IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY BRIEF

on behalf of

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INTRODUCTION

In her opening and this reply brief, appellant has set forth and discussed the intersection of legal errors and fact that prevailed at her trial

and has explained their significance to her claims that she was denied her constitutionally protected right to a fair trial.

Certain things stand out. Many of these errors related to the improper admission of irrelevant evidence of uncharged misconduct by appellant and her coappellant and to related instructional errors on the jury's consideration of such evidence. The effect of the improper admission of such irrelevant prejudicial evidence was heightened because the prosecutor used the evidence in improperly arguing the case to the jury during opening statement in an effort to capture and control the jury's view of appellant in the very first stage of trial. Finally, the trial court erred in instructing the jury that an aider and abettor is equally guilty of the crime committed by the perpetrator. This instruction erroneously allowed the jury to determine appellant's culpability of the charged crimes without first determining whether she personally possessed the required mens rea for the crimes. Appellant therefore respectfully submits that the errors described here, in association with the other arguments raised in the briefing, denied her a fair trial.

In this brief, appellant does not reply to arguments by respondent that are adequately addressed in her opening brief. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment, or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995 fn. 3, cert. den. (1993) 510 U.S. 963), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

The arguments in this reply are numbered to correspond to the argument numbers in appellant's opening brief (AOB) and, where appropriate, appellant has correlated appellant's argument numbers with those used by respondent in order to facilitate review.

Statutory references are to the Penal Code unless otherwise noted.

GUILT PHASE ARGUMENTS

I.

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

A. INTRODUCTION

In her opening brief, appellant contended that the trial court's expanded definition of the reasonable doubt burden of proof incorrectly stated the law regarding the prosecution's burden and in so doing created structural error requiring reversal of appellant's conviction. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281.) (AOB 92-120.)

Specifically, the trial court (1) failed to instruct that there must be in the minds of the jurors a permanancy or certitude, an "abiding conviction" in the language of Penal Code section 1096, in the defendant's guilt. (See AOB 102-104.) (2) The trial court also incorrectly diluted the reasonable doubt standard of proof by informing the jury that the prosecution had a "fairly substantial burden" to meet in proving appellant's guilt. (See AOB 104-111.) (3) In addition, the trial court expressly and incorrectly instructed the prospective jurors that the reasonable doubt standard of proof required that they evaluate the facts and the evidence by applying reason and the individual juror's own common sense. (See AOB 111-113.) (4) As well, the trial court mistakenly described the

prosecution's burden with a reference to human affairs and human interaction. (See AOB 113-119.)

Inasmuch as the instructional errors reduced the prosecution's burden of proof and thus affected appellant's substantial rights, appellant contended that this claim of error was cognizable on appeal even in the absence of defense counsel's objection below.

B. APPELLANT MAY PROPERLY RAISE THIS ISSUE UNDER PENAL CODE SECTIONS 1259 AND 1469

In the opening brief, appellant noted that defense counsel did not object to the trial court's incorrect statements of law regarding the reasonable doubt instruction. Appellant also pointed out, however, that counsel's failure to object did not adversely affect this Court's review of appellant's claim because Penal Code section 1259 authorizes review of instructional errors such as this that affect a defendant's substantial rights. (*People v. Brown* (2003) 31 Cal.4th 518, 539 fn. 7; AOB 93-94.) In addition to section 1259, Penal Code section 1469 also authorizes review under similar circumstances.[1]

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[1]. Penal Code section 1469 provides: "Upon appeal by the people the reviewing court may review any question of law involved in any ruling affecting the judgment or order appealed from, without exception having been taken in the trial court. Upon an appeal by a defendant the court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the trial court and which affected the substantial rights of the defendant. The court may also review any instruction given, refused or modified, even though no objection was made thereto in the trial court if the substantial rights of the defendant were affected thereby. The reviewing court may reverse, affirm

Respondent sets forth the provisions of Penal Code section 1259 in its brief and does not deny that this Court may review appellant's claim under the authority of this statute. Nor does respondent argue that appellant's substantial rights were not affected by the instructional errors. Instead, respondent's argument is that on review this Court should find appellant's claims forfeited because they lack merit. (RB 84.) For reasons appellant sets forth in the opening brief and in this reply brief, appellant's contentions are both cognizable and meritorious.

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

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

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

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or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. If a new trial is ordered upon appeal, it must be had in the court from which the appeal is taken."

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

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

The United States Supreme Court has described an "abiding conviction" as one that is "settled and fixed." (*Hopt v. Utah* (1887) 120 U.S. 430, 439.) The California Supreme Court has described it as one that is "lasting [and] permanent." (*People v. Brigham* (1979) 25 Cal.3d 283, 290). The Court of Appeal has described it as a "settled conviction" (*People v. Castro* (1945) 68 Cal.App.2d 491) and, more recently, as a readily understood term that does not require definition. (*People v. Pierce* (2009) 172 Cal.App.4th 567, 573).

When the trial court instructed the jury panel in appellant's trial regarding the reasonable doubt standard of proof, the court omitted any reference to the "settled and fixed," the "lasting and permanent," commonly referenced as "an abiding conviction of the truth of the charge," nature of the jury's finding. In her opening brief, appellant contended that this failure resulted in a dilution of the standard of proof. (AOB 102-104.)

Respondent counters with an argument that skews the thrust of appellant's original contention by characterizing appellant's contention as an insistence on the use of the words "abiding conviction." (RB 85-87.) Appellant's argument is not, as respondent suggests, that the trial court was required to provide a formulaic iteration of the statutory language, or as respondent describes it, a "verbatim description of the reasonable doubt standard." (RB 86.) Rather, appellant's argument is that the trial court omitted a critical and important aspect of the individual juror's mental state in finding appellant's guilt beyond a reasonable doubt when it failed to instruct the jury regarding the durability that must attend its finding of the truth of the charge. Notably respondent does not argue that the notion of durability, i.e., the notion that the conviction be abiding, lacks importance.

Respondent's alternate contention is that the court did not misstate the law. Instead the court merely provided the jurors with a "general description of the reasonable doubt standard." (RB 87.) The fact is that, however informally given, the trial court's statements to the jury regarding a matter of law constitute instructions, in this case preinstructions. And, on review, the court's comments to the jury regarding the reasonable doubt instruction reveal the comments to be preinstructions. As such, the instructions must be correct statements of the law. (*People v. Kainzrants* (1996) 45 Cal.App.4th 1068.)

In *Kainzrants*, upon which respondent relies (RB 86-87), the trial court preinstructed the jury during voir dire on the provocative act theory in the same way appellant's trial court preinstructed the jury on the reasonable doubt burden of proof. The defendant alleged error in the instruction on appeal. *Kainzrants* considered the alleged error in the

context of all instructions given by the court on the provocative act theory and found that the court had delivered the relevant legal principles fully and clearly. (*Id.*, at pp. 1074-1075.)

Respondent too contends there was no instructional error in light of other instructions given to the jury. (RB 86-87.) However, in appellant's case, the court stated an incorrect rule of law when it failed to instruct the jurors that in order to hold appellant guilty they must have the equivalent of an "abiding conviction of the truth of the charge. The law is settled that "[a]n instruction plainly erroneous is not cured by a correct instruction in some other part of the charge." (*People v. Westlake* (1899) 124 Cal. 452, 457.)

For the reasons stated above and in the opening brief, appellant respectfully submits that the trial court's failure to instruct that Penal Code section 1096 requires an "abiding conviction" or its equivalent as to appellant's guilt in the minds of the jurors was erroneous and incorrectly described as a matter of law the prosecution's burden.

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

In the opening brief, appellant contended the trial court erred when it instructed the jury on the burden of proof associated with the reasonable doubt standard through the use of a graphic analogy to the scales held by the Lady of Justice. (AOB 104-111.) The trial court instructed that

the "scales of justice start out tipped in favor of the defense" and that the prosecution's burden "is to bring those scales into balance and then substantially tip them in favor of the truth of the charges." The court further described the burden of proof as a "fairly substantial burden" to which "no number" and "no percentage" is assigned. (4RT 773:26-774:5-8; see also 4RT 677, 740-741, 809, 832, 865-866; 5RT 898, 928, 962.) Appellant pointed out that at its most demanding, the burden of proof described as necessary by the court was a "fairly substantial burden." The court's instruction included no language informing the jury that the burden of proof was so high as to require "near certainty" or "near certitude" of appellant's guilt in the minds of the jurors. As a result, the trial court's instruction diluted the reasonable doubt standard of proof. (AOB 104-111.)

Appellant supported and illustrated her contention with citations to *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 and to *People v. Garcia* (1975) 54 Cal.App.3d 61. (AOB 104-111.)

Respondent argues these cases are inapposite. (RB 87-91.)

In *Garcia*, the trial court instructed the jury on reasonable doubt in the language of Penal Code section 1096. The trial court then amplified that instruction by calling upon the jurors to weigh the evidence presented by the prosecution "in the scales, one side against the other, in a logical manner in an effort to determine wherein lies the truth." (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 68.)

Garcia stated: "This 'weighing' process, where a tipping of the scales determines the 'truth,' is wholly foreign to the concept of proof beyond a reasonable doubt." (*People v. Garcia*, *supra*, 54 Cal.App.3d at p. 69.) The trial court in appellant's case instructed the jury that the

prosecution's burden was to present evidence that "substantially tip[ped]" the scales in favor of the truth of the charges, a burden the court further described as "fairly substantial." In the opening brief, appellant argued that a "fairly substantial" production of evidence does not connote a burden of producing evidence of the truth of the charges to a "near certainty" or "near certitude." (AOB 108-110.)

Respondent argues that appellant's reliance on *Garcia* is misplaced because the trial court here did not suggest that jurors must weigh or balance one side versus another side and because the court described the reasonable doubt standard as the highest burden of proof provided for in the law. (RB 88.)

Respondent's argument is disingenuous because the concept of weighing or balancing respondent claims was absent in the trial court's charge to the jury are themselves implicit in the use of scales. And, even more to the point and contrary to respondent's assertion, every descriptive the court used in speaking of the prosecution's burden concerned the movement of one scale relative to the other. "In a criminal case, the scales of justice start out tipped in favor of the defense, because the defendants are presumed to be innocent. The burden the prosecution must meet is to bring those scales into balance and then substantially tip them in favor of the truth of the charges that were filed against the defendants." (4RT 773:26-774:5; see also 4RT 677, 740-741, 809, 832, 865-866; 5RT 898, 928, 962; see AOB 105-106 fn. 30.)

Respondent next claims that *People v. Katzenberger*, *supra*, does not help appellant in the way appellant claims. (RB 88-90; see AOB 106-108.) In *Katzenberger*, the prosecutor used six pieces of an eight-piece

puzzle of the Statue of Liberty as the basis of an analogy between the puzzle and the reasonable doubt standard. The reviewing court concluded that the use of an easily recognizable iconic figure with but a few pieces missing left the impression the reasonable doubt standard might be met by a few pieces of evidence and impermissibly allowed the jury to jump to a conclusion. (*People v. Katzenberger*, *supra*, 178 Cal.App.4th at pp. 1266-1267.) In addition, the reviewing court found that the fact that six of the eight pieces of the puzzle were in place and the prosecutor's argument that "this picture is beyond a reasonable doubt" impermissibly suggested that 75 percent functioned as a quantitative measure of reasonable doubt. (*Id.*, at p. 1268.)

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

away from balance. (Free Online Dictionary, Thesaurus and Encyclopedia.)

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

Respondent next contends that appellant mistakenly equates the use of the term "substantially" in the court's explanation of the reasonable doubt standard with the term "substantial" as used in the measurement of evidence in the context of sufficiency challenges and that appellant's contentions lack analytical coherence. (RB 91.)

Respondent in fact misconstrues the thrust of appellant's discussion, which was directed at illustrating the differing interpretations within matters of law attending the term "substantial" and the fact that misinstructions divert jurors from their prescribed duties. (AOB 109-110.)

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

Respondent first contends that appellant's reliance upon *People v. W.E. Paulsell* (1896) 115 Cal. 6 to argue that the trial court here erred in instructing the jury that it could apply common sense in evaluating the evidence is misplaced. (AOB 111-113; RB 91-93.) Respondent points out that subsequently, in *People v. White* (1897) 116 Cal. 17, 19, the Court

stated that the reversal in *Paulsell* occurred because a requested instruction was not given and not because a version of that instruction that was given included the phrase common sense. (RB 92.)

Paulsell, however, expressly states that reversal was ordered on account of both instructions given and refused. For example, the *Paulsell* stated: "The judgment must be reversed and a new trial ordered on account of instructions given and refused upon the subject of reasonable doubt. . . ." (*People v. Paulsell*, *supra*, 115 Cal. 10.) *Paulsell* also stated:

> In the present case, it is sufficient to say that the court introduced the new and unused phrase "common sense," and told the jury that the doubt must be based upon that. Counsel for appellant argues – after giving some of the definitions of common sense to be found in the dictionaries – that this language is merely the equivalent of saying that a jury should convict if they are satisfied of the guilt of the defendant to such a certainty as would influence their minds in the important affairs of life; which was held to be unsound by this court [citations]. It is sufficient to say, however, that the phrase "common sense" is about as uncertain as any phrase in the language. When one speaks of common sense, he generally means his own sense; and there is no warrant for the unnecessary use of such a term when there is apt language to express the idea of reasonable doubt which has been frequently approved and pointed out as the language proper to be used. ***For this reason the judgment must be reversed.*** (*People v. Paulsell*, *supra*, 115 Cal. at p. 12; emphasis added.)

Respondent further relies on *People v. Venegas* (1998) 18 Cal.4th 47 and *People v. Richardson* (2008) 43 Cal.4th 959, inter alia, in arguing that the use of common sense comports with the requirements of the reasonable doubt standard. (RB 93.) In *Venegas* and in *Richardson*,

this Court essentially concluded that jurors are permitted to rely on their own common sense and good judgment in evaluating the weight of the conflicting expert or scientific evidence before them. (*People v. Venegas*, *supra*, 18 Cal.4th at p. 80; *People v. Richardson*, *supra*, 43 Cal.4th at pp. 1017-1018.) At best, the references to "common sense" in these cases amount to dicta and do not refute appellant's argument with respect to the reasonable doubt standard.

In so concluding, none of these cases addressed the concern expressed in *Paulsell* regarding the lack of certainty attending the phrase "common sense" and the resulting uncertainty the inclusion of that phrase brings to the application of the reasonable doubt standard.

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

As appellant noted in the opening brief, the trial court instructed the jury on what reasonable doubt is not. In doing so, the trial introduced references to "people's interactions," "how people interact," "what people do in everyday life," and to "how they – people treat each other and do things in society" into the reasonable doubt standard and in so doing introduced reversible error into the instruction. (AOB 113-119.)

Appellant supported her argument with the reasoning applied in and analogies drawn from *People v. Brannon* (1873) 47 Cal. 96; *People v. Nguyen* (1995) 40 Cal.App.4th 28; *People v. Johnson* (2004) 115

Cal.App. 1169; (*Johnson I*); *People v. Johnson* (2004) 119 Cal.App.4th 976, 985-986 (*Johnson II*).) (AOB 113-119.)

The gist of respondent's argument appears to be that the cases upon which appellant relied are inapposite because the court's instructions in issue here did not include references to specific activities and the instructions in the cited cases did. (RB 96-97.)

Here, as set forth above, the trial court referred to "people's interactions," "how people interact," "what people do in everyday life," and to "how they – people treat each other and do things in society." That the court used more general descriptives than the specific references discussed in the published cases does not render the instructions legally correct. These general descriptives allowed the jurors to speculate in the same inappropriate way about the various standards people apply in their interactions in everyday life and to apply those standards to the reasonable doubt standard.

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

In the opening and reply briefs, appellant has explained why the court's various instructions regarding the reasonable doubt standard constituted error. Taken together, the court's incorrect instructions affected all necessary aspects of the reasonable doubt instruction in ways that diluted the burden of proof. The error is a structural one that is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; see also *People v. Johnson I*, *supra*, 115 Cal.App.4th at p. 1172.) "[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made

where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings." (*Sullivan*, *supra*, 508 U.S. at p. 281, italics omitted.)

