officer Erhart recalled smelling the odor of alcohol on Mrs. Contini on this date when he met her at the Stamer residence. (RT 133.) When Mrs. Contini spoke to Ms. Brown over the telephone from the Stamer residence, Ms. Brown did not think Mrs. Contini was drunk. (RT 553-554.)

kids because she had been drinking which caused her to become angry and start screaming.

At this point, Mrs. Contini got out of the car and started running towards the Stamer house. (RT 433-434.)

At the Stamer house while on the phone to the 911 dispatcher, she said that she wanted her children back but did not ask for police assistance. (RT 163, 435; ACT 3.) When the officer did arrive, she told him that her husband had hit her with a bat which was "kind of true." (RT 435.) She wanted the officer to retrieve her children from her house which he did. (RT 435.)

Jenny Brown then came to pick Mrs. Contini up and she stayed with Ms. Brown for one night. (RT 436.) Ms. Brown told her that the more Mrs. Contini asserted that she was a battered woman, the more likely it was that she would get custody of her children. (RT 437.) Ms. Brown then helped Mrs. Contini prepare a declaration for a restraining order against Mr. Contini detailing Mr. Contini's past abusive conduct against Mrs. Contini. (RT 437.) At trial, Mrs. Contini stated that almost everything in the declaration was not true. (RT 457.) Ms. Brown denied conspiring with Mrs. Contini to produce a false declaration. (RT 552.)

At various times, Ms. Brown helped pay for a storage shed for Mrs. Contini and helped pay to have Mr. Contini served with the restraining order. Ms. Brown's father gave Mrs. Contini a free eye exam and contact lenses. (RT 439, RT 557.)

Before the case came to trial, Mrs. Contini drafted a letter to the District Attorney's Office which stated that she did not want her husband prosecuted for the assault upon her

and had a friend, Hayes Reed, type up the letter. (RT 497-498.) Both she and Mr. Reed testified that he typed up the letter based on a handwritten copy that Mrs. Contini had given him. (RT 403, 497-498.)

At the time of trial, Mrs. Contini had reconciled with her husband and she wanted to continue their relationship because she still loved him. (RT 499, 511.) In the past she lied so she could get custody of their children. (RT 499.)

ARGUMENT

I.

THE TRIAL COURT ABUSED ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 IN ADMITTING OVER 12 INCIDENTS OF DOMESTIC VIOLENCE ALLEGEDLY PERPETRATED BY APPELLANT AGAINST HIS EX-WIFE NEARLY 10 YEARS AGO.

On March 1, 1999, the prosecution filed an in limine motion to admit, *inter alia*, evidence of acts of violence against Jenny Brown, to whom Mr. Contini was married in 1988. (CT 111; RT 188.) The motion detailed "hitting, kicking, choking, scratching and throwing her down the stairs" and often hitting her with a toilet plunger. The motion specified that on one occasion Mr. Contini sprayed WD40 and Windex in her mouth, forced her to take aspirin, and threatened to kill her. On another occasion, Mr. Contini allegedly held a gun to Ms. Brown's head. Furthermore, the motion stated that Ms. Brown was not allowed to have friends or money, and was required to remain in the house. Finally, the motion indicated that Ms. Brown left the marriage after Mr. Contini beat her with a "device used in a fish tank" which left welts all over her back and legs. (CT 111.) The motion stated that these prior acts of domestic violence were relevant to show that Mr. Contini's motive in assaulting and threatening his victims was to control them. (CT 114.) It further stated that Mr. Contini's prior acts in conjunction with the charged acts showed a common plan or design that he has a controlling, violent nature with respect to the women with whom he has close relationships. (CT 115-116.)

On March 8, 1999, the court heard arguments on the prosecution's in limine

motion. (CT 144, 190.) The defense argued that the evidence of abuse that took place during Ms. Brown's and Mr. Contini's marriage was "stale", the evidence if admitted would come in under a preponderance of the evidence standard which contradicts the beyond a reasonable doubt standard needed to convict in the present case, and the evidence was not timely proposed. (CT 193-194; RT 67.) The defense further argued that Ms. Brown's allegations were not part of their original dissolution of marriage, but surfaced only recently in a custody battle over their mutual son, and that Ms. Brown's father offered Maria Contini money if she would tell lies about Mr. Contini. (CT 198-199.)

The prosecution argued that the evidence was admissible because the abuse against Ms. Brown began in 1989 bringing it within nine years of the present alleged incidents. (CT 195-196.) The court granted the prosecution's request to call Ms. Brown as a witness , noting that the defense's objections to her testimony could be used to impeach Ms. Brown at trial. (CT 199.) The court stated:

"Well, I find that all that is an issue to whether or not the Court lets in the People's case in chief. There may be some very good impeaching evidence of Ms. Brown's testimony. If the jury were to believe these allegations of recent fabrication, and if the jury discounts Jenny Brown's testimony, so be it.

But in terms of allowing the People an opportunity to attempt to prove the case with the assistance of Evidence Code section 1109, a sufficient foundation has apparently been alleged. So my ruling is that I would allow the People to call Jenny Brown as a witness to testify to the prior bad acts that she says were committed by Mr. Contini." (CT 199.)

After hearing arguments on other witness' testimony, the court clarified that it was

granting the People's motion with regard to Jenny Brown based on Evidence Code sections 1109 and 1101, subdivision (b), and "with [Evidence Code section] 352 thrown in for good cause." (CT 202.)

At trial, Ms. Brown testified that the first acts of violence by Mr. Contini towards her occurred in November of 1998 and continued until two weeks before she left him in August of 1990. (RT 190-191.) Despite admitting that her memory was poor as to all the incidents of alleged domestic abuse by Mr. Contini, and that the abuse was "blurred into one big episode of awfulness", Ms. Brown's extensive testimony detailed over 12 incidents of abuse during this time period. (RT 248.) These included Mr. Contini hitting her with a spoon and plunger, spraying WD-40 in her mouth, and forcing her to take a half bottle of aspirin. (RT 193.) After she ingested the aspirin, Mr. Contini became worried and took her to the emergency room under a fake name and told her to say that she tried to commit suicide. When the hospital staff was going to have a psychiatrist come talk to her, Mr. Contini told Ms. Brown they would have to leave. (RT 193, 236, 279-280.)

She recounted one incident that occurred when she was wearing lipstick and Mr. Contini thought she was trying to impress someone so he slapped her, put pillows in her face, used his knees to hold her down, and asked her how he was going to kill her. (RT 197, 258.)

He would hit her if she touched one of his video movies. (RT 197, 253.) Another time Mr. Contini came home late when she was asleep and started hitting her with a plunger causing her nose to bleed. (RT 198.) Another incident she recounted involved

Mr. Contini scraping her legs with a pen until they bled. (RT 199.) On one occasion while she was feeding their child, Mr. Contini spit in her hair. (RT 199.) One Christmas, Mr. Contini choked her with the cinch of her bath robe. (RT 200.) Other times he would threaten her with a gun and ask her how he was going to kill her. (RT 201.) All of these incidents resulted in monthly bruises on her face and her body. (RT 219.) The incident that caused her to leave the marriage occurred when Mr. Contini beat her severely on her back and legs with a stick or a hose from a fish tank. (RT 190.)

She hid the abuse from her family because she was young, ashamed, and felt stupid. (RT 195.) She never sought treatment for her injuries because she was not allowed out of the house except to attend classes at Heald college. (RT 226.) Furthermore, during their entire relationship she was not allowed to have any friends, and did not know her neighbors. (RT 194.) She had no keys to the house, no money, no credits cards, and no phone access. (RT 227.)

Throughout Ms. Brown's testimony, the defense objected because she was relating events in terms of generalities instead of specific instances. (RT 192, 197.) At one point defense counsel stated: "I'm going to object again, your honor, to the general nature of these acts. And more acts than have ever been covered by any of the allegations or the court's order in this regard. *And I ask for a ruling.*" (RT 200, emphasis added.) The court overruled the objection and defense counsel's objection, but noted it would deem the defense's comments a continuing objection. (RT 200.)

Evidence Code section 1109, subdivision (a) permits the introduction of the

defendant's commission of other domestic violence acts in a present case accusing the defendant of domestic violence if "the evidence is not inadmissible pursuant to Section 352." Section 1109, subdivision (e) makes inadmissible evidence of acts occurring more than ten years before the charged offense unless the court determines that the admission of this evidence "is in the interest of justice." Evidence Code section 352 provides:

"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."

The admissibility of evidence of prior acts of domestic violence in a domestic violence prosecution is subject to the trial court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. (People v. Poplar (1999) 70 Cal.App.4th 1129, 1138.)

The trial court has broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time under Evidence Code section 352. (People v. Dyer (1988) 45 Cal.3d 26, 73.) "[T]he record must affirmatively show that the trial court did in fact weigh the prejudicial effect of the evidence against its probative value." (People v. Karis (1988) 46 Cal.3d 612, 637, citing People v. Green (1980) 27 Cal.3d 1, 25.) The exercise of this discretion must not be disturbed on appeal except when the court exercised its discretion in an arbitrary, capricious or absurd manner that resulted in a miscarriage of justice.

(People v. Rodrigues (1994) 8 Cal.4th 1060, 1124-1125; People v. Jordan (1986) 42 Cal.3d 308, 316.)

A. The Trial Court Did Not Perform the Balancing of Probative Value Against Prejudicial Effect Required by Evidence Code Sections 1109, Subdivision (a) and 352.

The trial court gave short shrift to the balancing required to be performed under Evidence Code section 352. Its only mention of the required balancing with regards to Ms. Brown's testimony during the arguments regarding the in limine motions was that its admission of her testimony was based on Evidence Code sections 1109 and 1101, subdivision (b) "[a]nd with [Evidence Code section] 352 thrown in for good cause." (CT 202.) Nowhere in the record of the in limine motion does it demonstrate that the court performed the weighing of probative value against the danger of prejudice with respect to Ms. Brown's testimony required by Evidence Code section 1109, subdivision (a) [evidence of the defendant's commission of other domestic violence acts is admissible if not made inadmissible pursuant to Evidence Code section 352].

As the court in People v. Green, supra, 27 Cal.3d at p. 26 noted:

"the reason for the rule is to furnish the appellate courts with the record necessary for meaningful review of any ensuing claim of abuse of discretion; an additional reason is to ensure that the ruling on the motion 'be the product of a mature and careful reflection on the part of the judge,'.... [Citation]"

In the present case, the statement by the court that the decision to admit Ms. Brown's testimony "with 352 thrown in for good case" does not indicate whatsoever that its decision was the product of mature and careful reflection, but rather indicates that as an

afterthought, the court simply stated that it was partially basing the admission of Jenny Brown's testimony on section 352. Moreover, this is not a case where the court simply failed to provide a precise description of the weighing process in which it engaged under Evidence Code section 352. (People v. Garceau (1993) 6 Cal.4th 140 [even though the court did not state on the record that it had weighed prejudice against probative value, where the parties argued at length about the probative value verses prejudice, and the court took the matter under submission, and denied the defendant's motion to strike issuing a limiting instruction, the record established that the court weighed and rejected the defense's arguments]; People v. Lucas (1995) 12 Cal.4th 415, 448-449 [the trial court does not have to expressly state its reasoning on an Evidence Code section 352 ruling.]

Here, the court's discussion about Ms. Brown's testimony centered on whether it was admissible under Evidence Code section 1109 and 1101. (CT 202.) Thus, the court's indication that it considered Evidence Code section 352 in its decision to admit Ms. Brown's testimony cannot be taken to indicate that it performed the required balancing under Evidence Code section 352.

Furthermore, at trial throughout Ms. Brown's testimony, the defense interposed numerous objections because she was relating events in terms of generalities instead of specific instances. Initially, the prosecution began eliciting information about the general nature of the abuse perpetrated by Mr. Contini against Ms. Brown, and Ms. Brown responded, "Oh, it could have been anything from -". Defense counsel objected on the grounds that Ms. Brown's testimony should be limited to the specific incidents covered in

the prosecution's in limine motion. (RT 192.) The court initially sustained the objection. (RT 192.) However, when Ms. Brown started talking about the manner in which Mr. Contini hit her, namely, with a open or closed fist, defense counsel again objected that the prosecution was eliciting generalities from Ms. Brown, which would be inconsistent with the court's prior ruling. The court overruled the objection. (RT 197.) When the prosecution asked Ms. Brown if there were other incidents where other types of abuse were inflicted, defense counsel again objected, stating: "I'm going to object again, your honor, to the general nature of these acts. And more acts than have ever been covered by any of the allegations or the court's order in this regard. *And I ask for a ruling.*" (RT 200, emphasis added.) The court overruled the objection but noted it would deem defense's comments a continuing objection. (RT 200.)

By overruling the defense's objection to make a ruling on the prior domestic violence acts testimony of Jenny Brown, the court again failed to perform its duty under Evidence Code section 1109 and 352 to weigh the probative value of the prior acts evidence against its prejudicial nature.

B. Even If the Court's Statements Did Rise to the Level of Balancing the Trial Court Abused its Discretion under Evidence Code Section 352 Because the Prior Acts of Domestic Violence Testified to by Ms. Brown Were Minimally Probative and Were Highly Prejudicial.

In People v. Harris (1998) 60 Cal.App.4th 727, 737-738, this court applied section 352 to evidence allegedly admissible under Evidence Code section 1108. Drawing from this court's prior decision in People v. Fitch (1997) 55 Cal.App.4th 172, the Harris court reiterated that "section 1108 passes constitutional muster if and only if section 352 preserves the accused's right to be tried *for the current offense*. '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, *supra*, 60 Cal.App.4th at p. 737, quoting United States v. Myers (5th Cir. 1977) 550 F.2d 1036, 1044.) Gleaning several relevant factors from the case law used to judge whether uncharged misconduct evidence should or should not be admitted under section 1101, subdivision (b), in the face of a section 352 objection, the Harris court concluded that the trial court erred in admitting evidence of a prior rape under section 1108. The court's analysis was directly preceded by the following language:

"In a case addressing the use of other crimes evidence under sections 1101 and 352, the California Supreme Court has stated that 'because other crimes evidence is so inherently prejudicial, its relevancy is to be 'examined with care. [¶] . . . [I]t is inadmissible if not relevant to an issue expressly in dispute [citation], if 'merely cumulative with respect to other evidence which the People may use to prove the same issue' [citation], or if more prejudicial than probative under all the circumstances.'" (People v. Harris, *supra*, 60 Cal.App.4th at p. 737, quoting People v. Alcala (1984) 36 Cal.3d 604, 631-632.)

Here, the trial court did not engage in the weighing process required by the statute, which allows propensity evidence into the record only when not barred by section 352. (Evid. Code, § 1109, subd. (a).) This is apparent as the analysis below demonstrates.

1. Strength and Inflammatory Nature of the Uncharged Misconduct Evidence

The first section 352 factor discussed in Harris was the inflammatory nature of the prior misconduct evidence. (People v. Harris, *supra*, 60 Cal.App.4th at p. 737, quoting People v. Ewoldt (1994) 7 Cal.4th 380, 405 [it is important to determine whether "[t]he testimony describing defendant's uncharged acts ... was no stronger and no more inflammatory than the testimony concerning the charged offenses"].)

The testimony of the uncharged acts against Jenny Brown encompassed over 12 incidents of domestic abuse perpetrated by Mr. Contini. These incidents include hitting Ms. Brown with a spoon and plunger, spraying WD-40 in her mouth, forcing her to take a half bottle of aspirin, slapping her, putting pillows in her face, asking her how he was going to kill her, scraping her legs with a pen, spitting on her hair, choking her with the cinch of her bathrobe, and severely beating her on her back and legs. (RT 190-191, 193, 197-201, 253, 258.)

In contrast, the case at hand charged Mr. Contini with counts arising from two incidents: one, the beating of his wife with a baseball bat; and two, the battery of his wife when he grabbed her arm as they were arguing in the driveway of their house. (CT 82-85.)

The testimony regarding these acts were no where near as extensive or descriptive as the testimony relating the violence that Ms. Brown suffered.

As to the baseball bat incident, Officer Erhart testified that Mrs. Contini had told him that her husband punched her in the face, and struck her in the upper arms and thighs with a baseball bat, and told her that he would have killed her if he had not thrown out his back. (RT 109, 409-410, 415.) However, Mrs. Contini testified that she was the initial aggressor with the bat. She hit her husband with it twice in the back and she was struck as the two of them were struggled. (RT 424-426.)

As to the battery incident in the driveway, Officer Erhart testified that when Mrs. Contini dropped off her children at the Contini house, her husband entered the car and they began conversing cordially at first but then he grabbed her arm so she fled in her car. (RT 115.) Mrs. Contini testified that she had been drinking at the time and was screaming at Mr. Contini and that her husband grabbed her arm or wrist but did not push her. (RT 433-434, 453.) Officer Erhart confirmed that Mrs. Contini smelled of alcohol. (RT 133.)