Appellant respectfully submits her conviction must be reversed.

II.

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

(Respondent addressed this argument in Argument V of Respondent's Brief, at pages 168-182.)

In the opening brief, appellant contended the trial court erred in instructing the jury that all principals were "equally guilty." An aider and abettor's guilt in a murder prosecution is based on the combined acts of the principals, but on the aider and abettor's personal mental state, as appellant explains below. Appellant asserted that she was entitled to have the jury consider her culpability in light of her own mens rea in deciding her guilt of the charged crimes and, if found liable for murder, in determining the degree of murder for which she is liable. (AOB 121-134; *People v. Concha* (2009) 47 Cal.4th 653, 663; *People v. Samaniego* (2009) 172 Cal.App.4th 1148; *People v. Nero* (2010) 181 Cal.App.4th 504; *People v. McCoy* (2001) 25 Cal.4th 1111.)

Respondent initially argues that appellant has forfeited the claim because defense counsel did not object to the instruction at the trial below. (RB 169, 171.) Respondent further contends that the "equally

guilty" language in the instruction was not misleading because there is no evidence that appellants acted with different mental states during the murder. (RB 169, 177.) Respondent's final contention is that the "equally guilty" language could not have affected the verdict in appellant's oral copulation conviction because "there are no different degrees or less culpable mental states of that offense. (RB 169, 181-182.)

A. THIS ISSUE IS COGNIZABLE ON REVIEW

In the Opening Brief, appellant noted that trial counsel did not object to CALJIC No. 3.00 as it was given to the jury, and further explained that defense counsel's failure to specify the error claimed here did not bar appellant's claim of instructional error. It is settled law that a trial court has a duty to instruct the jury sua sponte on general principles which are closely and openly connected with the facts before the court. (Pen. Code, §§ 1259, 1469; *People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154.) Statutory and case authority therefore provide for review of this issue by this Court under established law and legal principles.

Penal Code section 1259[2] authorizes this Court to "review any instruction given . . . even though no objection was made thereto in the

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[2]. Penal Code section 1259 provides: "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the

lower court, if the substantial rights of the defendant were affected thereby." Penal Code section 1469[3] authorizes review under similar circumstances. (AOB 129-131.)

Respondent nonetheless contends that appellant has forfeited review because trial counsel did not ask that CALJIC No. 3.00 be either modified or clarified at appellant's trial in 2000. (RB 169, 171-172.)

Respondent does not address the principal weakness inherent in respondent's argument: *McCoy* (and other cases) explicitly established that mental state evidence critically differentiates an individual aider-abettor's liability from that of other principals. This core body of case law had either only been recently decided or simply did not exist at the time of

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lower court, if the substantial rights of the defendant were affected thereby."

[3]. Penal Code section 1469 provides: "Upon appeal by the people the reviewing court may review any question of law involved in any ruling affecting the judgment or order appealed from, without exception having been taken in the trial court. Upon an appeal by a defendant the court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the trial court and which affected the substantial rights of the defendant. The court may also review any instruction given, refused or modified, even though no objection was made thereto in the trial court if the substantial rights of the defendant were affected thereby. The reviewing court may reverse, affirm or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial. If a new trial is ordered upon appeal, it must be had in the court from which the appeal is taken."

appellant's trial.[4]

Thus, even if defense counsel had known that the "equally guilty" language of CALJIC No. 3.00 was an incorrect statement of the law, as in fact it was later declared to be by *Samaniego* and *Nero*, and failed to act to correct the instructional error, this Court would nevertheless still have authority to review it. (Pen. Code, §§ 1259, 1469.) "Claims of instructional error are reviewable when such error could only have resulted from counsel's neglect or mistake in requesting the instruction [citation] even though defendant would be barred from challenging an instruction that his counsel requested for a tactical purpose [citations]." (*People v. Beardslee* (1991) 53 Cal.3d 68, 88-89; no forfeiture of right to appeal instruction requested by trial counsel that lessened prosecution burden of proving mental state.)

Respondent also argues that appellant is wrong in claiming that the instructional error impacted her substantial rights so as to make appellant's claim of instructional error reviewable under Penal Code sections 1259 and 1469. (RB 172.) This claim by respondent is also not supported by the case law.

In *People v. Graham* (1969) 71 Cal.2d 303, this Court explained that the limitation of the invited error concept to the narrow circumstance of trial counsel's deliberate tactical decision had its roots in

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[4]. The appellate record shows that appellant's trial began on August 22, 2011 (5CT 1155) and that the trial court entered the judgment of death on September 25, 2002. (September 25, 2002, RT 57-60.) At that time, *People v. McCoy* had only recently been decided on June 25, 2001. *Concha* and *Samaniego* were decided in 2009 and *Nero* in 2010.

the statutory mandates of Penal Code sections 1259 and 1469. (*Id.*, at p. 319.) *Graham* noted that "[a]n instruction relating to the various degrees of criminal homicide certainly affects the substantial rights of the defendant." (*Ibid.*) In *People v. Beardslee*, *supra*, this Court concluded that the mental state requirement of CALJIC No. 3.00 did affect the substantial rights of the defendant because it lessened the prosecutorial burden of proving the necessary mental state and, as such, the instructional error was reviewable under Penal Code section 1259. (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 89.)

The "equally guilty" language of CALJIC No. 3.00, as given to appellant's jury, lessened the prosecutorial burden of proving appellant's mental state. As such, the instructional error is reviewable under the authorities herein cited. Thus, under the circumstances present here, respondent's argument that appellant has forfeited her appeal of this instructional issue lacks merit.

B. THE *EQUALLY GUILTY* LANGUAGE OF THE AIDER AND ABETTOR INSTRUCTIONS MISDIRECTED THE JURY IN DETERMINING APPELLANT'S CULPABILITY FOR MURDER. AN AIDER AND ABETTOR'S GUILT IN A MURDER PROSECUTION IS BASED ON THE COMBINED ACTS OF THE PRINCIPALS, BUT ON THE MENTAL STATE OF THE AIDER AND ABETTOR.

"Murder is the unlawful killing of a person with malice aforethought. ([Pen. Code], § 187.) Murder includes both actus reus and mens rea elements. To satisfy the actus reus element of murder, an act of either the defendant *or an accomplice* must be the proximate cause of

death. [Citations omitted.]" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.)

"For the crime of murder, as for any crime other than strict liability offenses, 'there must exist a union, or joint operation of act and intent, or criminal negligence.' ([Pen. Code], § 20.)" (*People v. Concha*, *supra*, 47 Cal.4th at p. 660.) "To satisfy the mens rea element of murder, the defendant must *personally* act with malice aforethought. ([*People v.*] *McCoy* [(2001) 25 Cal.4th 1111,] 1118.)" (*Id.*, at p. 660; italics added.)

In *People v. McCoy*, upon which *Concha* relied, the Court recognized that an aider and abettor may harbor a greater mental state than that of the direct perpetrator and thus be culpable of a greater crime than the actual perpetrator. The Court based this conclusion on the premise that an aider and abettor's mens rea is personal and may be different from that of the direct perpetrator. (*People v. McCoy*, *supra*, at pp. 1117-1118.) """[A]lthough joint participants in a crime are tied to a 'single and common *actus reus*,' 'the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well.'"" (Dressler, Understanding Criminal Law [(2d ed. 1995)], § 30.06 [C], p. 450, fns. omitted.)" (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118-1119.)

McCoy concluded that an aider and abettor's liability is "thus vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions." (*People v. McCoy*, *supra*, 25 Cal.4th at pp. 1118.) "[W]hen an accomplice chooses to become a part of the criminal activity of another, she says in essence, 'your acts are my acts.

. . .'" (Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985) 37 Hastings L.J. 91, 111, fn. omitted.) (*People v. Prettyman* (1996) 14 Cal. 4th 248, 259.) "But that person's own acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*People v. McCoy*, *supra*, 25 Cal.4th at p. 1120.) In sum, "[a]ider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator." (*Ibid.*)

Respondent argues "the 'equally guilty' language was not misleading because there is no evidence that appellants acted with different mental states during the murder. . . ." (RB 169.) Respondent's contention is based on an incorrect premise. *Concha*, *McCoy*, *Samaniego*, and *Nero* make clear that the "equally guilty" language of the instruction constitutes an incorrect statement of the law. As such, the instruction should never have been given, whatever the state of the prosecution's evidence. Moreover, respondent's contention that the instruction as given was acceptable because respondent finds no evidence showing appellants "acted with different mental states" impermissibly shifts the trial burden of proving each defendant's mental state from the prosecution to whom the burden belongs to the defense. In appellant's case, the prosecutor had the burden of proving to the jurors that when the actus reus of murder was committed appellant contemporaneously possessed the required mens rea to convict her of murder and then in determining the degree of murder.

Respondent also points out that the defense of duress is not applicable to capital crimes. (RB 172-173.) Appellant never claimed otherwise and never relied on duress in supporting her claim of instructional error. Indeed, appellant forthrightly stated in her opening brief that duress was not a defense to murder. At the same time, appellant also pointed out that duress may negate the deliberation or premeditation required for first degree murder. (AOB 133.) (*People v. Anderson* (2002) 28 Cal.4th 767, 781-784; see also *People v. Burney* (2009) 47 Cal.4th 203, 249.) Respondent does not contend otherwise. Thus, under the incorrect instruction given, the jury may well have found that appellant lacked the required mental state to be guilty of first degree murder, but nonetheless believed under compulsion of the instruction that appellant was "equally guilty" and the jury's duty was to convict her on that basis.

Respondent further argues that the jury necessarily found that appellant had the requisite mental state required for murder because the jury found the kidnapping special circumstance (§ 190.2, subd. (a)(17)(B)) and the rape by instrument special circumstance (§ 190.2(a)(17)(K)) to be true. (RB 173-174; 8CT 1837; 34RT 7399-7400.) Once again, close review of respondent's contention reveals the logical error in respondent's analysis.

Respondent correctly points out that the applicable law provides that a person other than the actual killer is subject to the death penalty or life imprisonment without the possibility of parole if that person intended to kill or was a major participant in the underlying felony and acted with reckless indifference to human life. (RB 174; *People v. Estrada* (1995) 11 Cal.4th 568, 575; *People v. Mil* (2012) 53 Cal.4th 400, 408-409).) Under this instruction, the jury could return a true finding to the

special circumstance allegation for a person other than the actual killer by finding the person possessed the mental state for an intentional killing *or* by finding the person acted with reckless disregard in the commission of an enumerated felony.

Appellant's jury was instructed accordingly. (See RB 171; 34RT 7368-7369.) Thus, the instruction allowed the jury to find the special circumstance allegations to be true if it first found that appellant as an aider and abettor either acted with intent to kill *or* as a major participant in a felony acted with a reckless indifference to human life. Because the instruction permitted a true finding based on the felony murder action-related component alone, respondent is unable to argue the jury necessarily found that appellant possessed the required mens rea for the charged crimes and by extension that the incorrect and misleading "equally guilty" language did not factor into appellant's convictions. Given the use of the disjunctive in the instruction, respondent's reference to the instruction is nothing more than a red herring and the object of a misleading attempt to suggest that the true findings for the special circumstance allegations somehow establish that the jury necessarily found that appellant had the requisite mental state for the charged crimes.

Respondent's final contention is that the "equally guilty" language could not have affected the oral copulation verdict in count 3 "because there are no different degrees or less culpable mental states of that offense." (RB 169, 181-182.)

Respondent is wrong. A less culpable mental state would be the absence of the required mental state needed for conviction, i.e., a mental state that equated with a not guilty verdict. Here, with regard to count 3,

the jury struggled with the question of appellant's liability and specifically asked whether appellant could be "found to be a principal and by this aid and abet" and the court responded with the instruction that informed the jury that each principal is equally guilty. (See discussion at AOB 133-134.)

Respondent argues there was in any event no prejudice to appellant from the incorrect instruction. (RB 169.) Appellant respectfully refers the reader to her discussion regarding prejudice resulting from the incorrect instruction at pages 131-134 of the opening brief.

III.

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

(Respondent addressed this argument in Argument IX of Respondent's Brief, at pages 211-213)

A. DISCUSSION

Appellant did not testify during the guilt phase of the trial and asked that the jury not be instructed with CALJIC No. 2.60, which tells the jury to draw no inference from and not to discuss a defendant's failure to testify. Codefendant Daveggio asked that the instruction be given. Ultimately, the trial court gave the instruction over appellant's objection that the instruction would draw the jury's attention to the fact that appellant had not testified. In her opening brief, appellant contended the trial court erred in giving the instruction over her objection. In doing so, appellant set forth and discussed the applicable law. (See AOB 135-140; *People v. Roberts* (1992) 2 Cal.4th 271; *Lakeside v. Oregon* (1978) 435 U.S. 333.)

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

counsel by interfering with his attorney's trial strategy. (*Id.*, at pp. 340-342.)

Thereafter, in *Roberts*, this Court followed *Lakeside v. Oregon* in concluding that the giving of CALJIC No. 2.60 over defense objection was not constitutionally prohibited. (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 314-315.) *Roberts*, however, also expressly stated that the trial court should refrain from giving CALJIC No. 2.60 when a defendant so requests. "Nevertheless, the purpose of the instruction is to protect the defendant, and if the defendant does not want it given the trial court should accede to that request, notwithstanding the lack of a constitutional requirement to do so. (*Id.*, at p. 314.)

Respondent sets forth the same cases upon which appellant relied, but further contends that the trial court was obliged to give the instruction once Daveggio requested it despite appellant's objection. (See RB 211-213; *Carter v. Kentucky* (1981) 450 U.S. 288, 300.)

Here, counsel asked the instruction not be given to avoid drawing the jury's attention to appellant's not testifying, a reason directly linked to the protection of appellant's interests at trial. In *Roberts*, as noted above, this Court reasoned that the purpose of the instruction was to protect the defendant and that purpose would not be met if, in counsel's contemplation, the giving of the instruction would adversely impact appellant's case. (*People v. Roberts*, *supra*, 2 Cal.4th at pp. 314-315.) But here, trial counsel assessed the evidence against appellant, assessed the jury, and assessed the pros and cons of instructing this jury with CALJIC No. 2.60 (including the admonition not to take into account appellant's failure to testify), and made a strategic decision that the protective

admonitions contained within the instruction were inadequate to the task they were intended to accomplish. It is axiomatic that a defendant has the right to present her defense of choice. (*U.S. Const. amends VI, XIV*; *Faretta v. California* (1975) 422 U.S. 806, 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.").)

Accordingly, in this case, because it cannot be said that the error did not contribute to the verdict, the error in instructing the jury with CALJIC No. 2.60 was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Arizona v. Fulminante* (1991) 499 U.S. 279, 306-312.) Reversal of the judgment of conviction is therefore warranted.

IV.

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

(Respondent addressed this argument in Argument III of Respondent's Brief, at pages 135-149)

Respondent addresses arguments appellant has raised regarding evidence admitted under Evidence Code sections 1101 and 1108 (Arguments IV and VII, respectively) in a single argument, Argument III of respondent's brief, at pages 135-149, on the ground that an 1101 analysis is unnecessary if evidence is admitted under section 1108. (RB 135 fn. 12.)

In order to facilitate review, appellant's reply is consolidated into a single argument, which is set forth under Argument VII, *infra*, and which appellant incorporates by reference as though fully set forth here. In doing so, appellant does not concede any of the contentions raised in either Arguments IV or VII in the briefing.

V.