The testimony of Mr. Contini's ex-wife concerning the uncharged offense was much stronger and more inflammatory than the testimony of the charged acts. Ms. Brown's testimony covered in detail over 12 allegations of violence. They included detailed beatings and abuses with various objects including pillows, pens, guns, and a bath robe cinch, while the testimony of the charged acts covered only two acts, one, a minimal battery, and the other, a beating with a baseball bat. Given the disparity in the number of episodes and the highly descriptive nature of Jenny Brown's testimony as compared with the testimony of the charged acts in this case, the inflammatory nature of the uncharged acts was great and thus, this factor weighed heavily in favor of exclusion.

2. Significant probability that the jury was confused by this evidence

The next factor considered by this court in Harris involved the probability of confusion. (People v. Harris, supra, 60 Cal.App.4th at p. 738.) As the court warned in People v. Ewoldt, supra, 7 Cal.4th at p. 405, the fact that the defendant's uncharged acts did not result in criminal convictions "increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues' (Evid. Code, § 352), because the jury had to determine whether the uncharged offenses had occurred."

Here, Ms. Brown testified that she hid the abuse because she was young, ashamed, and felt stupid and did not mention many incidents in the declaration she had written in the family law case regarding custody of their son because she did not want her father to know. (RT 195, 260-263.) Thus, it was likely that the jury could have been punishing Mr. Contini for the uncharged acts and not the charges for which he was on trial. Again, this factor weighed on the side of excluding the evidence.

3. Remoteness

The next factor considered in Harris was remoteness. (People v. Harris, supra, 60 Cal.App.4th at p. 739.) In Harris, the court concluded that although there is no bright-line rule, a twenty-year-old act meets any reasonable threshold test of remoteness. In People v. Poplar (1999) 70 Cal.App.4th 1129, another case dealing with the admissibility of evidence under Evidence Code sections 1109 and 352, this court held that the

admissibility of uncharged acts that took place one year and two years before the charged crime was "relatively recent." (Id. at p. 1140.) Evidence Code section 1109, subdivision (e) also provides guidance on what constitutes remoteness, as it makes inadmissible evidence of acts occurring more than ten years before the charged offense unless the court determines that the admission of this evidence "is in the interest of justice."

Ms. Brown recounted events that occurred almost ten years prior to the two incidents for which Mr. Contini was being tried in this case. (RT 190-191.) Thus, it barely missed being subject to the "interest of justice" test in section 1109, subdivision (e), but definitely cannot be said to be "relatively recent." Thus, the remoteness factor also weighed in favor of exclusion.

4. *Consumption of time*

The Harris court also found consumption of time relevant to a section 352 analysis under section 1108. (People v. Harris, supra, 60 Cal.App.4th at p. 739.) In People v. Poplar, supra, 70 Cal.App.4th at p. 1139, this court ruled that 35 pages of prior act testimony for two witnesses was appropriate. Here, Ms. Brown's testimony consisted of over 100 pages of trial testimony and included her version of over 12 incidents involving domestic violence between her and Mr. Contini over a two year span. (RT 188-287, 551-559.) That is about 3 times the page length in Poplar and covered only one person's testimony. Furthermore, Ms. Brown's testimony consumed more time than any other witness, including the alleged victim, Maria Contini. (RT 188-287, 551-559 [the pages consisting of Jenny Brown's testimony], RT 416-519 [the pages consisting of Maria Contini's testimony].) Thus, the consumption of time also weighed in favor of exclusion.

5. *Probative value*

To assess probative value, materiality and necessity are important. The other crimes evidence must tend logically and reasonably to prove the issue upon which it is offered. That is, the other crimes evidence must prove the issue's materiality to the prosecution's case, and not be merely cumulative. (People v. Stanley (1967) 67 Cal.2d 812, 818-819; People v. Harris (1998) 60 Cal.App.4th 727, 739-740.)

Here, Ms. Brown's testimony, if believed, tended to show Mr. Contini's violent behavior towards his domestic partners. On that broad issue, it could be argued that Ms. Brown's testimony was probative of the two incidents allegedly perpetrated by Mr. Contini

against Mrs. Contini. The problem lies with the fact that although the evidence may have been probative of Mr. Contini's violent behavior to his spouses, the probative value was substantially outweighed by prejudice as is demonstrated in the four factors that weighed heavily in favor of exclusion of Ms. Brown's testimony: strength and inflammatory nature of Ms. Brown's testimony; confusion of the issues; remoteness; and consumption of time. Thus, the trial court abused its discretion in admitting Ms. Brown's testimony.

C. Mr. Contini Was Prejudiced By the Admission of Ms. Brown's Testimony Concerning His Alleged Act of Domestic Violence Against Her.

In order to avoid the due process violation inherent in trying a person for who he is rather than for what he did, a proper section 352 analysis of evidence admissible under section 1109 is imperative. (Cf. People v. Fitch (1997) 55 Cal.App.4th 172, 183 [Evidence Code section 352 provides a check upon the admission of evidence of uncharged sex offenses in prosecutions for current sex crimes].)¹⁷

Furthermore as federal law makes clear, the introduction of relevant evidence

¹⁷ See also People v. Johnson (Jan. 5, 2000, C028945) __ Cal.App.4th __ [2000 D.A.R. 185, 188] [The trial court's discretion to exclude prior acts evidence under Evidence Code section 352 saves Evidence Code section 1109 from defendant's due process challenge]; People v. Hoover (Jan. 27, 2000, E020011) __ Cal.App.4th __ [2000 D.A.R. 1079, 1081] [Evidence Code section 352 serves as a check for the admission of evidence of other offenses in prosecutions for crimes of domestic violence, and thus, 1109 does not violate due process].)

offends the due process clause if the evidence is so prejudicial that it renders the defendant's trial fundamentally unfair. (Estelle v. McGuire (1991) 502 U.S. 62, 68-70 [112 S.Ct. 475, 480-481, 116 L.Ed.2d 385]; Payne v. Tennessee (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 2608, 115 L.Ed.2d 720].) When that analysis under section 352 fails or is never made, that failure rises to a constitutional violation requiring application of the test under Chapman v. California (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], which burdens the People or this court with showing and finding the error harmless beyond a reasonable doubt.

However, even when measured by the "miscarriage of justice" standard, it is reasonable probable that absent the propensity evidence, it is likely that a more favorable outcome would have resulted. (People v. Harris, *supra*, 60 Cal.App.4th at p. 741; Cal. Const., art. VI, § 13; People v. Watson (1956) 46 Cal.2d 818.)

The jury was introduced to the prior acts evidence early on in the prosecutor's opening statement: "You will hear from the ex-wife of Mr. Contini, who will relate during the course of her relationship with Mr. Contini she suffered a great deal of abuse at his hands." (RT 101.)

Then the jury heard the overwhelming nature description of Ms. Brown's testimony of over 12 acts for which Mr. Contini had never been previously charged and Ms. Brown had never reported except once to Mr. Reed who denied seeing signs of abuse and once to a 911 dispatcher but then recanted the allegation. (RT 202, 397.) On the other hand, the jury heard the somewhat undetailed testimony relating to the two charged acts perpetrated

against Mrs. Contini.

Finally, in the prosecution's closing statement, the prosecutor meticulously covered the details of the alleged abuse that Ms. Brown suffered at Mr. Contini's hands:

"Mr. Contini preys on vulnerable people, and he has found at least two people that you have seen here in this courtroom to prey upon, two people who were in the right place at the right time, who were vulnerable people that he could, in fact, inflict his power and his control upon, Jenny Brown and Maria Contini.

Fortunately for Jenny Brown, that cycle of violence ended. She was able to break it and to get away. Fortunately for herself and her son.

Jenny Brown told us stories, ladies and gentleman, that but for the fact that you had also heard Ms. Huffstutler's experience in counseling domestic violence victims, working with domestic violence victims, you might not have really considered or been aware that an individual human being could have so much power and so much control over another human being, that they can essentially work the other human being like a puppet or a puppet string.

You heard Jenny Brown telling you how when she was married to Anthony Contini she had no friends. She wasn't allowed out of the house. She couldn't get the keys to the car. She was essentially a prisoner in her own home. He did not want her to have outside contacts, even contacts with her own family members.

Jenny told you about specific acts, ladies and gentleman, that I think are very important, not so much for the big picture that she was abused, but for the little details.

For example, the incident that Jenny relayed about the plunger where the defendant had taken a plunger to her and beat her, and I believe that was - what she testified was the last act, the act that finally motivated her to make the break and to get away from him.

Now, when she told us about that plunger incident, what did she tell you? She said that the defendant had hit her with the plunger and that it got blood on the carpet when she bled, and he got mad and made her clean her

own blood off the carpet.

And when we talk about, ladies and gentleman, someone who is so incensed with power over another human being, the things that would trigger the defendant to get mad, to trigger the defendant to act out in an abusive manner towards Jenny Brown because she had worn a brown lipstick to her class, that he thought somehow she was being provocative towards the other students, that she watched a movie that was his movie.

These are the little things that show the degree of power that Mr. Contini had over Jenny Brown at that time.

Jenny Brown - even in her testimony to this court, you could see, I believe, certain aspects of that whole mind-set that she was in back then.

When she was talking about the time she went to the hospital and she was asked, I believe, by defense counsel, well, what did you tell the psychiatrists, or didn't you talk to a psychiatrist? And she said, oh, I wouldn't be allowed to do that.

And I mean it's like she was going back to that mind-set of that period of time where - well, of course you don't talk to anyone outside about what's going on. And you don't let that secret out, such power and control, ladies and gentleman.

But fortunately for Jenny Brown, she was able to get out of it and even to this day she told us she is embarrassed about that part of her life, that she was young, that she was stupid, that she would have done things differently if she could have.

But fortunately, ladies and gentleman, none of us are going to be judged in our entire lives on what we did in our late teens and 20s.

But for Jenny Brown, that mistake obviously was one of a serious nature, and fortunately for her she broke out of it.

That same power and control, ladies and gentleman, has been exercised over Maria Contini. And whether and how that cycle of violence will end for Maria Contini, ladies and gentleman, is yet to be seen. That has yet to be determined." (RT 604-606.)

Later on in the closing statements, the prosecutor reminded the jury: "And again,

it's those little details that I think are very telling. Just like how Jenny Brown told us that when she - when the blood - when she got hit with the plunger and the blood is on the rug, that Mr. Contini is mad about there being blood on the rug and now she's got to clean it up." (RT 632.)

Some of the prosecutor's other remarks in her closing statement intimated that it was up to the jury to stop not only the abuse in this case, but also in the case of Jenny Brown: "And at some point, ladies and gentleman, the cycle of violence for Maria Contini has to stop. Anthony Contini had to get it through his head that he can't just keep doing this, that he can't go and find another Jenny or another Maria. It's not okay." (RT 641.)

Similarly, in the prosecutor's rebuttal closing argument, the prosecutor hinted that the jury should hold Mr. Contini responsible for actions not only against Maria Contini, but also for his actions against Jenny Brown:

"It's about, ladies and gentleman, Anthony Contini taking responsibility for his actions. You beat somebody up, that is wrong. You have to have a consequence because that's not acceptable, and without consequence.

And you can see, for two years Jenny Brown didn't say anything. She didn't say anything of what happened. He kept doing it. Maria Contini for seven years. What's happening? He keeps doing it." (RT 693.)

In sum, given the voluminous and prejudicial nature of Ms. Brown's testimony at trial and the prosecutor's closing remarks which reinforced the inflammatory nature of the acts against Jenny Brown, and the fact that Mr. Contini had not been held accountable for

them, it is "reasonably probable" that a result more favorable to appellant would have resulted had it not been for Jenny Brown's uncharged acts testimony. (People v. Watson, supra, 46 Cal.2d 818; People v. Harris, supra, 60 Cal.App.4th at p. 741.) This is especially true because here, the purported victim of the current incidents, Maria Contini, testified that the events did not unfold as she had previously reported, and had lied in order to get custody of her and Mr. Contini's children. (RT 499.) Part of her testimony concerning the nature in which the acts truly unfolded, namely that the fight the day of the 911 incident occurred when she had been drinking, was corroborated by Officer Erhart who testified that he smelled the odor of alcohol on Mrs. Contini that night. (RT 133.) Thus, without the prior bad acts testimony, it cannot be said that a result more favorable to appellant would not have resulted and appellant's conviction must be reversed.

II.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY PURSUANT TO THE 1997 VERSION OF CALJIC 2.50.02 WHICH VIOLATED APPELLANT'S RIGHTS UNDER THE DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The crimes for which Mr. Contini was found guilty occurred on July 22, July 28, and July 29, 1998, and his jury trial commenced on August 24, 1999. (CT 82-85, 235.) As to the testimony of other acts of domestic violence perpetrated against Jenny Brown heard at trial, the trial court instructed the jury with the 1997 version of CALJIC 2.50.02:

"Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in this case.

Domestic violence means an abuse committed against an adult who is a spouse, former spouse, cohabitant, former cohabitant or person with whom the defendant has a child or is having or has had a dating or engagement relationship.

Abuse means intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable apprehension of eminent serious bodily injury to himself or herself or another.

If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type of offense.

If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes for which he is accused. You may not consider this evidence for any other purpose." (CT 264; RT 591.)

At the time of trial, CALJIC 2.50.02 had been revised to add the following penultimate paragraph to the above instruction:

"However, if you find [by a preponderance of the evidence] that the

defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged offense[s]. The weight and significance, if any, are for you to decide."

The court erred in instructing the jury on the 1997 version of CALJIC 2.50.02, which instructed the jury that if it found that the defendant committed the prior offense he was likely to have committed the charged offense. Mr. Contini is entitled to reversal of his conviction as this instruction, even when viewed as a whole with other instructions, allowed a conviction without requiring proof beyond a reasonable doubt of his guilt in the present charged offenses.

A. CALJIC's 1997 version of 2.50.02 is constitutionally infirm because it allows the jury to infer guilt and make a finding on a standard less than reasonable doubt.

The 1997 version CALJIC No. 2.50.02 states in relevant part: "If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes for which he is accused." (CALJIC No. 2.50.02 (6th ed. 1998 pocket pt.).)

In People v. Soto (1998) 64 Cal.App.4th 966, 989, the Fifth District Court of Appeal accepted the premise that a person who had committed a prior sexual offense is more likely to have committed the charged sexual offense than a person who has not committed a prior sexual offense. Soto cited United States v. Guardia (10th Cir. 1998) 135 F.3d 1326, 1328 for the proposition that a "defendant with a propensity to commit

acts similar to the charged crime is more likely to have committed the charged crime than another."

However, the 1997 version of CALJIC 2.50.02 does not tell the jury that a person who has committed a prior domestic violence offense is more likely to have committed the charged domestic violence incident than a person who has not committed a past incident of domestic violence, as discussed in Soto. Instead, the 1997 version of CALJIC No. 2.50.02, as given in this case, instructed the jury that a person who has committed a prior domestic violence offense is likely to have committed the charged offense. Under this instruction, if the jury found that the defendant committed the past offense, it does not have to deliberate any further; it may find that he is likely to have committed this offense. This instruction is not a correct statement of law as it subverts the Fifth Amendment's due process requirement that proof of guilt be beyond a reasonable doubt by allowing an inference of guilt solely upon a showing that the defendant committed the prior acts. (In re Winship (1970) 397 U.S. 358, 361-364 [81 S.Ct. 1684, 6 L.Ed.2d 1081].)

In People v. Vichroy (1999) 76 Cal.App.4th 92, 99, petition for review filed December 14, 1999, the Second District Court of Appeal agreed that language found in the old version of CALJIC No. 2.50.01 for prior sexual offenses which is analogous to that given at Mr. Contini's trial, rendered the instruction constitutionally infirm.

The language at issue in Vichroy was: "If you find that the defendant had this disposition, **you may, but are not required to, infer that [he] was likely to commit and did commit the crime [or crimes] of which [he] is accused.**" (People v. Vichroy, *supra*, 76

Cal.App.4th at p. 99, emphasis in original.) The analogous language given at Mr. Contini's trial was: "If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes for which he is accused...." (CT 264; RT 591.)

The Vichroy court reasoned that "[t]he constitutional infirmity arises in this case because the jurors were instructed that they could convict appellant of the current charges based solely upon their determination that he committed the prior sexual offenses. CALJIC No. 2.50.01, as given, required no proof at all of the current charges." (People v. Vichroy, *supra*, 76 Cal.App.4th at p. 99.) As an almost identical jury instruction was given in Mr. Contini's trial, the same constitutional infirmity resulted.¹⁸

¹⁸ Appellant is aware that the First, Fourth, and Fifth Districts have recently rejected Vichroy's result in published decisions. (People v. Brown (Feb. 1, 2000, A083896) __ Cal.App.4th __ [2000 D.A.R. 1271, 1274]; People v. Regalado (Jan. 31, 2000, G023383) __ Cal.App.4th __ [2000 D.A.R. 2277, 2279]; People v. O'Neal (Feb. 29, 2000, F030228) __ Cal.App.4th __ [2000 D.A.R. 2361, 2369].) However, as the California Supreme Court has not ruled on the veracity Vichroy and has supported the revised version of CALJIC 2.50.01 in People v. Falsetta (1999) 21 Cal.4th 903, 920 (see discussion *infra*) appellant urges this court to hold in his favor based on the infirmity of the 1997 version of CALJIC 2.50.02. See also People v. Orellano (March 20, 2000,

B131860) __ Cal.App.4th __ [2000 D.A.R. 3013], agreeing with the conclusion in Vichroy.