THE TRIAL COURT ERRED IN THE INSTRUCTIONS GIVEN TO THE JURY REGARDING EVIDENCE OF WRONGFUL CONDUCT ADMITTED UNDER EVIDENCE CODE SECTION 1101. THE IMPROPER INSTRUCTIONS DEPRIVED APPELLANT OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

(Respondent addressed this argument in Argument IV of Respondent's Brief, at pages 149-168, and in particular at pages 149-157)

A. INTRODUCTION

In Argument IV of her opening brief, appellant argued that the trial court erred in admitting evidence of appellant's wrongful conduct with Christina, Rachel, Amy, and Aleda pursuant to Evidence Code section 1101. (See AOB 141-194.) Then, in Argument V of her opening brief, appellant made the related argument that while the trial court's instruction on the jury's use of the section 1101 evidence may have correctly stated a principle of law, the instruction created a substantial risk of misleading the jury because the evidence to which the law related was neither relevant nor admissible and the law therefore had no application to the facts of the case. (AOB 195-209.) In sum, the trial court's instruction failed to correctly limit the jury's use of other crimes evidence to the relevant disputed issues.

Appellant presents here her reply to respondent's argument regarding appellant's contentions in Argument V.

B. THIS ISSUE IS COGNIZABLE ON REVIEW

Respondent first contends that appellant has forfeited her claim of instructional error by failing to object below. (RB 150-151.)

Respondent relies on *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1037, and argues that in order for this Court to review appellant's claim appellant must have first objected or sought clarification of the instruction below. (RB 150-151.) In *Lewis and Oliver*, this Court did find that defendant Oliver forfeited his challenge to the Evidence Code section 1101 instruction by failing to preserve it at the trial level, but nevertheless considered the merits of Oliver's claim and concluded that no error occurred because the instruction was not misleading, confusing, or incomplete and because the jury could not have misapplied the instruction to Oliver's detriment. (*Id.*, at p. 1037.) Oliver's specific complaint was that the other crimes' instruction given did not sufficiently limit evidence of his codefendant's repeated verbal and physical mistreatment of a woman and this Court concluded that inasmuch as there was no evidence Oliver was present during the incidents of abuse the jury had no basis on which to attribute his codefendant's violent conduct to Oliver. There were therefore evident and significant differences between the review and outcome in *Lewis and Oliver* and appellant's circumstance as the discussion in subsection C, *infra*, and in Arguments IV and V in the opening briefs, at pages 141-194 and 195-209, respectively, explain. As appellant explains in those locations, evidence of other sexual assaults played a prominent role in the prosecution's case against appellant.

In addition, as appellant has explained above and incorporates by reference here, statutory and case authority provides for review by this

Court when a defendant's substantial rights are affected, as they have been here. In Argument II, subsection A, *supra*, appellant discusses the matter of forfeiture in the context of an instructional issue. Appellant incorporates here that discussion of the relevant law as though fully set forth herein. In addition, appellant also respectfully refers the reader to pages 220 to 222 of the opening brief, which appellant incorporates by reference here, where appellant discusses the trial court's ever-present duty to instruct the jury with correct statements of the law.

In addition, in *People v. Nottingham* (1985) 172 Cal.App.3d 484, the Court of Appeal recognized that a trial court has an obligation to instruct sua sponte where prior offenses admitted in sex offense cases are obviously important to the case.

> The trial court is normally not obligated to give sua sponte instructions in regard to the limited admissibility of evidence of prior bad acts at the time the jury receives the testimony. (*People v. Collie* (1981) 30 Cal.3d 43, 63.) But where the prior offenses admitted in sex offense cases "'might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence [in failing to request a limiting instruction] . . .,'" a limiting instruction should be given sua sponte. (*People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1067.) Even if such an instruction is not required, when a trial court does undertake to give a limiting instruction specifically calling attention to the significance of the substantially prejudicial evidence of prior bad acts, it should do so accurately. (*People v. Key* (1984) 153 Cal.App.3d 888, 899.) (*People v. Nottingham*, *supra*, 172 Cal.App.3d at p. 497; please see also related discussion of *Nottingham*'s reasoning as relevant to this case at AOB 199-200.)

That the prior sex offenses were important to the prosecution of this case requires no elaboration as the prosecution's proof of the charged offenses depended heavily upon evidence of other sexual offenses and the record and briefing focus repeatedly on that evidence. Accordingly, contrary to respondent's assertions, appellant has not forfeited review of this issue.

C. SUMMARY OF CONTENTIONS AND DISCUSSION

The gravamen of appellant's argument is that the court's final charge to the jury on the use of other crimes evidence allowed the jury to use evidence related to Aleda, Christina, Rachel, and Amy to prove motive, intent, characteristic common plan or scheme, and absence of consent in spite of the fact that not all of the evidence was relevant to prove all of those matters as appellant explained in Argument IV of the opening brief (AOB 141-194).

For example, the instruction incorrectly allowed evidence related to the kidnap, sexual assault, and release of Aleda to be used to prove appellant's liability for either Vanessa's charged murder or the related special circumstances even though Aleda's kidnap, sexual assault, and release lacked sufficient common features with Vanessa's kidnap, entirely different sexually assaultive conduct, and murder from which to infer the existence of a common plan or scheme to kidnap, sexually assault, and murder Vanessa in accordance with that plan. (See Argument IV of the opening brief at pages 141-194.)

In addition, the instruction also incorrectly allowed evidence of Aleda's stranger-on-stranger kidnap, sexual assault, and release to be

used to prove the charged crimes involving Sharona and April. Appellant explained in Argument IV of the opening brief (pages 141-194) that evidence related to Aleda lacked sufficient common features with the prosecution's evidence concerning the charged sexual assaults upon Sharona and April as to the force used, the nature of the sexual assaults, Sharona's and April's ages, and the fact of the abduction itself to establish the existence of a common plan or scheme and the further inference that the assaults upon Sharona and April were carried out in implementation of that plan.

The instruction also incorrectly allowed evidence related to Amy to be used to prove appellant's guilt of the charges related to Vanessa, Sharona, and April in spite of the paucity of common features between these crimes. The evidence related to Amy, for example, when compared with evidence relating to Vanessa, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan. In sharp contrast with evidence related to Vanessa, evidence related to Amy revealed a sexual assault brutally perpetrated upon a friend, who was then released. In the same way, Amy's experience shared virtually no common features with April's and only a limited few with Sharona's. Evidence related to Amy did not support the finding of a common plan sufficient to support an inference that the abduction and murder of Vanessa and the charged sexual assaults upon Sharona and April were committed in accordance with that plan. (See Argument IV, AOB 141-194.)

The instruction also incorrectly allowed the jury to use evidence related to Christina and the evidence related to Rachel to prove

the existence of a common plan and to further prove that Vanessa was murdered in accordance with that plan. Appellant has previously explained (Argument IV, AOB 141-194) that both the evidence related to Christina and the evidence related to Rachel, when compared with the evidence related to Vanessa, did not support the finding of a common plan sufficient to support an inference that Vanessa was murdered in accordance with that plan.

The instruction incorrectly allowed the jury to use evidence related to Aleda to prove that appellant was guilty of the murder of Vanessa and its associated special circumstances, despite the fact that evidence related to Aleda, when compared with evidence related to Vanessa, contained some similarities but the common marks were not sufficiently distinctive to give logical force to an inference of identity. (See Argument IV, AOB 141-194.)

The instruction also incorrectly allowed the jury to use evidence of the defendants' acts of pedophilia to prove the defendants had the intent to engage in acts of paraphilia with Vanessa and to murder her. The instruction allowed the jury to use evidence of the defendants' non-paraphilic sexual misconduct with Amy and Aleda to prove the defendants had an intent to rape Vanessa with modified curling irons. Evidence pertaining to Rachel, Christina, Amy, and Aleda was not relevant to prove the defendants intended to kill Vanessa. (See Argument IV, AOB 141-194.)

In support of this contention, appellant discussed in her opening brief (at pp. 198-200) the cases of *People v. Swearington* (1977) 71 Cal.App.3d 935, and *People v. Nottingham*, *supra*, 172 Cal. App. 3d 484.

Respondent argues these cases are inapposite because this Court has ruled that (1) the instruction given here (CALJIC No. 2.50) correctly states the law; (2) *Swearington*'s premise is incorrect; and (3) the instruction given adequately informed the jury of how it might use the evidence. (RB 153-156.)

Respondent initially argues that the pattern instruction CALJIC No. 2.50 correctly states the law. Respondent also makes the related argument that the other crimes evidence was directly tied to the evidence regarding the charged crimes. Respondent supports the latter contention with the following generally drawn illustrations that capture some but not all of the various ways the broadly worded instruction allowed the jury to use the other crimes evidence to prove the charged crimes: (1) the kidnap and assault of Aleda was relevant to prove the kidnap for purposes of sexual assault of Vanessa; (2) the sexual assaults upon Rachel, Christina, and Amy were relevant to prove the sexual assaults upon Sharona and April. (RB 154-155.) As appellant has more specifically set forth above, the instruction given appellant's jury, but for limiting language on the use of evidence related to Aleda to prove identity, allowed the jury to use other crimes evidence without further limitation in proving the motive, intent, characteristic method, plan, or scheme, and intent required for the charged crimes and special circumstances. (CALJIC No. 2.50, as given appellant's jury, is reproduced at pages 200 to 202 in appellant's opening brief; see also 138CT 36343-36344.) The examples set forth above explain the specific ways in which the instruction allowed the jury to use evidence of other crimes to improperly prove the charged crimes.

Respondent relies upon *People v. Wilson* (2005) 36 Cal.4th 309, 328, and *People v. Carter* (2005) 36 Cal.4th 1114, 1151, to support its argument that CALJIC No. 2.50 is a correct statement of the law. (RB 154.) A review of these cases, however, shows that this Court concluded that the version of CALJIC No. 2.50 given in those cases correctly stated the law in the context of the factual and legal circumstances there present.

For example, in *Wilson*, the trial court instructed the jury with CALJIC No. 2.50, which allowed the jury to use the defendant's prior grand theft, marijuana use, and a jailhouse solicitation of murder to prove the identity of the perpetrator in a prosecution for first degree robbery murder and felony murder special circumstance. (*People v. Wilson*, *supra*, 36 Cal.4th at p. 317.) On appeal, the defendant argued the instruction allowed the other crimes evidence to function as propensity evidence because the instruction was silent as to how the jury might use the unspecified evidence to show identity. This Court found that the defendant's jailhouse solicitation of the murder of a key prosecution witness was probative of his consciousness of guilt, which was probative of his identity as the perpetrator of the charged offenses. This Court further found that the evidence of the murder solicitation was so relevant to the issue of the defendant's guilt of the charged crimes that there was little danger that the jury would consider the evidence for improper purposes. (*Id.*, at p. 328.) In this context, *Wilson* found CALJIC No. 2.50 to be a correct statement of the law. In so doing, *Wilson* relied on *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1615.) *Linkenauger* involved a case of domestic violence that ended in murder. Evidence of prior marital discord and physical assaults was admitted at trial. The trial court

instructed with CALJIC No. 2.50, modified to state that the prior acts evidence could be used to prove intent, identity, and motive. On appeal, the defendant argued that the trial court was required to match the prior act evidence with each issue to be proven. (*Id.*, at p. 1614.) The Court of Appeal held that such an instruction would be argumentative and repetitious of other instructions and in this context concluded that CALJIC No. 2.50 as given was a correct statement of the law. (*Id.*, at p. 1615.)

Thus, contrary to respondent's assertion, *Wilson* and *Linkenauger* do not hold that CALJIC No. 2.50 correctly states the law for all purposes. Rather, each of those cases considered the propriety of modified versions of CALJIC No. 2.50 as they applied to properly admitted other crimes evidence and concluded the instructions correctly stated the law. Appellant's claim in contrast asserts that the version of CALJIC No. 2.50 given his jury incorrectly allowed the jury to use improperly admitted evidence to prove his guilt of the charged crimes. Neither *Wilson* nor *Linkenauger* control the issue appellant brings for review by this Court.

People v. Carter (2005) 36 Cal.4th 1114, 1151, upon which respondent also relies (RB 154), is another case in which this Court concluded that the version of CALJIC No. 2.50 given the jury correctly stated the law after finding evidence of uncharged murders and related sexual assaults properly admitted to prove the identity of the perpetrator of the charged murders and related sexual assaults. *Carter*, then, as was true of *Wilson* and *Linkenauger*, and is not true of appellant's circumstance, found the version of CALJIC No. 2.50 given to its jury to be a correct statement of the law in the context of the properly admitted other crimes evidence within its contemplation.

Respondent next contends that *Swearington* is incorrectly decided to the extent it "rests upon the notion that a defendant's failure to dispute an element of the crime renders evidence on that element inadmissible." (RB 155.) Appellant discussed *Swearington* at pages 198-199 of the opening brief and respectfully refers the reader to that discussion. In addition, appellant notes that she relied on *Swearington* and *Nottingham* for the principle that a trial court is charged with instructing the jury in language tailored to inform the jury of the precise issues to which the other crimes evidence relates and with appropriately limiting the jury's consideration of the other crimes evidence. (AOB 200.) Appellant did not rely on *Swearington* in this argument in order to prove the trial court erred in admitting the evidence. Rather, appellant's argument was directed at showing that the trial court did not properly limit the jury's use of the other crimes evidence the court had chosen to admit.

Respondent's final contention is that the version of CALJIC No. 2.50 given appellant's jury adequately instructed the jury because the instruction limited proof of identity to evidence related to Aleda. Respondent reasons that the jury would therefore infer that the other crimes evidence was to be considered only with regard to intent, motive, and common plan or scheme. (RB 155-157.) Appellant notes that the instruction also allowed the jury to consider the evidence on the matter of consent.

Respondent fails to address the thrust of appellant's argument, which is that the version of CALJIC No. 2.50 given appellant's jury allowed the jury to use evidence that lacked relevance to the charged crimes to prove appellant's guilt of the charged crimes. Appellant has

described the uses to which the instruction allowed the evidence to be used above and in Arguments IV and V of the opening brief. Respondent is silent with regard to these points because there can be no reasonable explanation for the inappropriate use of such evidence.

For the reasons set forth here and in the opening brief, the incorrect instruction erroneously allowing use of evidence of uncharged misconduct to prove elements of the charged offenses deprived appellant of the right to a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination in a capital case guaranteed by the Eighth Amendment.

VI.

APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT WERE VIOLATED BY THE TRIAL COURT'S INSTRUCTION THAT ALLOWED THE JURY TO FIND SHE HAD A PROPENSITY FOR COMMITTING SEX OFFENSES BASED ON THE EVIDENCE OF SOME OFFENSES WITH WHICH SHE WAS CHARGED

(Respondent addressed this argument in Argument IV of Respondent's Brief, at pages 149-168, and in particular at pages 157-168)

A. DISCUSSION

Evidence Code section 1108 authorizes the use of evidence of a prior sexual offense to establish a defendant's propensity to commit a sexual offense, if that prior offense has been found to be more probative than prejudicial in a review under Evidence Code section 352. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 796-797.)

In appellant's case, however, an incorrect instruction allowed the jury to draw an inference of criminal propensity from evidence pertaining to charged offenses that had not been subjected to the trial court's exercise of discretion under Evidence Code section 352. The instruction therefore erroneously violated the limitation set forth in Evidence Code section 1108. (See AOB 210-230.) That error deprived appellant of the right to due process of law and a fair trial under the Fifth

and Fourteenth Amendments and to a reliable determination of the facts in a capital case under the Eighth Amendment.

In her opening brief, appellant observed that none of the charged crimes was subjected to the requisite balancing of probative value and prejudice associated with the admission of evidence pursuant to Evidence Code section 1108. (AOB 222.) In the context of this discussion of the relevant law and the facts of this case, appellant reviewed and distinguished the case of *People v. Wilson* (2008) 166 Cal.App.4th 1034 on the ground that the trial court in *Wilson* actually engaged in the Evidence Code section 352 weighing process that *People v. Falsetta* (1999) 21 Cal.4th 903 credited with saving Evidence Code section 1108 from a due process challenge. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 917-918; AOB 222-225.) No such discretionary weighing regarding the use of charged crimes as disposition evidence occurred in appellant's case. A trial court's failure to exercise discretion is "itself an abuse of discretion." (*Garcia v. Santana* (2009) 174 Cal.App.4th 464, 477; *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515; *People v. Orabuena* (2004) 116 Cal.App.4th 84, 99.)