The error of the 1997 version of the instruction is highlighted by the fact that the opinion in People v. Falsetta (1999) 21 Cal.4th 903, 920, notes that the *revised* edition of CALJIC No. 2.50.01¹⁹ "will help assure that the defendant will not be convicted of the charged offense merely because the evidence of his other offenses indicates he is a 'bad person' with a criminal disposition." Keeping in mind that the court's decision in Falsetta did not pass on the veracity of each paragraph of the revised instruction, it did view the revised instruction on the whole as "adequately set[ting] forth the controlling principals under section 1108." (Id. at p. 924.)²⁰ Thus, because the 1997 version of CALJIC 2.50.02 omitted such language and left open the possibility that Mr. Contini was convicted of the charged offenses because of the prior acts evidence, the trial court erred in giving the jury this instruction.

¹⁹ CALJIC No. 2.50.01 revised is the prior sex offense instruction that is analogous to the revised CALJIC No. 2.50.02 for prior domestic violence which contains the language *inter alia*, that "if you find [by a preponderance of the evidence] that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove [beyond a reasonable doubt] that [he] [she] committed the charged crimes[s]."

²⁰ Furthermore, Falsetta's endorsement of the 1999 version of this jury instruction was recently noted by the First District Court of Appeal in People v. Brown

(Feb. 3, 2000; A083896) __Cal.App.4th __[2000 D.A.R. 1271, 1273-1274].

B. Even When the Trial Is Viewed as a Whole, it Is Likely That Appellant Was Found Guilty on the Current Charges on Less than Proof Beyond a Reasonable Doubt and Because the Jury Found the Prior Acts to Be True.

To determine whether there is a reasonable likelihood the jury understood the instructions as appellant asserts, the reviewing court considers the entire record of the trial including other jury instructions and closing arguments made to the jury. (People v. Carpenter (1997) 15 Cal.4th 312, 383; People v. Van Winkle (1999) 75 Cal.App.4th 133, 142-143; People v. Cain (1995) 10 Cal.4th 1, 36.)

In the present case, the jury was instructed, *inter alia*, pursuant to CALJIC Nos. 1.01 (instructions to be viewed as a whole), 2.01 (sufficiency of circumstantial evidence), 2.50.02 (evidence of other domestic abuse acts), 2.90 (reasonable doubt), 9.35 (spouse or cohabitant beating), 9.02 (assault with a deadly weapon), and 16.140 (battery). (CT 249, 254, 264, 270, 274, 276, 281.)

Although the jury was instructed to consider the instructions as a whole (CT 249), was instructed on the presumption of innocence and reasonable doubt (CT 270) and on the sufficiency of circumstantial evidence including the requirement that each fact on which an inference rests must be proved beyond a reasonable doubt (CT 254), nothing in these instructions, or anything in CALJIC 2.50.02, informed the jury that they could not convict appellant of the current charges simply because they concluded he committed a prior offense involving domestic violence.

Moreover, the older version of CALJIC No. 2.50.02 given in this case²¹ conflicts

with the reasonable doubt instruction, CALJIC No. 2.90, because No. 2.90 requires a presumption of innocence unless the People prove the defendant guilty beyond a reasonable doubt while No. 2.50.02 allows a finding of guilt based on a "disposition" and a likely to commit" standard. Appellant submits that such an error makes the conviction reversible per se (see Sullivan v. Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182]) or at least should require an analysis of prejudice under Chapman v. California, *supra*, 386 U.S. at p. 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

Even though the jury was instructed on reasonable doubt, it cannot be supposed that this instruction overcame the contrary instructions the jury received in the form of CALJIC 2.50.02. (See, e.g., Sandstrom v. Montana (1979) 442 U.S. 510, 520-524 [99 S.Ct. 2450, 61 L.Ed.2d 39] [instruction which lightened the State's burden of proof violated due process despite proper reasonable doubt instruction].)

"It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. [Citations.] But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." (Sandstrom v. Montana, *supra*, 442 U.S. at p. 518, fn. 7 [99 S.Ct. 2450, 61 L.Ed.2d 39].)

The giving of a general reasonable doubt instruction does not act as a cure-all for instructions that are contrary to that instruction:

“A specific instruction which is defective in respect to the burden of proof is not remedied by correct general statements of law elsewhere given in the

charge unless the general statement clearly indicates that its consideration must be imported into the defective instruction.’ DeGroot v. United States, 78 F.2d 244, 253 (9th Cir. 1935) (internal citations omitted).” (United States v. Sanchez-Lima (9th Cir. 1998) 161 F.3d 545, 549; and see Francis v. Franklin (1985) 471 U.S. 307, 319 [105 S.Ct.1965, 85 L.Ed.2d 344]; and see id. at p. 322 [“Language that merely contradicts and does not explain a constitutionally infirm instruction will not absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.”].)

Here, the jury could have read CALJIC No. 2.90 together with CALJIC No. 2.50.02 as meaning that, if they had concluded that appellant was probably a wife beater, they could find him guilty of the current offense beyond a reasonable doubt.

Finally, when looking at the closing arguments made by the prosecution, it becomes even more apparent that the jury must have believed that it could find Mr. Contini guilty because of the prior acts against Jenny Brown, and, thus, on less than proof beyond a reasonable doubt of the current charges. In closing statements, the prosecutor's comments about the acts allegedly perpetrated against Ms. Brown by Mr. Contini took up over seven pages and emphasized propensity for Mr. Contini to act towards Maria Contini as he did towards Jenny Brown. (RT 604-606, 632, 641, 693.)

For example, the prosecutor repeatedly juxtaposed Jenny Brown and Maria Contini's situations seeming to note that since one of them was his victim, the other one was as well: "Mr. Contini preys on vulnerable people, and he has found at least two people that you have seen here in this courtroom to prey upon, two people who were in the right place at the right time, who were vulnerable people that he could, in fact, inflict his power and his

control upon, Jenny Brown and Maria Contini." (RT 604.)

As another example, the prosecutor described in detail some of the incidents against Ms. Brown and then stated, "the same power and control, ladies and gentleman, has been exercised over Maria Contini" (RT 606.) Later on, the prosecutor stated, "And you can see, for two years Jenny Brown didn't say anything. She didn't say anything of what happened. He kept doing it. Maria Contini for seven years. What's happening? He keeps doing it." (RT 693.)

In sum, the prosecutor's closing remarks indicating to the jury that he first abused Jenny Brown and thus, he must have abused Maria Contini, and the irreconcilability of CALJIC No. 2.90 and CALJIC No. 2.50.02 as given, make it speculative to conclude the error did not prejudice appellant. Accordingly, appellant's conviction should be reversed.

III.

THE FAILURE OF THE COURT TO INSTRUCT THE JURY ON CALJIC No. 2.50.1, NAMELY, THAT THE PROSECUTION HAD THE BURDEN OF PROVING APPELLANT'S PRIOR ACTS BY A PREPONDERANCE OF THE EVIDENCE, REQUIRES REVERSAL .

At Mr. Contini's trial, the jury was not instructed on how to assess the evidence presented by Jenny Brown. Specifically, the jury was not told that the prosecution had the burden of proving by a preponderance of the evidence that Mr. Contini committed the acts of domestic violence against Ms. Brown. Because the court failed to instruct that the prosecution had the burden to prove by a preponderance of the evidence that Mr. Contini committed the prior acts, his conviction must be reversed. (CALJIC No. 2.50.1 (6th ed. 1996).)²²

In this case, the trial court instructed the jury using the 1997 version of CALJIC 2.50.02, which read, in part:

"Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in this case....

If you find that the defendant committed a prior offense involving domestic violence, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type of offense.

If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes for which he is accused. You may not consider this evidence for any other purpose." (CT 264; RT 591.)

The above instruction gave the jury no guidance at all by what standard it was to find that the defendant committed the prior acts of domestic violence, or whose

duty is was to offer such proof. It simply instructed that jury that if it found (with no mention of the standard of proof by which the finding must be made) that Mr. Contini committed a prior offense involving domestic violence it could infer that he had the disposition to commit the same or similar offense.

A. The Court Had a Duty to Instruct the Jury on CALJIC No. 2.50.1 Sua Sponte.

The Evidence Code and case law establish that the court has a duty to instruct the jury as to who bears the burden of proof on each issue. Evidence Code section 502 requires that the court:

"shall instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt."
(Evid. Code, § 502.)