Respondent's counterargument first discusses the case of *People v. Catlin* (2001) 26 Cal.4th 81. (RB 164-165.) *Catlin*, as respondent acknowledges (RB 164), interpreted Evidence Code section 1101 and held that section 1101 allowed the jury to use other crimes evidence, including evidence of another charged count, in reaching a verdict on a charged count. (*People v. Catlin*, *supra*, 26 Cal.4th 153.)

Respondent offers no explanation, however, as to why this Court's interpretation in *Catlin* of Evidence Code section 1101 helps

respondent counter appellant's argument that the instruction given here impermissibly allowed the jury to use evidence of charged crimes to prove other charged crimes without the Evidence Code section 352 weighing required by due process concerns. In the opening brief, appellant discussed the relevant law regarding the use of, and the limitations on the use of, propensity evidence, and the reasons underlying those limitations. Appellant respectfully refers the reader to that discussion at pages 214-222 of the opening brief. Sections 1101 and 1108 serve very different functions in the management of evidence and respondent's attempt to blur the differences in functionality is mistaken.

Respondent next claims that "[a] defendant in a case in which evidence is cross-admissible under section 1108 should not be in a different position than a defendant in a case in which evidence is cross-admissible under section 1101." Respondent's assertion relies on neither case nor statutory authorities because none is provided. (RB 165.) Instead, respondent makes a dubious extrapolation drawn from the following comment in *Falsetta*: "Available legislative history indicates section 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta*, *supra*, 21 Cal. 4th at p. 911; RB 165.) From this, respondent extrapolates that section 1101 and section 1108 defendants are entitled to similar treatment without further elaboration, a kind of "sauce for the goose, sauce for the gander" rationale. But, as appellant has observed above, Evidence Code section 1101 and 1108 treat different kinds of evidence for different purposes and for that

reason respondent's efforts to blur the distinction between the two types of evidence and their discrete purposes without an analysis that takes those differences into account are not logical.

Respondent further claims that *Wilson*, *supra*, supports respondent's position that a charged offense may be used as propensity evidence in proving another charged offense. As noted above, appellant argued in the opening brief that *Wilson* is readily distinguishable from appellant's circumstance because the trial court there complied with Evidence Code section 1108 when it subjected the propensity evidence, i.e., the other charged crime used to prove the charged crime, to the weighing required under Evidence Code section 352. (AOB 222-225.)

Respondent disagrees. Respondent does not argue that the trial court here weighed the intended propensity evidence under Evidence Code section 352 because it manifestly did not. Instead, respondent contends that when the trial court ruled on the defense motions to sever the April and Sharona sexual assault charges from the murder charge involving Vanessa, the trial court necessarily performed the functional equivalent of the Evidence Code section 352 review required by Evidence Code section 1108. (RB 166-167.) Respondent argues that in ruling the evidence cross-admissible, the trial court both exercised its discretion as required by section 352 and foreclosed any finding of prejudice that might arise if this Court finds appellant's claim successful. (RB 166-167.)

What respondent's argument does not address is that ruling certain evidence admissible for the jury's consideration in the context of a severance motion is so substantially different a thing from instructing a jury that the law allows it to use that certain evidence as proof of the defendant's

propensity to commit the charged crime as to be a difference in kind. Our courts have recognized that once jurors learn the defendant has committed other, similar crimes, they are likely to turn the presumption of innocence on its head. "[O]ur decisions exercising supervisory power over criminal trials . . . suggest that evidence of prior crimes, introduced for no purpose other than to show criminal disposition, would violate the Due Process Clause." (*Spencer v. Texas* (1967) 385 U.S. 554, 574-575, conc. and dis. opn. of Warren, C.J.) Common sense alone dictates that a decision regarding the cross-admissibility of evidence in the context of a severance motion does not serve as the functional equivalent of the discretionary finding that certain evidence is so much more probative than it is prejudicial that it may be used to prove the defendant's propensity to prove the charged crime. Motions to sever are necessarily made prior to trial. In contrast, Evidence Code section 352 review typically occurs during trial in the context of evidence already before the jury and the fact that the evidence to be weighed is then viewed in the context of evidence already before the jury changes, or can change, the calculus as to both probity and prejudice.

As to respondent's discussion regarding prejudice, appellant respectfully refers the reader to her discussion of the appropriate standard of review and prejudice at pages 229 to 230 of the opening brief.

Finally, respondent contends that appellant has forfeited the right of review of this claim by her failure to object below. (RB 150-151.) In Argument II, subsection A, *supra*, appellant discusses the matter of forfeiture in the context of an instructional issue. Appellant incorporates here that discussion of the relevant law as though fully set forth herein. In

addition, appellant also respectfully refers the reader to pages 220 to 222 of the opening brief, which appellant incorporates by reference here, where appellant discusses the trial court's ever-present duty to instruct the jury with correct statements of the law.

VII.

APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT WERE VIOLATED BY THE TRIAL COURT'S INCORRECT ADMISSION OF PREJUDICIAL EVIDENCE OF OTHER SEXUAL OFFENSES TO PROVE APPELLANT'S PROPENSITY TO COMMIT THE CHARGED CRIMES

(Respondent addressed this argument in Argument III of Respondent's Brief, at pages 135-149)

A. INTRODUCTION

Two sections of the Evidence Code governing the admission of character evidence are in issue in this case in Arguments IV and VII. "Evidence Code section 1108 authorizes the admission of evidence of a prior sexual offense to establish the defendant's propensity to commit a sexual offense, subject to exclusion under Evidence Code section 352." (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286; see also *People v. Walker* (2006) 139 Cal.App.4th 782, 796-797; Argument VII at AOB 231-244.) Evidence of a defendant's commission of a crime other than one for which she is then being tried is not admissible to show bad character or predisposition to criminality, but it may be admitted to prove some material fact at issue, such as motive, intent, or identity. (Evid. Code, § 1101; Argument IV at AOB 141-194.)

Following a hearing on the subject, the trial court in this case exercised its discretion (Evid. Code, § 352) and admitted evidence of the

defendants' uncharged conduct involving Christina, Rachel, Amy, and Aleda to show motive, intent, and a characteristic common plan and design under both Evidence Code sections 1101 and 1108. In addition, the trial court also admitted evidence involving Aleda to prove identity under both sections 1101 and 1108. (5CT 1203-1207; 3RT 653-656.)

In Argument IV of her opening brief, at pages 141 to 194, appellant explained why evidence of the uncharged offenses admitted by the trial court had no tendency in reason to establish the factors for which they were admitted under Evidence Code section 1101. In Argument VII, appellant explained that the trial court also incorrectly allowed this evidence to be admitted under Evidence Code Section 1108. (See AOB 231-244.) Appellant also made the related argument that the effect of the admission of this evidence under sections 1101 and 1108 was compounded by incorrect instructions regarding the jury's use of the evidence. (AOB 195-209, 210-230.)

Respondent has decided against responding separately to the Evidence Code section 1101 contentions raised by appellant in the opening brief. Instead, respondent contends that by its decision in *People v. Loy* (2011) 52 Cal.4th 46, 63, this Court has decided that if evidence of sexual misconduct is admitted under section 1108, that admission satisfies the requirements of section 1101 without further analysis. (See RB 135 fn.12.)

In order to provide coherence in the discussion regarding the interface between sections 1101 and 1108 and thus facilitate review, appellant discusses respondent's contentions here, but also incorporates her argument by reference, as appropriate, into her discussion regarding the admission of evidence under Evidence Code section 1101 contained in

Argument IV of appellant's opening brief (AOB 141-194). In doing so, appellant does not concede any of the contentions raised in either Arguments IV or VII in the Opening Brief. In Argument IV of her opening brief (AOB 141-194), appellant recited the evidence pertaining to charged and uncharged crimes and discussed the similarities and dissimilarities between them in the context of the purposes for which they were admitted under Evidence Code section 1101. Then, because the trial court also admitted the same evidence of uncharged crimes to prove the same disputed matters under section 1108, appellant incorporated by reference her discussion of charged and uncharged offenses in Argument IV into her contentions that the evidence was also wrongly admitted under section 1108 in Argument VII (AOB 231-232). Appellant now incorporates by reference that discussion of charged and uncharged crimes as appropriate into the discussion here.

In the discussion below, appellant explains why respondent's analysis is flawed. Briefly, Evidence Code sections 1101 and 1108 together provide for the admission of character evidence for certain limited purposes if the proffered character evidence meets the required standards of relevancy for the stated purpose. As stated above and in the opening brief, section 1101 admitted character evidence to prove, e.g., motive, intent, existence of common plan or scheme, and identity, but precluded the use of such evidence to prove the defendant's disposition to commit the charged crime. Section 1108 eliminated section 1101's prohibition against the use of propensity evidence where sexual offenses are charged by allowing evidence of prior sexual misconduct to be used, subject to Evidence Code

section 352, to prove that the defendant had a propensity to commit the charged sexual offenses. (See AOB 210 fns. 65, 66.)

Section 1108, does not, as respondent advocates, allow the admission of evidence of sexual misconduct for all other section 1101 purposes without proper section 1101 analysis and weighing. As relevant here, for example, the question of similarity of charged and uncharged crimes remains "relevant to the trial court's exercise of discretion" under sections 1101 and 1108. (*People v. Loy* (2011) 52 Cal.4th 46, 63.) Moreover, the level of similarity between charged and uncharged crimes necessary for admission under section 1108, as illustrated in *Loy*'s evaluation and weighing of the evidence before it, establishes that the trial court erred in admitting the uncharged crimes involving Christina, Aleda, Rachel, and Amy under section 1108 to prove appellant's guilt of the charged crimes.

B. DISCUSSION

After appellant filed her opening brief, this Court discussed the law attending the admission of other crimes evidence under Evidence Code section 1108 in *People v. Loy*, *supra*, 52 Cal.4th 46. The defendant in *Loy* was charged with sexually assaulting and killing his 12-year-old niece. The forensic pathologist who performed the autopsy found bleeding in various areas of the vagina consistent with sexual penetration and also concluded that death was caused by asphyxia due to compression of the face and/or neck and/or body. The coroner further testified that asphyxia is the most common sex-associated way of killing someone. (*Id.*, at p. 53.) After hearing argument, the trial court admitted, under section 1108,

evidence that the defendant had on two separate prior occasions committed multiple violent sexual assaults against a woman. Each of the women testified that during the assault the defendant choked her with his hand around the front of her neck. (*Id.*, at pp. 54-55.)

On appeal, the defendant in *Loy* challenged the admission of the prior sexual assaults on multiple grounds, including a claim that the evidence should have been excluded because it lacked sufficient similarity to the charged offense. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.) Appellant similarly claimed that her trial court abused its discretion in incorrectly admitting evidence of other sexual misconduct under both Evidence Code sections 1101 and 1108 (Arguments IV (AOB 141-194) and VII (AOB 231-244), respectively).

In considering the defendant's claim that the evidence of his previous crimes was not sufficiently similar to the charged capital case, *Loy* noted that even if the charged and uncharged sexual offenses lacked similarity, that circumstance, although "relevant to the trial court's exercise of discretion," was not dispositive of the matter. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.) *Loy* then reviewed cases in which various courts of appeal had discussed the interface between Evidence Code sections 1101 and 1108, e.g., *People v. James* (2000) 81 Cal.App.4th 1343, 1353 fn.7 (section 1108 allows jury in sex offense cases to consider evidence of prior sex offenses for any relevant purpose), accord *People v. Britt* (2002) 104 Cal.App.4th 500; *People v. Yovanov* (1999) 69 Cal.App.4th 392, 405 (uncharged sexual offense presumed admissible without regard to limitations of section 1101); and *People v. Frazier* (2001) 89 Cal.App.4th

30, 40-41 (charged and uncharged crimes need not be sufficiently similar that the uncharged crimes would be admissible under section 1101).

Loy then adopted the standard set forth in *Frazier*, *supra*, in concluding that evidence of the defendant's prior sexual offenses had been properly admitted under section 1108. *Loy* noted that while the previous sexual offenses may not have been sufficiently similar to be admissible under section 1101, they were not dissimilar. *Loy* identified the following points of similarity. (1) One of the victims was only four years older than the 12-year-old victim was when she died; (2) the defendant had choked both of his previous victims; (3) the forensic pathologist stated the 12-year-old victim had died of asphyxiation; (4) the forensic pathologist testified asphyxiation was the most common means of killing in cases of sexual assault. (*People v. Loy*, *supra*, 52 Cal.4th at pp. 63-64.) *Loy* found evidence of the choking to be highly relevant and therefore "weighing in favor of admission."

In *People v. James*, the Court of Appeal held that section 1108 "permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses for any relevant purpose." (*People v. James*, *supra*, 81 Cal.App.4th at p. 1353, fn. 7.) Evidence is relevant if it has any "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Respondent contends the uncharged evidence was no more inflammatory than the charged offenses (RB 143-144); was not remote in time (RB 144-145); would not have caused the jury to want to punish appellant for the uncharged crimes through the vehicle of the charged crimes (RB 145-146). Respondent is mistaken. Because these matters are

set forth in the opening brief (AOB 141-194), appellant respectfully refers the Court to just one of many examples of evidence more inflammatory than the charged crimes. At pages 144 to 147 of the opening brief, appellant discusses the inescapably inflammatory nature of evidence of predacious sexual assaults against appellant's own young daughter Rachel and against Amy, a friend, in separate incidents in which the application of force and use of violence predominated. Such evidence is intrinsically inflammatory in multiple facets – breach of the parent-child relationship; breach of the friend-friend relationship; use of handcuffs in one incident and duct tape in the other; the application of violence and force in both incidents – and in many ways more inflammatory than evidence presented to prove the charged crimes involving Sharona, April, and Vanessa Samson. Contrary to respondent's urging, such inflammatory evidence was likely to cause the jury to want to punish appellant.

Respondent's final contention is that the "uncharged offenses were strikingly similar to the charged offenses." Respondent supports this assertion with a solitary example. "In all instances, appellants acted as a team to either lure victims they knew to a location where they could be sexually assaulted, or to kidnap their victims off the street as in the cases of Aleda and Vanessa." (RB 146.)

Loy informs this discussion. *Loy* found sufficient similarity between the charged and uncharged crimes for admission under section 1108 primarily in evidence that each of the previous victims testified that the defendant had choked her by placing a hand around the front of her neck in the course of sexually assaulting her. There was forensic evidence of vaginal bleeding in the victim consistent with sexual penetration and the

forensic pathologist's determination that death was caused by asphyxiation and testimony that asphyxiation was the most common means of killing in sexual assaults. This Court found this evidence to be highly relevant and weighing in favor of admission. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63.)

Loy explained that while such similarity may not have been sufficiently similar to prove identity under the test of *People v. Ewoldt* (1994) 7 Cal.4th 380, 403, it was highly relevant in determining the defendant's culpability under section 1108. (*People v. Loy*, *supra*, 52 Cal.4th at p. 63; see also, *People v. Balcom* (1994) 7 Cal.4th 414, 425.) *Loy* reveals that the degree of similarity required is much more than a de minimis level of similarity and certainly more than just the prior commission of a sexual offense (*cf. People v. Frazier*, *supra*, 89 Cal.App.4th at p. 41). The relevance of the other crimes evidence in *Loy* is indisputable revealing as it does a characteristic or methodology in the *Loy* defendant's sexual assaults from which it may logically and reasonably be inferred that the 12-year-old victim was similarly sexually assaulted and choked to death by him. In contrast, for the reasons set forth in the discussion of the evidence in the opening brief (AOB 141-194), the uncharged crimes in this case were not sufficiently similar to afford the equivalent logical and reasonable inference that appellant committed the charged crimes to be admitted under section 1108.