Evidence Code section 115 defines "burden of proof" as "the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

Instructions which tell the jury to consider prior acts evidence only if it found them by a preponderance of the evidence are instructions which affect a defendant's substantial rights. (People v. Carpenter (1997) 15 Cal.4th 312, 381.) Therefore, this court may review the trial court's error in failing to give CALJIC No. 2.50.1 despite the defendant's failure to ask at trial that this instruction be given. (Pen Code, § 1259 [the appellate court may review any instruction refused even though no objection was made thereto, if the

substantial rights of the defendant were affected thereby].)

Any suggestion that such a duty is permissive must be disapproved. Specifically, the Use Note to CALJIC No. 2.50.1 (6th ed. 1996) page 96, states: This instruction should be given, if requested by a party, citing People v. Simon (1986) 184 Cal.App.3d 125, 134. However, the Use Note misapplies Simon. In Simon, the defendant was convicted of second degree murder. Over defense objections, the prosecution introduced evidence of an earlier, uncharged incident in which the defendant had drawn a gun on another man in the apartment to rebut defendant's present claim of self-defense. The Fourth District Court of Appeal reversed the conviction and stated that on remand the trial court must make a preliminary finding of fact under Evidence Code section 403 to determine by a preponderance of the evidence if jealousy (rather than defense of a friend) motivated the earlier uncharged incident. If so, evidence of that incident would be admissible to rebut the claim of self-defense by tending to suggest the instant homicide was likewise motivated by jealousy. However, this case is specific to its facts only and should not be extended to cover the case at hand. In fact, the Simon court acknowledged that the other acts evidence in that case was atypical because the defendant admitted the fact of the earlier assault but contended his motive for the prior assault made the prior incident irrelevant. (Id. at p. 130-131.) Thus, as the Simon court itself acknowledged that the case presented atypical other acts evidence, the case should not be used to impose duties in other cases.

Further, the language from which the Use Note was extracted does not even deal with all the components of No. 2.50.1. Simon says:

"[O]n retrial, the trial court should first determine whether the evidence of the Ashton incident is sufficient to allow the jury to determine by a preponderance standard that Simon's assault on Ashton was motivated by jealousy. *If it does so determine, the court may and if requested must instruct the jury that unless it determines by a preponderance of the evidence that Simon's motivation was jealousy, it must disregard the evidence of the Ashton incident.*" (Id. at p. 134, emphasis added.)

This language does not, as the Use Note indicates, stand for the permissive giving of CALJIC No. 2.50.1. The quoted language is simply not analogous to No. 2.50.1. The quoted language in Simon does not even address that the gist of 2.50.1, that *the prosecution* had the burden of proof regarding the other acts testimony. Thus, one cannot say that there is no sua sponte duty to give CALJIC No. 2.50.1 based on Simon, as Simon does not even cover a substantial portion of CALJIC No. 2.50.1.

In sum, as most cases involving other acts evidence are not at all like Simon, and a failure to assign the burden of proof to the proper party violates appellant's fundamental rights, the court had a sua sponte duty to instruct on CALJIC No. 2.50.1

B. The Court's Failure to Give CALJIC No. 2.50.1 Requires Reversal Per Se.

In People v. Carpenter, *supra*, 15 Cal.4th 312, 382, the court in ruling that the preponderance of evidence standard rather than the clear and convincing evidence standard applies to prior acts evidence, noted the following:

"The preponderance of the evidence standard adequately protects defendants. Once the other crimes evidence is admitted, whatever improper prejudicial effect there may be is realized whatever standard is adopted. If the jury finds by a preponderance of the evidence that the defendant committed the other crimes, the evidence is clearly relevant and may therefore be considered. (Citations omitted.)" (Ibid.)

Here, Mr. Contini did not receive the protection of any standard of proof when his prior acts evidence was admitted at trial. The detrimental effect of a failure to instruct on the requisite burden of proof in criminal cases is demonstrated by a review of case law dealing with the court's failure to give the reasonable doubt instruction at the trial of a criminal defendant. In People v. Phillips (1997) 59 Cal.App.4th 952, the Second District Court of Appeal held that the trial court's error in failing to give reasonable doubt instructions rose to the level of a structural constitutional defect and required reversal per se. (Id. at p. 957-958.) It was irrelevant that the prosecution and defense both purported to define reasonable doubt during their closing arguments because their conflicting definitions were bound to have confused the jury. (Id. at p. 958.) Similarly, in People v. Crawford (1997) 58 Cal.App.4th 815, the First District Court of Appeal held that the trial court's error in failing to instruct on the requirement of proof beyond a reasonable doubt and in failing to assign the burden of proof to the prosecution required reversal per se because it denied "to appellant the most elementary and fundamental right provided by our system of justice, a jury verdict of guilty beyond a reasonable doubt." (Id. at p. 823-824.)

In the case at hand, by failing to instruct the jury that the prosecution carried the burden of proving the other acts evidence by a preponderance of the evidence and by giving the 1997 version of CALJIC No. 2.50.01, which allowed the jury to infer Mr. Contini's guilt of the current offense based on its finding "that the defendant committed a prior offense involving domestic violence" (CT 264, RT 591), the court committed error

rising to the level of a structural constitutional defect compelling reversal of Mr. Contini's conviction per se. The court in People v. Phillips, supra, 59 Cal.App.4th at p. 956-957, cited Sullivan v. Louisiana (1993) 508 U.S. 275 [113 S.Ct. 2078, 124 L.Ed.2d 182] for the proposition that a constitutionally deficient reasonable doubt instruction is not amenable to a harmless error analysis and requires reversal per se because of the "interrelationship between the Fifth Amendment's requirement that the People prove a criminal case beyond a reasonable doubt, and the Sixth Amendment's guarantee that a defendant is entitled to a jury trial. (People v. Phillips, supra, 59 Cal.App.4th at p. 956.)

Here, the failure to instruct on the prosecution's burden of proof by preponderance of the evidence of the prior acts evidence directly impacted the prosecution's duty to prove the current charges beyond a reasonable doubt. This is due to the court's erroneous giving of the old version of CALJIC No. 2.50.02, which allowed the prior acts evidence to be used to infer that Mr. Contini committed the present crimes, coupled with the court's failure to give CALJIC No. 2.50.1. Once the jury was misinformed, or as the case was here, not informed as to how to deal with the prior acts evidence, but was then told it could use the prior acts evidence to determine Mr. Contini's guilt of the present crimes, structural error occurred as "the framework in which the trial proceeds" was detrimentally affected. (Arizona v. Fulminante (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302] [errors which are structural in nature, i.e. errors so fundamental that they affect "the framework in which the trial proceeds, rather than simply an error in the trial process itself," defy harmless error analysis and require automatic reversal].)

C. Even Under a Harmless Error Analysis, Appellant Was Prejudiced By the Court's Failure to Give CALJIC No. 2.50.1.

Even under the more deferential standard of review of People v. Watson, *supra*, 46 Cal.2d at p. 818, which requires an error to be deemed harmless unless it is reasonably probable that the result would have been more favorable to the defendant in the absence of the error, the court's failure to give CALJIC 2.50.1 prejudiced Mr. Contini.

The other acts testimony given by Jenny Brown was suspect as it was inconsistent as to dates and specifics, was not corroborated by anyone, and was possibly motivated by her desire to obtain full custody of the child Mr. Contini and Ms. Brown share. However, because the jury was never informed as to how to deal with the prior acts testimony, namely, that the prosecution had the burden of proving by a preponderance of the evidence that such acts did in fact occur, and Ms. Brown's testimony was suspect, appellant was prejudiced.

Ms. Brown's testimony was replete with inconsistencies as to dates and places of when certain alleged beating occurred. For example, after describing the first incident when Mr. Contini slapped her, she was asked when the next violent incident occurred, and responded, "I don't really have another specific incident." (RT 190.) However she then went on to describe an incident when Mr. Contini choked her with a bathrobe cinch, but on direct examination testified that this incident occurred in Wisconsin, and on cross-examination testified that it occurred in Sacramento. (RT 200, 246.) Another incident Ms. Brown described occurred when she was watching Mr. Contini's movies and he hit

her. However she admitted on cross-examination that she could not recall the actual fight but she knew that there was a physical fight because "there always was." (RT 253-255.)

When describing an incident when she swallowed a half bottle of aspirin and Mr. Contini made her go the hospital, she could not recall whether she took the aspirin herself or Mr. Contini poured the pills down her throat, whether the incident took place in 1988, 1990, or 1991, whether she used her name or a fake name while at the hospital, and could not recall the name of the hospital,. (RT 228-229, 234.) When describing an incident when Mr. Contini held a gun near her, she could not remember when it occurred but thought it was sometime in 1989. (RT 241-242.) When describing another incident when Mr. Contini reacted violently when she was wearing lipstick, Ms. Brown admitted that she could not remember specifics about the incident such as where in the house the incident occurred. (RT 258.)

In addition to the testimony being inconsistent as to dates and details, the other acts testimony was not corroborated by anyone. Ms. Brown testified that sometime in 1988 she showed the bruises inflicted by Mr. Contini to his friend Hayes Reed and told him, "This is what type of friend you have." (RT 216.) However, Mr. Reed denied any such incident and testified that he never saw any bruises on Ms. Brown while she and Mr. Contini were married. (RT 397, 407.)

Finally, Ms. Brown admitted that after she found out about the 911 incident and baseball bat incident involving Maria Contini, she filed for a change in the split custody arrangement of her son that she shared with Mr. Contini to full custody. (RT 555, 558.)

In sum, the nature of Ms. Brown's testimony lay doubt as to whether the incidents occurred at all due to her inconsistent versions of the prior bad acts, a lack of corroboration of the prior bad acts, and a motive to lie regarding the prior bad acts. However, the jury was not told that there was a standard of proof by which it had to judge Ms. Brown's testimony. It was simply told that if it found that Mr. Contini committed a prior act involving domestic violence it may infer that he had the disposition to commit the same or similar offenses. (CT 264; RT 591.) This of course begs the questions of what standard to apply to determining whether the prior bad acts were indeed committed, and on whom the burden lay to prove those acts. Without being told that the prosecution was required to prove the prior bad acts, it is reasonable that the jury could have drawn negative inferences from the defense's decision to have only Mr. Reed testify to refute Ms. Brown's testimony. For example, the jury could have wondered why the defense did not call Mr. Contini's brother and sister-in-law to refute Ms. Brown's testimony that they were present when Mr. Contini slapped her while she was pregnant. (RT 237-238.)

In sum, given the inconsistent nature of Ms. Brown's testimony, the lack of corroboration of the prior bad acts she described, her motive to lie, the failure to instruct the jury on who had the burden of proof as to the prior acts evidence and what exactly that burden was, it is reasonably probable that a result more favorable to Mr. Contini would have occurred.

IV.

THE ADMISSION OF THE TESTIMONY OF JENNY BROWN THROUGH EVIDENCE CODE SECTION 1109 DEPRIVED APPELLANT OF DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ANALOGOUS PROVISIONS OF THE CALIFORNIA CONSTITUTION.

The prosecution's case in chief largely dwelled on testimonial evidence concerning Mr. Contini's alleged conduct against his ex-wife Jenny Brown approximately nine years prior to the charged offense. (RT 188-287, 551-559.) The admission of the prior acts propensity evidence, however, violated appellant's rights to due process and fair trial. It is a fundamental principle of our jurisprudence 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, quoting United States v. Meyers (5th Cir. 1977) 550 F.2d 1036, 1044.) Thus, in essence, the prior acts propensity evidence allowed the jury to allay reasonable doubts on the basis of evidence that does not concern what the defendant did, but rather who he is.

A. Use of Prior Acts as Proof of a Crime Fundamentally Offends Anglo-American Jurisprudence.

Since 1681, the common law has disallowed the use of a defendant's past behavior to prove his commission of a charged offense. California's evidentiary rules, along with those of 37 other states and the federal system, have statutorily codified this rule disallowing the use of prior acts propensity evidence. (McKinney v. Rees (1993) 993 F.2d 1378, 1381, fn. 2 [collecting authority].) In the remaining 12 states, as well as in the District of Columbia, the same rules are well-established in the common-law precedents.

(Ibid.)

The rule against the use of prior acts propensity evidence rests on the same rationales as the protections guaranteed by the Fourteenth Amendment. 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 [111 S.Ct. 2597, 115 L.Ed.2d 720].) While the United States Supreme Court has not expressly decided whether the admission of other acts evidence for the sole purpose of proving criminal disposition violates due process, reported federal and state decisions indicate the unconstitutionality of the practice.²³

Chief Justice Earl Warren characterized the practice of using criminal disposition evidence as fundamentally unfair: "[O]ur decisions . . . as well as decisions by the courts of appeals and of state courts, 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, 572-574 [87 S.Ct. 648, 17 L.Ed.2d 606] [Warren, C.J., concurring and dissenting].)

Similarly, the California Supreme Court has noted the inadmissibility of prior acts evidence to prove propensity to commit a charged offense. "It is well established that evidence of other crimes is inadmissible to prove the accused had the propensity or disposition to commit the crime charged." (People v. Guerrero (1976) 16 Cal.3d 719, 724; see also People v. Thompson (1980) 27 Cal.3d 303, 317-318.)

More recently, the Ninth Circuit declared impermissible the use of other acts

evidence to prove a defendant's guilt both under California and federal law. (McKinney v. Rees, supra, 993 F.2d at p. 1380.) The court declared that the use of character evidence to prove commission of an offense violated the fundamental principles of justice in the United States.

"The use of 'other acts' evidence as character evidence is not only impermissible under the theory of evidence codified in the California rules of evidence (Cal. Evid. Code § 1101 (West Supp. 1993)) and the Federal Rules of Evidence (Fed.R.Evid. 404(b)), but is contrary to firmly established principles of Anglo-American jurisprudence." (Ibid.)

Since the decision in McKinney v. Rees, both the United States Congress and California Legislature have attempted to statutorily abrogate the common-law rule against other acts character evidence.

B. Statutory Abrogations of the Rule Against Character Evidence are Unconstitutional as they Dilute the Burden of Proof in Violation of Due Process.

In 1994, Congress enacted exceptions to the prohibition against other-acts evidence for cases involving sexual assault and child molestation. (Fed. Rules Evid., rules 413, 414, 415.) In 1995, the California Legislature followed Congress's lead by creating an exception to the rule against criminal propensity evidence in cases involving sexual offenses. (Evid. Code, § 1108.) The following year, the Legislature created another exception to the rule against propensity evidence, this time for cases involving charges of domestic violence. (Evid. Code, § 1109 [added by Stats. 1996, ch. 261, § 2].)

Evidence Code Section 1109, effective January 1, 1996, provides:

(a) Except as provided in subdivision (e), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.

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

(c) This section shall not be construed to limit or preclude the admission or consideration of other evidence under any other statute or case law.

(d) As used in this section, "domestic violence " has the meaning set forth in Section 13700 of the Penal Code.²⁴

(e) Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice.

Evidence Code section 1101, subdivision (a), generally makes inadmissible "evidence of a person's character or a trait of his or her character . . . when offered to prove his or her conduct on a specified occasion." Evidence offered in compliance with section 1109 is expressly excepted from section 1101. (Evid. Code, §1109, subd. (a).)

The legislative history of section 1109 indicates that propensity evidence is "particularly appropriate in the area of domestic violence" and alleged two reasons for this. First, "there is a great likelihood that any one battering episode is part of a larger scheme of dominance and control." Second, "that scheme usually escalates in frequency and severity." (Assem. Com. on Public Safety Rep. on Sen. Bill No. 1876 (June 25, 1996) pp. 3-

4 (1996 Reg. Sess.).²⁵ What the Constitution forbids, the Legislature cannot authorize by statute. (People v. Navarro (1972) 7 Cal.3d 248, 260.) However, even if the Legislature properly gave effect to this its intent via Evidence Code section 1109, introducing prior acts evidence in cases where the charged acts at issue are not any more severe than the prior acts does not serve to demonstrate an escalating pattern of behavior. Thus, the legislative history behind 1109 cannot be said to be served by admitting all forms of prior acts evidence, even if domestic in nature.

In People v. Fitch (1997) 55 Cal.App.4th 172, this court had the opportunity to address a due process challenge to the constitutionality of prior acts propensity evidence based on the diminished standard of proof caused by the admission of prior acts propensity evidence. The defendant in Fitch contended that the use of character evidence to prove criminal propensity diluted the due process requirement of proof beyond a reasonable doubt of every fact necessary to constitute the charged crime. (Id. at p. 182.) This court in Fitch acknowledged the risk of propensity character evidence lessening the prosecutor's burden of proof. (Id. at p. 183, citing People v. Garceau, supra, 6 Cal.4th at p. 186.) Furthermore, the Fitch court acknowledged federal case authority holding that prior act propensity evidence violated due process:

"[The Ninth Circuit] found the prohibition against use of such character evidence 'is based on such a 'fundamental conception of justice' and the 'community's sense of fair play and decency' as concerned the Supreme Court in Dowling.'" [Citation.] The admission of this evidence deprived defendant of a fair trial. "It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are." (Id. at p. 181, quoting McKinney v. Rees, supra, 993 F.2d at p. 1386.)