For example, respondent points to a similarity in the evidence that both Aleda and Vanessa were kidnapped off the street, but does not relate the similarity to a disputed fact. (RB 146.) Appellant addressed the dissimilarities in the evidence when admitted to prove the existence of a common plan or scheme in her opening brief (AOB 170). Appellant noted

that there was evidence of stranger-on-stranger abduction involving both Aleda and Vanessa and evidence of a sexual assault upon Aleda and very limited forensic evidence of a sexual assault of a different nature upon Vanessa. In short, Aleda's evidence included within the criminal transaction the crimes of abduction, multiple acts of sexual assault, and release. Vanessa's evidence included abduction, sexual assault different in kind from Aleda's evidence, and murder. There was, in addition, no evidence as to whether the sexual assault upon Vanessa occurred pre- or post-mortem, an attempted pre-mortem rape by instrument being the minimum necessary to prove the rape by instrument special circumstance. Evidence that Daveggio and appellant abducted Aleda, a stranger, was, however, not admitted only to prove the existence of a common plan to abduct Vanessa, a stranger, but to further prove that Vanessa was abducted for a sexual purpose, just as Aleda was, even though there was no evidence of shared common features in the sexual assault upon Aleda and Vanessa. What is lacking here is the degree of probativeness and thus relevance found in the choking evidence in *Loy* that allows reasonable inferences to flow in a coherent path to proof of guilt.

Respondent also contends that the uncharged offense showed that appellant and Daveggio acted as a team to lure victims they knew to locations where they could be assaulted but provides no elaboration beyond that mere conclusory assertion. The trial court admitted this evidence under both Evidence Code sections 1101 and 1108 to prove the existence of a common plan or scheme, intent, and motive. Appellant discussed the admission of this evidence in her opening brief at pages 157-177 and respectfully refers the reader to that discussion.

For the reasons stated here and in Arguments IV and VII of the opening brief, appellant respectfully submits that the trial court erred in admitting prejudicial evidence of uncharged sexual misconduct under both Evidence Code sections 1101 and 1108.

VIII.

THE PROSECUTOR COMMITTED MISCONDUCT IN STATEMENTS TO THE JURY BY IMPROPERLY APPEALING TO THE JURORS' PASSIONS AND SYMPATHIES AND ARGUING MATTERS NOT BASED ON THE EVIDENCE. THE PROSECUTOR'S MISCONDUCT DEPRIVED APPELLANT OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE GUARANTEED BY THE EIGHTH AMENDMENT

(Respondent addressed this argument in Argument II of Respondent's Brief, at pages 98-134.)

In the opening brief, appellant argued that the trial prosecutor committed "prosecutorial error" amounting to prejudicial error in various statements to the jury and set forth a representative sampling of those remarks. (See AOB 245-283; *People v. Hill* (1998) 17 Cal.4th 800, 822-823, 823 fn.1.) These statements, some of which were unrelated to facts proven in the case, were calculated to engage the passions and sympathies of the jury for the victims and against appellant. The prosecutor's misconduct deprived appellant of her constitutional right to due process and a fair trial under the Fifth and Fourteenth Amendments and her right to a reliable determination of the facts in a capital case guaranteed by the Eighth Amendment.

A. THIS ISSUE IS COGNIZABLE ON REVIEW

Respondent begins by claiming that appellant has failed to preserve this issue for review by her failure to make timely objection and seek corrective action below. (RB 114-122.)

Appellant explained in her opening brief why her claim should not be barred for want of a timely defense objection and respectfully refers the reader to that discussion at pages 270-274 of the opening brief, supplemented by this brief summary. The prosecutor made many of the remarks now challenged as prosecutorial error or misconduct during her opening statement in an effort to capture and control the jury's view of appellant from the outset of trial. As appellant explained in the pages of the opening brief designated above, the primary reason defense counsel's failure to object to every instance of prosecutorial misconduct does not bar review is apparent on the cold face of the appellate record. The record establishes that further defense objections would have been futile because the trial court repeatedly tried to stop, but never succeeded in stopping, the prosecutor from presenting argument during her opening statement. See, for example, samples of the trial court's specific and explicit admonitions to the prosecutor reproduced in the opening brief at pages 250, 252-253, 255-258, 260-261, 263.

Respondent also contends that by failing to seek a ruling appellant has forfeited her claim that the prosecutor was crying or breaking up at a point in time when the prosecutor was commenting upon Thanksgiving Eve events at Vanessa's home and April's home. (RB 117; see prosecutor's remarks reproduced at pages 257-258 of the opening brief; 16RT 3677:26-28 to 3678:1-18.) Respondent argues that inasmuch as the

record fails to reflect that the prosecutor had reddened eyes or a tear-streaked face, the reasonable inference is that the prosecutor was not crying. (RB 117.) Respondent goes so far as to suggest that appellant seeks to "ambush" respondent on appeal with a "manufactured claim of prejudice." (RB 117.)

Appellant argued in her opening brief that the trial court's neglect in inquiring into and ruling upon whether the prosecutor committed misconduct by crying or breaking up was yet another indication that defense objections to the prosecutor's conduct were futile because the record showed the trial court was unable to control the prosecutor's conduct. (AOB 271-272.) In the course of that argument, appellant referenced the case of *People v. Bain* (1971) 5 Cal. 3d 839, for its recognition that a trial court's failure to take control of the situation and reprimand counsel allowed the case to be "conducted at an emotional pitch which is destructive to a fair trial." (*Id.*, at p. 849.). (AOB 271-272.) Respondent argues that *Bain* is inapposite and appellant's reliance on it misplaced. (RB 118.) The gist of respondent's argument is that *Bain* is inapposite because the trial court there failed to control the parties to the trial, whereas the trial court in the present case "clamped down" on the prosecutor. (RB 118.) Respondent does not support the assertion that the trial court effectively "clamped down" on the prosecutor with citations to the record because, in fact, the record does not support respondent's assertion. Instead, the record reveals the point appellant made both in her opening brief (AOB 271) and here – the trial court was unable to effectively control the prosecutor. (See, e.g., the trial court's repeated admonitions to the prosecutor reproduced at AOB 250-268.) Contrary to respondent's

observation, appellant's use of *Bain* for the proposition that a trial court has as one of its duties an obligation to take control of a trial is on point, as is appellant's argument that futility attends a defendant's continued objections when the trial court is unable to control the parties to a trial.

As noted above, respondent has also made the serious claim that appellant pursues a "manufactured" claim in her contention that the trial court's failure to inquire into trial counsel's complaint that the prosecutor was either crying or breaking up during her remarks to the jury. (RB 116-117.) There is, of course, no evidence to support respondent's claim that trial counsel "manufactured" his observation that the prosecutor was crying or that her voice was breaking up and respondent supports this contention by speculative inferences alone. (RB 116-117.) In *Bain*, this Court considered a situation in which the prosecutor claimed the defense counsel had fabricated the defense. This Court found no basis for the claim of fabrication by defense counsel and held the prosecutor's comment to that effect constituted misconduct. (*People v. Bain*, *supra*, 5 Cal.3d at p. 847.) Here, trial counsel stated his observations on the record. The attention of the trial court was, however, focused instead on the prosecutor's improper attempt to contrast Thanksgiving Day preparations in Vanessa's home with those in the home of Daveggio's daughter April. (See reproduced testimony at AOB 257-258.) There is nothing in the record to suggest that trial counsel "manufactured" this claim.

A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People v. Arias* (1996) 13 Cal. 4th 92, 159; *People v. Noguera* (1992) 4 Cal. 4th 599, 638.) In addition, failure to request the jury be admonished

does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford* (1997) 15 Cal. 4th 1229, 1333, quoting *People v. Price* (1991) 1 Cal. 4th 324, 447.) The absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green* (1980) 27 Cal. 3d 1, 35 fn. 19; *People v. Pitts* (1990) 223 Cal. App. 3d 606, 692; *People v. Lindsey* (1988) 205 Cal. App. 3d 112, 116 fn. 1; see also *People v. Hill* (1998) 17 Cal. 4th 800, 820-821.)

Furthermore, the law recognizes that among his or her general trial duties, a judge is obliged to restrict counsel's argument to appropriate boundaries. It is the duty of the judge to control all proceedings during the trial and to limit the argument of counsel to relevant and material matters.[5] (Pen. Code, § 1044; see also *People v. Bell* (1989) 49 Cal.3d 502.) In *People v. Bain*, *supra*, this Court concluded that a trial court's failure to take control of the situation and reprimand counsel allowed the case to be "conducted at an emotional pitch which is destructive to a fair trial." (*People v. Bain*, *supra*, 5 Cal.3d at p. 849.)

For the reasons stated here and in the opening brief, appellant respectfully submits that her claim was not forfeited by inaction below.

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[5] Penal Code section 1044 states: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

B. THE PROSECUTOR COMMITTED MISCONDUCT

1. Respondent Misconstrues Appellant's Arguments

At the outset, appellant notes that there are certain discrepancies between what appellant argued in her opening brief and what respondent represents appellant argued. Furthermore, respondent appears to have used the misrepresented contention to support a particular point in argument.

For example, respondent states that appellants claimed that the prosecutor improperly argued "that Daveggio allowed Aleda Doe to get dressed while Michaud thought about whether Aleda would be allowed to live or die." (RB 125.) Respondent urges this Court to find that the prosecutor's comments were supported by the evidence and therefore did not constitute misconduct. (RB 125.)

The record, however, graphically shows that respondent misrepresents the objection made by defense counsel, as well as the position of the trial court and counsel on the very finding respondent urges this Court to make. As may be seen in the reproduced colloquy between court and counsel set forth below, the gist of defense counsel's objection was not as respondent represents. Defense counsel pointed out that the trial court had admitted evidence related to Aleda to prove identity. The prosecutor's statements to the jurors, in contrast, were focused on telling the jurors about the details of Daveggio's sexual assault upon Aleda, including his ejaculating on her face and hair. Counsel argued that in the absence of corresponding evidence regarding the sexual assault upon Vanessa, the prosecutor's only purpose in making these statements was to

inflame the jury and to allow the jury to speculate that similar sexual assaults had been committed upon Samson.

The prosecutor argued in turn that Aleda's testimony would support her statements, which is the very contention presently made by respondent. (RB 125.) The reproduced colloquy below establishes that it was the trial court, not defense counsel, who pointed out that the prosecutor's statements constituted improper argument because Aleda was not in a position to know what appellant was thinking.

> [Defense Counsel Mr. Ciraolo]: Your Honor, I will object to some of Ms. Backers' opening comments. The detail that she is presenting on Aleda Doe is only calculated to inflame the jury. The court has allowed the Aleda Doe testimony to come in for the purpose of similar [sic] and identity.
>
> There is no evidence that I can recall that this kind of conduct occurred to the victim. There is no evidence of ejaculation on Samson, the 187 victim. The court said that it can come in because it is a similar for identity. None of this detail has been indicated to have occurred to the 187 victim. It is only calculated for the prosecution to try to have the jury be inflamed and speculate that this sort of thing might have happened to Ms. Samson.
>
> So I know what the court's ruling is on the evidence, but I want to be clear that from its inception Ms. Backers is attempting to inflame this jury.
>
> [The Court]: Mr. Karl?
>
> [Defense Counsel Mr. Karl]: We agree.
>
> [The Court]: I have a bigger problem with the way it is being presented. I mean, I have about reached the limit: As Michelle thought about whether she lives or dies? You have no damned idea of what Michelle was thinking about. That is argument. That is an inference as to what was going

on as to what the initial plan was. I mean, you are arguing the case.

[Ms. Backers]: Excuse me. That is what the victim is going to testify to.

[The Court]: She doesn't know what Michelle Michaud was thinking about.

[Ms. Backers]: She knows that the defendant Daveggio said he was leaving it up to Michelle.

[The Court]: Leaving what up? That is an inference.

[Ms. Backers]: That was the conversation she heard.

[The Court]: That is an inference, Ms. Backers. I am putting you on notice that if this continues, I will start making objections while you are doing it. That is argument. What Michelle was thinking is argument. It is an inference that can be drawn from the facts. I will let you argue that, but you are not going to do it in opening statement. This is an opening statement. This is not closing argument. And you are arguing the case and you know better. And I am trying to get everybody to get this thing started, but I am not a happy camper with the way this is going. So you are on notice that you better start presenting this stuff as an opening statement and not closing argument. (16RT 3622:1-28 to 3623:1-16.)

Although respondent argues this Court should find that the evidence supports the finding that Daveggio allowed Aleda to get dressed while appellant thought about whether Aleda would live or die, respondent fails to identify the supporting evidence it purports exists. The prosecutor told the court that Aleda's testimony would provide evidentiary support for her representation. The trial court, however, aptly pointed up that Aleda could not have been privy to appellant's thought processes.

Another example of respondent's mistaken representation of appellant's argument may be found in respondent's statement that appellant

objected at trial to the prosecutor's statements setting forth the circumstances preceding Vanessa's kidnapping and the fact that her boyfriend had given her "the sweatshirt she was wearing when appellants murdered her." Respondent urges this Court to find that appellant has forfeited her claim on error regarding this issue because she failed to seek a curative admonition below. (RB 115.)

The record (which appellant has reproduced at AOB 261-262), however, manifests that defense counsel objected to the "victim impact" aspect of the prosecutor's remarks and specifically pointed to the prosecutor's reference to boyfriend Rob Oxonian. The record also shows that during the ensuing colloquy the trial court noted it had earlier ruled that the prosecutor could state that when Vanessa disappeared she was wearing a San Diego State University sweatshirt that her boyfriend had given to her. The court then cautioned the prosecutor to limit her further remarks about Vanessa and her boyfriend. "That is why she is wearing that sweatshirt. We talked about this. [¶] Try not to get into a whole lot. She has a boyfriend who has a sweatshirt." (16RT 3704:13-16.)

Under the circumstances of the trial court's ruling and the limitations it set on the prosecutor's future comments in this area, defense counsel may have reasonably concluded that it was the better course to not highlight the prosecutor's reference to Vanessa's now permanently lost relationship with her boyfriend with a curative admonition. And, as appellant has set forth above, the failure to request the jury be admonished does not forfeit the issue for appeal if "'an admonition would not have cured the harm caused by the misconduct.'" (*People v. Bradford*, *supra*, 15 Cal. 4th at p. 1333, quoting *People v. Price*, *supra*, 1 Cal. 4th at p. 447.)

The absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." (*People v. Green*, *supra*, 27 Cal. 3d at p. 35 fn. 19; *People v. Pitts*, *supra*, 223 Cal. App. 3d at p. 692; *People v. Lindsey*, *supra*, 205 Cal. App. 3d at p. 116 fn. 1; see also *People v. Hill*, *supra*, 17 Cal. 4th at p. 820-821.)

Appellant discusses in the subsections below other contentions that respondent has misconstrued in ways favorable to respondent's argument.

2. The Prosecutor's Statements Were Not within Acceptable Boundaries and Respondent Articulates a Standard of Prosecutorial Misconduct That Is Much More Restrictive Than the Law Allows

The prosecutor made a significant majority of the comments challenged here in the course of her opening statement to the jury. The trial court repeatedly admonished the prosecutor that she was impermissibly arguing her case instead of telling the jury about the evidence she intended to present as is appropriate in an opening statement. (16RT 3603:24-28 to 3603:24-28 to 3604:1-13; 3608:16-28 to 3609:1-28 to 3610:1-7; see *People v. Millwee* (1998) 18 Cal.4th 96, 137 [purpose of opening statement is to inform jury of evidence the prosecution intends to present].) In light of the court's repeated admonitions, the prosecutor's persistent refusal to curtail the use of argument in her opening statement reveals the prosecutor's tactical intent to prejudicially color the jury's view of appellant from the beginning of the trial.

Respondent contends appellant's claims lack merit. (RB 122-134.) Respondent first argues that the prosecutor's statements were within acceptable bounds allowed by the applicable law. Respondent relies on *People v. Sanders* (1995) 11 Cal.4th 475, 527, and *People v. Pensinger* (1991) 52 Cal. 3d 1210, 1251, both of which discuss the propriety of remarks made during summation arguments rather than in opening statements, and on *People v. Farnam* (2002) 28 Cal.4th 107, 168-169, which discussed the propriety of prosecutor's remarks made during opening statement. Respondent argues that a prosecutor is allowed to make vigorous arguments, to even use epithets warranted by the evidence, as long as these arguments are not inflammatory and are not principally aimed at arousing the passion or prejudice of the jury. (RB 123.) In *Farnam*, this Court concluded that the prosecutor's colorful descriptions of the victim and the circumstances of the murder, to which the defense did not object below, did not amount to misconduct because the descriptions accurately forecast the evidence admitted in the prosecution's case-in-chief. (*Ibid.*)

In appellant's case, as appellant explains below and in the opening brief (AOB 245-283), the prosecutor's statements were not fair comment on what she anticipated the evidence would show. They did not accurately forecast the evidence admitted in the prosecution's case-in-chief. Appellant's claims, therefore, were not meritless on this ground, as respondent claims.

Respondent also argues that remarks made in opening statements are not misconduct unless the evidence referred to is "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted." (RB 123, citing *People v. Wrest* (1992) 3 Cal.4th

1088, 1108; *People v. Martinez* (1989) 207 Cal.App.3d 1204; and *People v. Davenport* (1995) 11 Cal.4th 1171, abrogated on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555.)

Respondent's articulated standard is more restrictive than the law allows. The law is settled that more than cross-admissibility controls what this Court terms "prosecutorial error." (*People v. Hill*, *supra*, 17 Cal.4th 800 at pp. 822-823 fn.1.) For example, while a prosecutor may present opening statement in the manner of a story, the prosecutor may not ask jurors to step into the victim's shoes and imagine the victim's suffering. (*People v. Millwee*, *supra*, 18 Cal.4th at p. 137.) A prosecutor may make descriptive comment and use epithets warranted by the evidence as long as the comments do not inflame the jury or are not principally aimed at arousing the passions or prejudice of the jury. (*People v. Terry* (1962) 52 Cal.2d 538, 561; *People v. Sanders*, *supra*, 11 Cal.4th at p. 527. In *Gall v. Parker* (6th Cir. 2000) 231 F.3d 265, 277, overruled on other grounds in *Matthews v. Simpson* (6th Cir. 2008) 603 F. 3d 960, 1037-1038, the prosecutor chose not to attack the defendant's insanity evidence by pointing to counter-evidence that the defendant was sane. Instead, the prosecutor attacked the insanity defense itself and ultimately, inter alia, warned the jury that the defendant would go free if he were found not guilty by reason of insanity. *Gall* found this latter comment violated the cardinal rule that a prosecutor may not make statements calculated to incite the passions and prejudices of the jurors. *Gall* concluded that the prosecutor's misconduct was sufficiently egregious to render the trial fundamentally unfair. (*Gall v. Parker*, *supra*, 231 F.3d at p. 315.)

The Supreme Court of the United States has determined that misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 646.) The High Court has also recognized that this is particularly true when prosecutorial misrepresentation occurs because jurors generally believe that the prosecutor faithfully acts as a representative of a sovereignty, whose interest "in a criminal prosecution is not that it shall win a case, but that justice will be done." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

In *People v. Wrest*, *supra*, this Court observed that "remarks made in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor 'was "so patently inadmissible as to charge the prosecutor with knowledge that it could never be admitted."'" (*People v. Wrest*, *supra*, 3 Cal.4th at p. 1108, quoting *People v. Martinez*, *supra*, 207 Cal.App.3d at p. 1225, fn. 5.; see also *People v. Davenport*, *supra*, 11 Cal.4th at p. 1213, holding similarly.) In *Davenport*, this Court found that the challenged remarks by the prosecutor concerned evidence so relevant that it could "scarcely be characterized as 'patently inadmissible'" and that the defendant did not attempt to argue otherwise. (*People v. Davenport*, *supra*, 11 Cal.4th at p. 1213.) In contrast with the circumstance in *Davenport*, appellant's objections here are that the statements were unsupported by the evidence and/or inflammatory.

In *Wrest*, this Court determined that the variance between the prosecutor's statements and the actual proof was either so minor or nonexistent that it could not infer misconduct from the prosecutor's

remarks. (*People v. Wrest*, *supra*, 3 Cal.4th at p. 1108.) In *Martinez*, the Court of Appeal recited the rule that a prosecutor's remarks during opening statement are misconduct where they are based on "patently inadmissible" evidence in the course of reviewing such a claim on appeal, but decided the issue before it on another ground, *viz.*, that the defendant had not requested a curative admonition below and had thus waived the issue.

Here, in appellant's case, for the reasons set forth above and in the contentions that follow, the difference between the challenged statements and actual proof were neither de minimis as in *Wrest*, nor waived by failure to request a curative admonition as in *Martinez*.

3. The Prosecutor Impermissibly Appealed to the Jury's Sympathy and Passions

It has long been established that a prosecutor may not appeal to the passions or prejudices of the jury. In the opening brief, appellant argued that the trial prosecutor did so. (AOB 268-281.) In *People v. Talle* (1952) 111 Cal.App.2d 650, the court stated:

> It hardly needs citation of authority that an argument by the prosecution that appeals to the passion or prejudice of the jury, that asks for a guilty verdict because of sympathy for the deceased, that repeatedly characterizes the defendant as a "despicable beast," . . . that engages in fanciful inferences, not warranted by the evidence, and makes them as statements of fact not warranted by the record, . . . is erroneous and prejudicial. (*People* v. *Talle*, *supra*, 111 Cal.App.2d at 675.)

Respondent does not address appellant's substantive complaint that the prosecutor improperly appealed to the passions and

sympathies of the jury. Instead, respondent argues, for example, that appellant complains that the prosecutor's remarks are prejudicial because the remarks were accompanied by a video "depicting Vanessa's lifeless body," which is inaccurate as appellant explains below. Respondent at the same time argues that it is appellant's conduct that was inflammatory and not the prosecutor's accurate descriptions of appellant's actions. (RB 121.)

Respondent is correct in that appellant discussed the showing of the videotape in the opening brief (AOB 272-273), but respondent once again offers a misdirected view of appellant's argument. Viewed in proper context, the briefing shows that appellant's complaint is directed at the fact that the prosecutor *argued* the case in a prejudicial manner during opening statement. Appellant respectfully refers the reader to her argument at pages 272 to 273 of the opening brief where appellant's reference to the videotape may be viewed in context.

Moreover, while the conduct attributed to appellant and her codefendant may be described as heinous, that circumstance does not give the prosecutor leeway to appeal to the passions and prejudices of the jury, as *Gall v. Parker* recognized.

> "This is indeed a tragic case. The primary tragedy is that a young girl's life was taken in the most cruel and grisly fashion. It is also evident that Eugene Gall was the man who cut her life short. And naturally, the death and Gall's culpability engendered an understandably outraged and angry public as well as a prosecution determined to convict. In these situations, it is a court's duty to ensure that amid the tragedy, anger and outrage over hideous acts perpetrated, a fair and constitutional trial takes place. Constitutionally fair trials do not occur whenever a judge, jury and litigants go through the formal process of presenting arguments and examining witnesses. For a trial to be constitutionally sound

> requires far more: it is a trial where the prosecutor must prove all elements of a crime beyond a reasonable doubt in order to convict; where the prosecutor adheres to certain rules of conduct that guarantee a fair trial and a proper consideration of the defendant's theories and supporting evidence; where the jurors consider only evidence adduced by the parties and that a defendant has had an opportunity to rebut; and where a defendant enjoys the right to cross-examine adverse witnesses. (*Gall v. Parker*, *supra*, 231 F.3d at pp. 277-278.)

Respondent asserts that the prosecutor correctly referred to "four-foot, ten-inch Aleda Doe as a 'little girl'" because the prosecutor is allowed to describe a victim's traits. (RB 128.) Evidence at trial established that Aleda Doe was twenty years old, working as a dental assistant, and attending an evening class at Morrison College in Reno that finished at 10:00 p.m., when she was pulled into the green van. She weighed 120 pounds. (AOB 16; 17RT 3993-3995, 3997-3999, 4038.) Aleda Doe was by these indicia not a little girl and the prosecutor's reference to her as a "little girl" is quite obviously manipulative and well illustrates appellant's claim that the prosecutor had an agenda in her opening statement to capture and control the jury's view of appellant.

Respondent also argues that it was appropriate for the prosecutor to tell the jury that Daveggio had ejaculated on Aleda's face and hair because that was a factual circumstance of the crime "and provided the means to test Daveggio's DNA and conclusively identify him as the perpetrator." (RB 128.) But that representation is not accurate because DNA swabs did not "conclusively" identify him as the perpetrator of crimes against Aleda. The following evidence was received at trial.

Washoe County Crime Laboratory senior criminalist Renee Romero tested the swabs taken from Aleda Doe's cheeks and neck and found epithelial cells, but no sperm cells. (24RT 5501.) Department of Justice senior criminalist Richard Waller tested Aleda Doe's cheek swabs and found that they contained a protein found in seminal fluid and also found the enzyme amylase, which is found in high concentrations in saliva, in all three swabs. (25RT 5624-5626.) Waller stated his opinion that the mixture of saliva and seminal fluid was consistent with a circumstance where a victim was forced to orally copulate the penis of her assailant who subsequently ejaculated on her face. (25RT 2526-2527.) The parties stipulated that Daveggio had had a vasectomy on December 15, 1993. (25RT 5647.)

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

At the time she made her opening statement, the prosecutor had other less inflammatory, more persuasive, and manifestly admissible

evidence that Daveggio was the person who abducted and sexually assaulted Aleda that she could have previewed for the jury. For example, the prosecutor knew and the jury was ultimately instructed that both defendants were convicted in federal district court in Nevada of committing the crimes against Aleda Doe. (17RT 3991-3992.) The prosecutor knew, just as Aleda testified at trial, that Aleda had identified Daveggio as the man who had pulled her into the van and that she had earlier picked his picture out of a photographic lineup. (17RT 4013.) Of the evidence regarding Daveggio's identity as Aleda's attacker available to her, the prosecutor chose the most salacious, the most denigrating, and yet the least dispositive of the issue to preview for the jury in an obvious attempt to prejudicially inflame the jury's emotions against the defendants.

4. The Prosecutor Impermissibly Argued Facts Not in Evidence

The law is settled that "[a] prosecutor may not go beyond the evidence in his argument to the jury." (*People v. Benson* (1990) 52 Cal.3d 754, 795; *People v. Pinholster* (1992) 1 Cal.4th 865, 948 [reference to matter outside record is practice that is clearly misconduct].)

In this case, as appellant explained in Argument X (AOB 331-348), the prosecution presented no forensic evidence that Vanessa Samson had been restrained or that a gun and/or crossbow had been used against her. The prosecution presented no eyewitness evidence that Vanessa had been restrained or that a gun and/or crossbow had been used against her. The prosecution presented no evidence, forensic or otherwise, that any person had been spread-eagled and restrained in the van with ropes

attached to the anchor bolts as the prosecutor argued occurred. Such evidence was therefore not relevant to proof of the charged crimes.

Accordingly, appellant contended that the prosecutor committed misconduct in commenting on this evidence in her opening statement. (AOB 259-261.) Respondent's counter argument is that the prosecutor was justified in making these remarks as the evidence showed that Daveggio and appellant had developed a method to tie someone to the seat bolts. (RB 131.) Respondent does not explain why the existence of a restraint system, if there was one, was relevant to the proof of charged crimes in which there existed no evidence of the use of restraints in accomplishing the crimes. Respondent argues the use of ropes as tie-downs is relevant because appellant had a length of yellow rope in her pocket when she was arrested and a black rope was found next to Vanessa's body. (RB 131.) In making this assertion, however, respondent makes no attempt at reconciling evidence that the yellow rope found in appellant's pocket did not match the pattern of the furrow mark on Vanessa's neck. (23RT 5178-5180; 32RT 6831-6832.) The evidence at trial established that the yellow rope found in appellant's pocket the day after Vanessa was killed was not connected to Vanessa.

Respondent also claims that Daveggio's penalty phase testimony that he experimented with using the anchor bolts as tie-downs establishes that the prosecutor's remarks were a "fair inference from the evidence." (RB 132.) To the extent, if any, that Daveggio's penalty phase testimony is either admissible or arguable against appellant, appellant offers the following observation. The defect in respondent's argument is that, in speaking of the evidence to be presented regarding the charges related to

Vanessa Samson, the prosecutor told the jury that the evidence of the rope tie-downs, the carpet cuts, and the anchor bolts was relevant to showing Vanessa was restrained in the absence of evidence Vanessa was restrained.

> Then you have ropes. The van is full of ropes. She [appellant] has rope in her pocket. There is rope at the murder scene. There is eight feet of missing rope. If you take eight and divide it by four that makes four two-foot tiedowns. And the slits in the carpet aren't just slits in the carpet, ladies and gentlemen, they match the anchor bolts exactly. You take the slits and look at where those anchor bolts are and they match the four outer most anchor bolts exactly. You slip a piece of rope through there and you can tie *her* wrists and ankles. (33RT 7089:19-28 to 7090:1-6 (emphasis added); see also 33RT 7197:24-28.)

Appellant reiterates – the prosecutor committed misconduct by arguing facts not in evidence.

C. SIMILAR MISCONDUCT BY THE PROSECUTOR IN OTHER CAPITAL CASES

Appellant presented examples of other similar misconduct by this prosecutor in the opening brief at pages 278-281.

Respondent first argues that the prosecutor's conduct in other trials is not relevant because a finding of prosecutorial misconduct does not require intentional misconduct. (RB 133-134.) Appellant discusses this contention below.

Respondent alternatively and briefly contends the prosecutor did not commit misconduct. (RB 134.) Rather than reiterate the argument set forth in the opening brief, appellant respectfully refers the reader to her discussion of this issue at pages 278-281 of the opening brief.

As to respondent's initial contention that the prosecutor's conduct in other cases is not relevant here because the prosecutor's intent is not in issue in the determination of misconduct, appellant agrees that a defendant need not establish bad faith on the part of the prosecutor. In 1979, this Court held that a showing of bad faith was no longer required in proving prosecutorial misconduct and disapproved those cases that implied that prosecutorial misconduct must be intentional before it constitutes reversible error. (*People v. Hill* (1998) 17 Cal.4th 800, 822; *People v. Bolton* (1979) 23 Cal.3d 208, 213-214.) *Hill* explained that an injury to a defendant is no less an injury because it was committed inadvertently rather than intentionally. (*Ibid.*) The standard is an objective one, that is, the court must determine how the remarks would have been understood by a reasonable juror. (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

But *Hill* is instructive in another respect – one that is relevant to whether the prosecutor's misconduct in other cases is relevant to the present discussion. In *Hill*, this Court recognized the existence of an "institutional concern" where claims of prosecutorial misconduct are concerned and in keeping with that recognition took judicial notice, over objection of the Attorney General, of other cases in which the prosecutor in the case before it had committed misconduct. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 847-848.) This Court explained:

> In reaching this conclusion, we address an institutional concern as well. Our public prosecutors are charged with an important and solemn duty to ensure that justice and fairness remain the touchstone of our criminal justice system. In the vast majority of cases, these men and women perform their difficult jobs with professionalism, adhering to the highest ethical standards of their calling. This case marks an

> unfortunate exception. We take judicial notice of a 1987 unpublished opinion of the Court of Appeal, Second Appellate District, Division Two, affirming a conviction of Roderick Congious, which not only cites Deputy District Attorney Rosalie Morton for prosecutorial misconduct, but identifies her as the offending prosecutor in two other, published appellate court decisions in which the Court of Appeal found prosecutorial misconduct without identifying the prosecutor. (See *People v. Kelley* [(1977)], 75 Cal. App. 3d 672, 680-682; *People v. Mendoza* (1974) 37 Cal. App. 3d 717, 726-727.) As the opinions in these cases make clear, defendant's is not the first case in which this prosecutor committed misconduct. We are confident the prosecutors of this state need no reminder of the high standard to which they are held, and that the rule prohibiting reversals for prosecutorial misconduct absent a miscarriage of justice in no way authorizes or justifies the type of misconduct that occurred in this case. (*People v. Hill*, *supra*, 17 Cal. 4th at pp. 847-848, fns. omitted.)