Although this court rejected Fitch's due process challenge, this court did not expressly determine whether the rule against propensity evidence constituted a fundamental principle of justice. (See id. at pp. 181-182.)

Since Fitch, the California Supreme Court has ruled "it unclear whether the rule against 'propensity' evidence in *sex offense cases* should be deemed a fundamental principle of justice." (People v. Falsetta (1999) 21 Cal.4th 903, 914, emphasis in original.) The court discussed the legislative history behind the adoption of Evidence Code section 1108 and noted that sex crimes are usually committed in secret without third party witnesses or substantial corroborating evidence. (Id. at p. 915.) The court went on to explain that 1108 did not offend due process because: (1) section 1108 is limited to sex offenses and requires pretrial notice, and in Falsetta, the priors involved convictions arose from the defendant's guilty plea; (2) judicial efficiency will not suffer because the "trial court will exercise sound discretion under section 352 to preclude inefficient mini-trials of this nature"; and (3) undue prejudice will not result because section 352 provides a safeguard. (Id. at pp. 915-916.)

Based on Falsetta's reasoning, prior acts evidence that rests on prior uncharged acts as opposed to prior criminal convictions violates due process. Although Falsetta and section 1109 do not require a conviction for use of prior acts evidence, Falsetta's reasoning in its due process analysis emphasized the fact that: "the present case involves only admission of defendant's prior rape convictions arising from his guilty pleas in both cases.

Accordingly, defendants in similar circumstances will not be burdened unduly by having to 'defend' against these charges." (People v. Falsetta, supra, 21 Cal.4th at p. 916.) Thus, Falsetta's rationale rested heavily on the fact that the defendant's prior acts involved convictions based on guilty pleas, a situation which is not always present, as is the case here. This troubling issue is pointed out in Justice Mosk's concurring opinion in Falsetta, where he writes: "What about other cases, when there is no such prior guilty plea, and perhaps, no conviction? Must there be a trial within a trial to ascertain the prior facts?" (Id. at p. 925 (conc. opn. of Mosk, J.).)

Appellant also takes issue with Falsetta's conclusion that undue prejudice will not result from application of Evidence Code section 1108 because section 352 provides a safeguard. (Id. at pp. 915-916.) This assumes that section 352 will always be applied correctly, which is not always the case. As Justice Mosk pointed out in his concurrence in Falsetta: "As to the issue of undue prejudice, I am concerned that, under the majority's analysis, the 'careful weighing process' under Evidence Code section 352 would appear to exclude, in every case, the long-standing principle that use of a prior offense to show 'propensity' may itself be highly prejudicial." (People v. Falsetta, supra, 21 Cal.4th at p. 925 (conc. opn. of Mosk, J.).) Justice Mosk's concern is realized in this case, as discussed, supra, in Argument I of Appellant's Opening Brief, as Evidence Code section 352 did not provide the requisite safeguard.

This court should now hold the rule against propensity evidence to be a fundamental principle of justice as numerous cases establish the fundamental unfairness of

admitting prior acts to show criminal propensity. (Michelson v. United States (1948) 335 U.S. 469, 475-476 [69 S.Ct. 213, 93 L.Ed. 168]; McKinney v. Rees, supra, 993 F.2d at p. 1380; People v. Guerrero, supra, 16 Cal.3d at p. 724.)

C. The Due Process Violation Resulting From Admission of Prior Acts Evidence Prejudiced Appellant and Requires Reversal of His Conviction.

The unconstitutional lessening of the prosecution's burden of proof which here resulted in a due process violations requires reversal per se because a defendant is entitled to have a trier of fact, not a reviewing court, apply a correct reasonable doubt standard in determining the issue of guilt. (See Sullivan v. Louisiana, supra, 508 U.S. at p. 277-278 [113 S.Ct.2078, 124 L.Ed.2d 182].) This same rule applies even if the trier of fact acted pursuant to a proper reasonable doubt instruction. (Sandstrom v. Montana, supra, 442 U.S. at p. 518, fn. 7 [99 S.Ct.2450, 61 L.Ed.2d 39].)

Even when applying lesser standard of review, the wrongful admission of Mr. Contini's prior bad acts compels reversal. The California Constitution provides:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of ... improper admission ... of evidence ... unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal.Const. art. VI, § 13.)

By this standard, the wrongful admission of evidence requires a reviewing court to determine whether it is "reasonably probable" that the error adversely affected the outcome.

(People v. Watson, *supra*, 46 Cal.2d at p. 837.) Usually under this standard, the reviewing court simply ignores the erroneously admitted evidence to consider whether the remaining properly admitted evidence continues to address all the crucial elements of the offense. (People v. Barker (1979) 94 Cal.App.3d 321, 334.) In most cases the improperly admitted evidence redundantly addresses key points made by the properly admitted evidence and its exclusion would not change the strength of the case against the defendant. (Ibid.)

Here, however, the admission of Mr. Contini's prior bad acts against Jenny Brown introduced noncumulative evidence. Evidence Code section 1109 allows testimony that cannot otherwise be introduced under Evidence Code section 1101, subdivision (b). (People v. Harris, *supra*, 60 Cal.App.4th at p. 740.) Section 1109 allows the trier of fact to convict on the basis of propensity to commit a crime, rather than on the basis of the evidence concerning the circumstances of the current offenses. Specifically, it lowers the prosecution's burden of proof even if the trier of fact is allowed to hear the same evidence of prior bad acts for other purposes. (People v. Garceau, *supra*, 6 Cal.App.4th at p. 186.)

Even if the evidence of bad acts committed by Mr. Contini against Ms. Brown may have also been introduced to establish intent, motive, or identity pursuant to Evidence Code section 1101, subdivision (b), the admission of this evidence under section 1109 harmful. (CT 113-117.) This is because admission under section 1109 goes farther than section 1101 in that it allows the jury to infer that since Mr. Contini committed the past offenses, he committed the current offenses. This is exactly the inference that the given

jury instruction allows the jury to draw. (CT 264, RT 591.) It is this combination of prior bad acts evidence with the inference of propensity to commit the current offenses which lowers the standard of proof and allows a conviction.

Without the inference of criminal propensity, the standard of proof of beyond a reasonable doubt for the crimes committed against Maria Contini would have been difficult to achieve. As to the battery with the baseball bat that allegedly occurred on July 22, 1998, the only way this incident came to the attention of the police was by a report of the incident by Mrs. Contini seven days later, on July 28, 1998, when she was distraught over a fight she had with Mr. Contini that night. (RT 109, 409-410.) At that time she told the 911 dispatcher, her neighbor, Brett Stamer, and Officer Erhart that her husband had previously hit her with a bat. (RT 171, 109, 409-410.) At Mr. Contini's trial, she testified that she was the initial aggressor who hit Mr. Contini with the bat after she saw pictures of Mr. Contini at a recent bachelor's party. (RT 424.) The bruises were caused by an ensuing struggle between the two, and from a recent camping trip. (RT 425-428.) Mrs. Contini testified that she had lied in the past because Ms. Brown told her that if she asserted that she was a battered woman, she would receive full custody of the couple's children. (RT 437.)

As to the episode underlying the charge for battery on July 28, 1998, Mrs. Contini testified that she and her husband were arguing because Mr. Contini would not give her the kids because she had been drinking. This caused her to become angry and she started screaming. (RT 433-434.) Mr. Contini did not push her, but grabbed her arm or wrist.

(RT 453.) When Officer Erhart interviewed Mrs. Contini within a short time of the incident, he did not think the bruises that he saw on Mrs. Contini looked fresh. (RT 414.)

He further confirmed that Mrs. Contini smelled of alcohol. (RT 133.)

If the jury was presented only with the facts underlying these two incidents, given Ms. Contini's conflicting testimony and the testimony of the nature of her bruising, it cannot be said that the jury would have returned guilty verdicts. Absent the prior acts testimony, there was "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has effected the result." (People v. Watson, supra, 46 Cal.2d at p. 837.) Thus, the error in admitting the prior acts evidence through Evidence Code section 1109 which allowed the jury to use the prior bad acts against Jenny Brown to convict Mr. Contini of the current charges against Maria Contini was prejudicial and appellant's conviction must be reversed.

CONCLUSION

For the foregoing reasons, appellant requests that his conviction be reversed and the case remanded for a new trial.

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Respectfully Submitted,

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