The policy reasons articulated in *Hill* for identifying and considering other instances of misconduct by the prosecutor in appellant's case are relevant and applicable here. Respondent is wrong in its assertion that the material is not relevant.

IX.

THE TRIAL COURT ERRED IN REFUSING TWO DEFENSE REQUESTS RELATING TO THE ADMISSIBILITY OF FINGERPRINT IDENTIFICATION EVIDENCE. THESE RULINGS DEPRIVED APPELLANT OF THE RIGHT TO PRESENT A DEFENSE AND THE RIGHT TO CONFRONT WITNESSES AGAINST HER IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO, AND OF THE GUARANTEE OF GREATER RELIABILITY REQUIRED IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

(Respondent addressed this argument in Argument VII of Respondent's Brief, at pages 193-200.)

A. INTRODUCTION

In the opening brief, appellant argued that the trial court erred in refusing two defense requests relating to the admissibility of fingerprint identification evidence. (AOB 284-330.) In particular, the defense sought to preclude the prosecution expert from testifying that latent fingerprints recovered during the investigation matched exemplars obtained from the defendants. When that request was denied, the defense requested a hearing on this issue pursuant to *People v. Kelly* (1976) 17 Cal.3d 24 (overruled in part on other grounds in *People v. Wilkinson* (2004) 33 Cal.4th 821, 839.) That request was also denied.

In the opening brief, appellant argued that that while the "science" of latent fingerprint identification is not new, the reliability and validity of fingerprint identification is presently in question. (See AOB 297-306.) Accordingly, the trial erred in refusing the defense requests. Appellant further explained that a *Kelly* hearing is the necessary first step in

a reevaluation of the validity and reliability of fingerprint identification evidence. (AOB 306-315.)

B. DISCUSSION

Appellant reiterates that she argued the trial court erred in denying her requests (1) for a *Kelly* hearing on the admissibility of fingerprint identification evidence and (2) to preclude the prosecution's expert witnesses from testifying and the prosecutor from arguing that her fingerprints matched latent prints recovered during the investigation.

In its brief, respondent addresses the denial of appellant's request for a *Kelly* hearing, but is silent regarding the erroneous denial of appellant's request that evidence of fingerprint "matches" be excluded. Respondent thus concedes the argument regarding this latter issue. (*People v. Knights* (1985) 166 Cal.App.3d 46, 48; *Yarbrough v. Yarbrough* (1956) 144 Cal.App.2d 610, 612; *Berry v. Ryan* (1950) 97 Cal.App.2d 492, 493.)

1. The Court Erred in Denying the Request for a *Kelly* Hearing

The *Frye* test or general acceptance test is a test that once determined the admissibility of scientific evidence in federal courts. (*Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579 establishes the now prevailing federal standard in accordance with the Federal Rules of Evidence.) *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 articulated the rule that expert opinion evidence based on a new scientific technique is admissible at trial only if the technique is generally accepted as reliable in the relevant scientific community.

In *People v. Kelly*, *supra*, this Court reaffirmed its allegiance to the rule requiring a preliminary showing of general acceptance of a new technique in the relevant scientific community. (*People v. Kelly*, *supra*, 17 Cal.3d at p. 30.)

The admission of fingerprint identification evidence in trials predated both *Frye* and the adoption of the general acceptance standard in California. Because of this historical circumstance, fingerprint identification evidence has never been subjected to the standard later adopted for the admission of "new" scientific evidence in *Kelly*. (See discussion at AOB 290-296.)

Since the time fingerprint identification evidence was routinely admitted into trials, however, substantial research within the relevant forensic community has cast doubts on the reliability of the theory and techniques underlying fingerprint identification evidence, including the very issue of whether a "match" should be declared. Defense counsel attempted to bring these concerns to the trial court's attention, but was unsuccessful in doing so. It is because the acceptability of fingerprint identification evidence within the relevant forensic community is in question that *Kelly* requires that courts re-evaluate the admissibility of the evidence. Here, the trial court committed error when it summarily rebuffed counsel's attempts to notify it that the reliability of fingerprint identification evidence was being questioned within the forensic community. (See summary of the motions made at trial, the evidence that was introduced, and the prosecutor's arguments at AOB 287-290.)

Kelly, as will be seen, expressly requires the re-evaluation appellant contends her trial court should have performed. With a good deal

of prescience, this Court, in *Kelly*, anticipated that the views of the scientific community might change over time and that certain scientific theories and/or techniques once widely accepted would be questioned, abandoned, or come to be viewed with disfavor. Thus, although *Kelly* held on the one hand that the admission of a new scientific technique need not be relitigated once it has been found acceptable in a published opinion, it also expressly stated that the admission of such evidence as an accepted scientific technique would continue only until such time new evidence showed a change in the view of the relevant scientific community.

> Moreover, once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, *at least until new evidence is presented reflecting a change in the attitude of the scientific community.* (*People v. Kelly*, *supra*, 17 Cal.3d at p.32, italics added.)

Subsequently, in *People v. Leahy* (1994) 8 Cal.4th 587, this Court considered the question of whether the results of a horizontal gaze nystagmus (HGN) field sobriety test, which had been used by law enforcement agencies for years, were admissible in the absence of a *Kelly* foundational showing. This Court concluded that given the recent history of legal challenges to the admissibility of HGN test evidence, "it seems appropriate that we deem the technique 'new' or 'novel' for purposes of *Kelly*." (*Id.*, at p. 606.) In reaching this decision, the Court dismissed the People's contention that the HGN test had been used by law enforcement for 30 years. "In determining whether a scientific technique is 'new' for *Kelly* purposes, long-standing use by police officers seems less significant a

factor than repeated use, study, testing and confirmation by scientists or trained technicians." (*Id.*, at p. 605.)

In language of particular relevance to the present discussion on fingerprint identification evidence, *Leahy* stated: "To hold that a scientific technique could become immune from *Kelly* scrutiny merely by reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom seems unjustified. (*Id.*, at p. 606.) *Leahy* thereafter concluded that HGN tests involve a "new scientific technique" that is required to meet *Kelly*'s general acceptance test. (*Id.*, at p. 607.)

Thus, *Leahy* establishes that fingerprint identification techniques are not immunized from *Kelly* scrutiny on the basis of their history.

Here, there was, as appellant will explain below, sufficient reason to question the continued validity and acceptability of fingerprint identification evidence under *Kelly*.

In light of the circumstances described above, the trial court abused its discretion in denying appellant's requests for a *Kelly* hearing on the admissibility of fingerprint identification evidence and to preclude the prosecution's expert witnesses from testifying that appellant's fingerprints matched latent prints recovered during the investigation and to prevent the prosecutor from commenting that appellant's prints matched the prints found. Appellant's contention, in brief, is that the trial court erred in refusing the defense request for a *Kelly* hearing because there was sufficient reason to question the reliability of the fingerprint identification evidence to warrant a *Kelly* hearing. Appellant's claim is not that the fingerprint evidence was necessarily inadmissible.

As part of her right to present a defense guaranteed under the right to due process of law and her right to confront witnesses, appellant should have been allowed to question the basis of this evidence in the forum of a *Kelly* hearing.

Respondent's argument, in sum, is that "the science underlying fingerprint analysis is not subject to a *Kelly* hearing because the science is not new, and its reliability is apparent to a lay person." (RB 198.)

In the opening brief, appellant set forth the historical basis for the admission of fingerprint identification evidence and the recent developments in that area. (AOB 290-296.) Appellant set forth also the theory underlying the admissibility of fingerprint identification evidence and described the developing recognition that the validity and reliability of fingerprint identification evidence is in question and provided samples of incorrect identifications. (AOB 297-306.) Appellant explained why a *Kelly* hearing is the necessary first step in re-evaluating the validity and reliability of fingerprint identification evidence. (AOB 306-315.)

Respondent treats these arguments summarily, contending only that appellant has not shown there is any new evidence reflecting a change in the attitude of the scientific community. Respondent further asserts that appellants only presented the trial court with the results of one FBI study. (RB 199.) The more reasonable view is that the substance of the study and not the number of studies is the relevant factor. At trial below, defense counsel was not given the opportunity to fully develop his contention. A review of the colloquy between the trial court and counsel and, in particular, of the trial court's statements, which appellant has

summarized at AOB pages 287-289, reflects that the trial court's mind was set and the subject of a *Kelly* hearing was very simply off the table. The trial court said: "In this court[,] fingerprint evidence is still good." (15RT 3514:5-6.) The court also said: "We are not doing any *Kelly/Frye* hearings because back east some judge decides he wants to write new law. That's not happening." (15RT 3514:10-12.)

These circumstances make clear that defense counsel did not have the opportunity to elaborate upon their concerns regarding the reliability and validity of fingerprint identification evidence. As noted above, appellant discussed the theoretical underpinnings of fingerprint identification evidence and the developing recognition that the validity and reliability of fingerprint identification evidence in the opening brief at pages 297-306, and appellant respectfully refers the reader to that discussion.

In her opening brief, appellant discussed the applicable law (AOB 306-315) and further explained that this Court's decisions in *People v. Webb* (1993) 6 Cal.4th 494 and *People v. v. Farnam* (2002) 28 Cal.4th 107 do not compel a different result (AOB 315-318.). In both *Webb* and *Farnam*, this Court discussed the *Kelly* standard in the context of fingerprint evidence. Appellant explained that whereas her challenge was to the validity and reliability of fingerprint identification evidence itself, *Webb* challenged the use of a chemical and laser process involved in the detection of fingerprints and *Farnam* challenged the use of a computerized system in the CAL-ID system to create matches. (*People v. Webb*, *supra*, 6 Cal.4th at p. 524; *People v. Farnan*, *supra*, 28 Cal.4th at p. 160.)

Respondent asserts that appellant's arguments are unavailing. (RB 197-198.) Although respondent acknowledges that the issue before this Court in both *Webb* and *Farnam* involved challenges to the methods used to obtain fingerprints and fingerprint matches and not the validity and reliability of fingerprint identification evidence, the issue presently before this Court, respondent nevertheless claims that both cases "stand for the proposition that the analysis of fingerprint evidence itself is not subject to a *Kelly* hearing." (RB 197.)

Well-settled and well-reasoned law establishes that matters not in issue before a court may not be regarded as precedent for that issue.

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated. (*Cohens v. Virginia* (1821) 19 U.S. 264, 399-400.)

Accordingly, *Webb* and *Farnam* do not support respondent's argument as respondent claims.

Appellant has discussed the matter of prejudice at pages 326-330 of the opening brief and respectfully refers the reader to that discussion, which appellant supplements with the discussion that follows.

Respondent presents its view of prejudice at pages 199-200 of its brief. Respondent argues that appellant was not prejudiced because

appellant had the opportunity to examine the prosecution fingerprint expert about the FBI study and about conclusions that appellant's print matched latent prints. (RB 199.) Appellant's objection to testimony regarding fingerprint "matches" is presently an issue before this Court. Moreover, cross-examination of a prosecution expert regarding the FBI study for the jury's edification in weighing the evidence is not the equivalent of a hearing before a court of law on the admissibility of certain evidence based on challenges to the integrity of that evidence, as was the circumstance here. Respondent's argument lacks coherence.

X.

THE TRIAL COURT ERRED IN ADMITTING ITEMS OF EVIDENCE OTHERWISE INADMISSIBLE UNDER EVIDENCE CODE SECTIONS 210, 350, 352, 1101. THE IMPROPER ADMISSION OF THIS EVIDENCE DENIED APPELLANT THE RIGHT TO DUE PROCESS AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND HER RIGHT TO A RELIABLE DETERMINATION OF THE FACTS IN A CAPITAL CASE UNDER THE EIGHTH AMENDMENT

(Respondent addressed this argument in Argument VIII of Respondent's Brief, at pages 200-210.)

A. DISCUSSION

In the opening brief, appellant challenged the admission of evidence that: (1) cuts had been made in the carpeting in appellant's van that allowed access to unused seat anchor bolts to which ropes could be secured to theoretically restrain someone in a spread-eagled position; (2) crossbows and bolts were seized from appellant's van and from a box of belongings Daveggio and appellant left with his daughters; and (3) guns were seized from appellant's van and from the motel room occupied by Daveggio and appellant at the time of their arrest. Appellant argued the evidence was inadmissible character evidence under Evidence Code section 1101 and/or the evidence was either not relevant or, if probative, its probative value was outweighed by its prejudicial nature. (AOB 331-348.)

This evidence of guns, crossbows, bolts, and restraints was not relevant in proving appellant's culpability for the murder and special circumstance allegation pertaining to Vanessa Samson because there was no evidence that any of these items had been used to achieve her death.

There was no evidence that Vanessa Samson had been restrained in any fashion and no evidence that she or anyone had been restrained by ropes passed through the van anchor bolts made accessible by cuts made into the carpet. (See defense arguments 14RT 3445-3448.) Similarly, there was no evidence that the crossbow or guns had been used against or in killing Vanessa Samson. (See defense arguments 14RT 3443.) In the absence of evidence connecting these items of evidence with material matters in issue at trial, the evidence was not relevant and amounted to inadmissible character evidence. The character evidence allowed the jury to view appellant as a bad person or a person with a propensity for violence because she possessed deadly weapons and owned a van that had, arguably, been modified to allow a person to be restrained in a spread-eagled position.

In the opening brief, appellant supported her contentions with citations to, inter alia, *People v. Henderson* (1976) 58 Cal.App.3d 349, *People v. Riser* (1956) 47 Cal.2d 566 (overruled on other grounds in *People v. Balderas* (1985) 41 Cal.3d 144), and *United States v. Hitt* (1992 9th Cir.) 981 F.2d 422. (AOB 337-348.)

Respondent initially contends that where evidence associated with modifications to the van's carpet is concerned appellants forfeited the right to claim error as to all but photographs of a template made from the carpet because appellants failed to properly object below. (RB 200.) That is not the case, however.

The record on appeal establishes that prior to its admission the defense objected on grounds of relevance and foundation to the admission of evidence pertaining to the cuts in the carpeting, including the prosecution-created template marking the location of the slits cut into the

carpeting in relation to the anchor bolts and illustrations of ropes passed through the anchor bolts (People's Nos. 30, 31). (14RT 3445-3446; see discussion at AOB 332-333.) Defense counsel argued there was no evidence that anyone had been tied down in the manner suggested by the prosecutor. Counsel pointed out while there was evidence that Vanessa had been strangled with a rope, there was no evidence she had been restrained, much less restrained with ropes, from which it might be referred she had been restrained by ropes passed through the van anchor bolts in the manner urged by the prosecutor.[6] Counsel characterized the evidence as inflammatory and based on nothing more than speculation. (14RT 3446-3447.) Counsel for appellant objected "strenuously" to evidence of the ropes being admitted. (14RT 3448.)

The prosecutor in turn pointed to evidence that a section of rope was found in a white towel in the van and that Vanessa's DNA was detected upon other items found in the towel. The prosecutor represented that an eight-foot length of the rope was missing and that the rope found next to Vanessa's body and the rope found in appellant's pocket at the time of her arrest approximated eight feet in length. (14RT 3446.) The trial court ruled the evidence of the carpet cuts, including the template and ropes, more probative than prejudicial and therefore admissible to prove planning, premeditation, and scheming. (See 15RT 3506; AOB 333.)

Respondent next argues that the guns were relevant because gun use was a common characteristic of the charged and uncharged sexual

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6. As to this particular defense argument, the trial court inquired: "Were there any indications on any limbs of the deceased?" The prosecutor conceded the point: "No." (14RT 3448:8-10.)

assault evidence. (RB 205-206.) Respondent also contends the carpet cuts and the rope were relevant to "appellants' diabolical plot to torture and murder Vanessa." (RB 207.)

Respondent further contends that appellant's reliance on *Henderson*, *Riser*, and *Hitt* is misplaced because the evidence in issue in those cases was not connected to the charged crimes whereas, in contrast, the challenged evidence here was relevant to the charges. (RB 208-210.) Respondent, in turn, relies upon *People v. Alexander* (2010) 49 Cal.4th 846, 903-904, and on *People v. Prince* (2007) 40 Cal.4th 1179. (RB 203-205.) As appellant explains below, respondent's argument is not supported by either the law or respondent's reasoning.

In *Alexander*, the defendant was charged with murdering a secret service agent by shooting the agent at close range. At trial, a crime scene reconstruction and bloodstain expert testified the shooter, who was wearing a jacket, would have been splattered with a fine mist of blood caused by the close-range shot. Presumptive blood tests conducted on a jacket seized during the investigation and linked to the defendant indicated the presence of blood on the jacket. On appeal, the defendant challenged the admission of the results of the presumptive blood tests on the grounds that the presumptive tests could not confirm the substance tested was human blood, that the confirmatory tests failed to prove the presence of blood, and that it was not known when the jacket was exposed to the substance that tested presumptive for blood. This Court found the presumptive blood test results relevant and admissible because the evidence indicated the jacket might be stained with blood in a pattern consistent with the manner in which the murder was committed and that circumstance

tended in reason to prove or disprove a disputed fact of consequence to the determination of the murder charge. (Evid. Code, § 210.) *Alexander* reasoned that the grounds for exclusion identified by the defense were relevant not to the admissibility of, but to the weight to be given to, the evidence of the presumptive blood results. (*People v. Alexander*, *supra*, 49 Cal. 4th at pp. 860, 904.)

Contrary to respondent's assertions then, *Alexander* supports appellant's argument that the evidence of guns, crossbows, and carpet cuts should have been excluded because, unlike the blood test results and the defendant's jacket in *Alexander*, the evidence in issue here was not relevant to a material point in issue. *Alexander* found the presumptive blood test results relevant and therefore admissible based on this analytical track: The shooter wore a jacket. The shooter shot at close range. As a result of the close-range shooting, a fine mist of blood would have covered the shooter. A jacket seized during the investigation and linked to the defendant tested presumptively for blood. The results of the presumptive blood tests were admissible because they indicated the jacket might have been used in the shooting and that circumstance tended to prove a disputed fact of consequence in the determination of the murder charge, to wit, whether the defendant was the shooter or had knowledge regarding the shooter's identity.

In contrast, in appellant's case, the equivalent of the nexus between the items of evidence, i.e., the evidentiary link between the close-range shooting, the anticipated presence of blood of the shooter's clothing, and the results of presumptive blood tests indicating the presence of blood on the defendant's jacket, is missing. There was in appellant's case no

evidence that the guns or cross bow had been used on Vanessa Samson that would make that evidence relevant and no evidence that Vanessa had been physically restrained that would have made evidence of the carpet cuts and ropes relevant to either the sexual assault, kidnapping, or murder charges associated with Vanessa Samson, as appellant explains more fully below.

In *Prince*, the defendant was convicted of multiple counts of first degree murder, burglary, and attempted burglary, among other crimes. Police seized four knives, including a kitchen and a steak knife, from the defendant's car upon his arrest. The murder victims were stabbed and there was evidence that during the crimes the defendant had removed kitchen knives from drawers and in one instance taken a kitchen knife away. There was evidence the defendant used his car to stalk young women and that he used kitchen knives similar to the one taken from his car. There was also evidence that the defendant had brought a knife with him to two of the murders. At trial, testimony regarding the physical evidence was admitted without defense objection, but defense counsel subsequently objected to the admission of the knives as exhibits as being more prejudicial than probative (Evid. Code, § 352.) On appeal, this Court reasoned that the trial court did not abuse its discretion in admitting the evidence. *Prince* pointed to evidence that the defendant had come armed with his own knife to two of the murders and that the burglaries and attempted burglaries he committed after the murders bore similarities to the murders and the burglaries related to the murders. This circumstance allowed the jury to conclude that he "was armed with his own knife (perhaps one of the knives discovered in his automobile) when he committed some of the charged burglaries and

attempted burglaries." (*People v. Prince*, *supra*, 40 Cal.4th at pp. 1248-1249.)

Thus, here again in *Prince*, the connections between the evidence that made the challenged evidence of the knives admissible is readily discernible, whereas in appellant's case they are not. In *Prince*, although there was no evidence that the four knives seized from the defendant's car had been used in the charged murders, there was evidence that the defendant had brought a knife with him to two of the charged murders and had used his automobile in stalking victims, which this Court found relevant to the jury's determination that the defendant was armed with his own knife when he committed some of the related charged crimes.

Appellant reiterates that in her case no evidence linked the guns, crossbow, or carpet cuts to the crimes associated with Vanessa Samson. Moreover, there is no evidence that linked these items of evidence to the charged sexual assaults committed against either Sharona or April. In addition, respondent's attempts to argue the weapons were relevant to evidence related to uncharged crimes involving Amy and Christina are not helpful to respondent because even if those weapons were determined to be helpful in proving those uncharged crimes by a preponderance of the evidence, the indisputable fact is that neither evidence pertaining to Amy nor evidence pertaining to Christina was relevant to proving the charged crimes as appellant explains below.

The thrust of respondent's contention is that the challenged evidence was relevant to issues at trial and therefore properly admitted. (RB 205-208.) Respondent describes gun use as a characteristic of the sexual assault crimes, but that representation is not accurate. The sexual

assault crimes, charged and uncharged, were distinguishable by victims who were known to both appellants and victims who were not known to them. The victims who were known to them were either friends or relations. Of the victims who were known to appellants, there was evidence that appellants used guns in sexually assaulting Amy and Christina, neither of which was charged. Amy testified she was struck by a gun and Christina testified appellant displayed a gun while they were in the bathroom where the sexual assault took place. Sharona, on the other hand, testified that Daveggio displayed a gun after the sexual assault was over and so not used in committing the assault and April testified that Daveggio displayed a gun during an incident independent of the sexual assault. In contrast, Aleda and Vanessa, the two victims who were not known to appellants and whose circumstances contain other resemblances, were women who were taken off the sidewalks where they were walking and sexually assaulted and, in the case of Vanessa, strangled and killed. There was no evidence of gun or crossbow use or of the use of restraints upon either woman or any evidence either Aleda or Vanessa was tied down to the van floor with restraints secured to seat anchor bolts made accessible through cuts in the carpet.

Moreover, respondent's own argument well illustrates the point appellant makes. Respondent argues: "Likewise, given appellants' *penchant for using weaponry* to intimidate and control their victims, as well as evidence of the loaded gun in the motel room, it was entirely reasonable to *infer* that the cocked crossbow in the van was used for a similar purpose when appellants were transporting Vanessa on her long journey to Lake Tahoe." (RB 206; italics added.) Respondent's reference to appellants'

"*penchant* for using weaponry" in the absence of evidence weapons were used in committing the charged crimes involving Vanessa demonstrates that, even in the midst of making the contrary argument, in respondent's view the evidence really functioned as evidence of appellant's bad character. Further, respondent's need to "*infer*" that the cocked crossbow was used against Vanessa during the drive to Lake Tahoe in the absence of evidence that the crossbow was used or evidence of just when the crossbow was cocked reveals the speculative nature of respondent's argument that the evidence was relevant.

The kind of evidentiary connection so necessary a part of this Court's analysis in *Alexander* and in *Prince* is absent here and the cases relied upon by respondent support rather than dispose of appellant's arguments.

As noted above, respondent contends that appellant incorrectly relies on *Henderson*, *Riser*, and *Hitt* because the evidence in issue in those cases was not connected to the charged crimes whereas, in contrast, the challenged evidence here was relevant to the charges. (RB 208-210.) Clearly, respondent and appellant are in agreement on the relevant law, but disagree of the application of the facts to the law. Appellant respectfully refers the reader to the discussion of *Henderson*, *Riser*, and *Hitt* set forth in the opening brief at pages 331-348.

XI.

THE TRIAL COURT ERRED IN REFUSING THE DEFENSE-REQUESTED MODIFICATION FOR CALJIC NO. 8.81.17, REGARDING KIDNAPPING AS AN "INCIDENTAL" CRIME TO THE MURDER. THIS ERROR DEPRIVED APPELLANT OF THE RIGHT TO TRIAL BY JURY, THE RIGHT TO A RELIABLE DETERMINATION OF THE FACTS, AND THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES

(Respondent addressed this argument in Argument VI of Respondent's Brief, at pages 182-193)

A. INTRODUCTION

Defendants asked that the jury be given the following proffered modification to the felony murder special circumstance instruction (CALJIC No. 8.81.17). The proffered defense special instruction was based on language taken from *Ario v. Superior Court, Alameda County* (1981) 124 Cal.App.3d 285, 287-290, and was intended to make clear that "[f]or a felony-murder special circumstance to apply, the felony cannot be merely 'incidental or ancillary to the murder'; it must demonstrate 'an independent felonious purpose,' not an intent 'simply to kill.'" (*People v. Abilez* (2007) 41 Cal.4th 472, 511.) The proffered instruction read:

> If you find that the kidnapping was for the purpose of murder, then under the law, murder was not committed while the defendant was engaged in kidnapping. Hence, the special circumstance of murder in commission of kidnapping is not established. (7CT 1779.)

The trial court found the proffered instruction to be an incorrect statement of the law and declined to give it. (33RT 7053-7054.)

In the opening brief, appellant argued that, contrary to the trial court's finding, the proffered instruction was a correct statement of law; that a criminal defendant is entitled to an instruction pinpointing her theory of defense; and that appellant was prejudiced by the court's refusal to give the proffered instruction. (AOB 349-370.)

B. RESPONDENT'S ARGUMENT AND DISCUSSION

Respondent contends the trial court did not err in refusing the clarifying instruction because the jury was adequately instructed in the language of the pattern instruction (CALJIC No. 8.81.17.) Respondent relies on *People v. Horning* (2004) 34 Cal.4th 871 and *People v. Davis* (2009) 46 Cal.4th 539. (RB 182-192.) In respondent's view, *Horning* and *Davis* are dispositive of appellant's claim. (RB 190.) However, a review of the holdings in these cases reveals that the decisions arose in different contexts than those present here and neither supports respondent's position in the way respondent claims.

In *Horning*, this Court considered a situation in which the trial court had omitted a portion of the pattern felony murder special circumstance instruction (CALJIC No. 8.81.17). As a result, as to the relevant portion of the instruction, the trial court told the jury only: "In other words, the special circumstance referred to in these instructions is not established if the robbery or burglary were merely incidental to the commission of the murder." (*People v. Horning*, *supra*, 34 Cal. 4th at p. 907.) On appeal, the defendant contended that the trial court erred in not instructing with the omitted portion of the instruction – that the murder had to be committed in order to carry out or advance the robbery or burglary.

This Court disagreed, finding that, although courts have used various phrasings in explaining the unitary requirement that no separate felony-based special circumstance exists if the felony was merely incidental to the murder, there was but one requirement. This Court concluded that although the pattern instruction provided two alternative phrasings to convey the one requirement, instructing with one of the two was sufficient.

Thus, the circumstances in *Horning* differ from those in issue here and the differences refute respondent's argument that the outcome in *Horning* disposes of appellant's claim of error. Respondent argues that *Horning* stands for the proposition that the phrasing "merely incidental" (1) is not ambiguous and (2) adequately instructs the jury on the applicable law. (RB 183, 190.) But, proper review of *Horning* shows the court's analysis was much more narrowly focused on whether the version of the pattern instruction given adequately conveyed the applicable law in the context of whether the omitted portion of the instruction defined an element of the special circumstance enhancement that was not covered by the instruction given.

The gravamen of defense counsel's objection, in contrast, focused on the suitability of the phrasing given in this case. As *Horning* noted, courts have sanctioned various phrasings to convey to the jury that the felony murder special circumstance cannot be established if the crime was not a murder in the commission of the felony. In trial counsel's view, the phrasing in the pattern instruction was not suitable for appellant's case because it was confusing. (See AOB 350-354.) The decision in *Horning* is not dispositive of that issue.

Respondent also relies on *People v. Davis*. In *Davis*, the defense requested two pinpoint instructions requiring "the prosecution to prove that the defendant had a purpose for the [attempted lewd act, robbery, burglary and kidnapping] wholly independent of murder," and instructing the jury that it "may not convict the defendant of first degree murder based upon the commission or attempted commission of burglary if the defendant entered the premises with the intent to [murder]." (*People v. Davis*, *supra*, 46 Cal. 4th at p. 616.)

The trial court refused the instructions as being duplicative and, instead, gave CALJIC No. 8.81.17, which instructed that "the special circumstance referred to in these instructions is not established if the robbery, kidnapping, or lewd act on a child was merely incidental to the commission of the murder." (*Ibid.*)

After deliberations began, the jury asked for the definition of the phrase "merely incidental." The parties agreed to give the jury a definition of "incidental" from Black's Law Dictionary: "[D]epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose." (*Ibid.*)

On appeal in *Davis*, the defendant argued the Black's Law Dictionary definition was vague and ambiguous. This Court first observed that trial counsel agreed to the definition given, stated a common dictionary meaning was not appropriate, and did not renew his request for the pinpoint instructions. This Court commented that, forfeiture aside, the Black's Law Dictionary definition was superior to the initially requested (albeit not renewed) pinpoint instructions "because it was better targeted to the

specific issue that caused the jurors' concern," *viz.*, the definition of the phrase "merely incidental." (*Id.*, at p. 617.) This Court further observed that the defendant had failed to explain why the Black's Law definition was deficient. (*Ibid.*)

Respondent argues that *Davis* establishes that appellant's jury was adequately instructed. (RB 187-188.) But, here again, a review of *Davis* shows that this Court was focused there on a very case-specific procedural and contextual posture in concluding that the Black's Law definition of "merely incidental" was superior to the pinpoint instructions earlier proposed by the defense. This Court reasoned that the Black's Law definition was superior only because it was targeted to the jury's specific question asking for a definition of the phrasing "merely incidental" and because the *Davis* defendant challenged the definition but never explained why it was deficient. Consequently, while *Davis* may have tangentially touched upon the adequacy of the instruction, it does not resolve the question in issue here, which is whether the trial court erred in refusing the proposed clarifying instruction on the felony murder special circumstance in circumstances present in appellant's case.

Respondent's contention then that *Horning* and *Davis* establish that the phrase "merely incidental" adequately conveys controlling law (RB 190) and thus dispose of appellant's claim lacks merit for the reasons stated.

Respondent further argues that appellant was not prejudiced by the rejection of the defense-proposed modification to CALJIC No. 8.81.17. Respondent relies on the argument of the parties at trial and upon the meaning and use of the word "incidental." (See RB 190-193.)

Appellant has discussed both of these matters above and in her opening brief. Rather than repeat such arguments here, appellant respectfully refers the reader to the discussion at pages 349-370 of her opening brief.

In addition, appellant was entitled to the instruction as a defense-requested pinpoint instruction setting forth the defense theory of the case. The due process and trial by jury clauses of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution mandate that "as a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." (*Mathews v. United States* (1988) 485 U.S. 58, 63, citing *Stevenson v. United States* (1896) 162 U.S. 313 (refusal of voluntary manslaughter instruction in murder case where self-defense was primary defense constituted reversible error); see also *Keeble v. United States* (1973) 412 U.S. 205, 213; *United States v. Escobar deBright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202 ("[T]he principle [is] established in American law . . . that a defendant is entitled to a properly phrased theory of defense instruction if there is some evidence to support that theory"); *United States v. Kenny* (9th Cir. 1981) 645 F.2d 1323, 1337 ("jury must be instructed as to the defense theory of the case").)

This mandate derives from the fact that the "right to submit a defense for which [a defendant] has an evidentiary foundation is fundamental to a fair trial and has been considered protected under both the Fifth and Sixth Amendments." (*Whipple v. Duckworth* (7th Cir. 1992) 957 F.2d 418, 423, overruled on other grounds in *Eaglin v. Welborn* (7th Cir. 1995) 57 F.3d 496.) Accordingly, refusing to instruct on the defense theory

of the case denies a defendant a fair trial. (*United States v. Douglas* (7th Cir. 1987) 818 F.2d 1317, 1320-1321.)

A criminal defendant is entitled upon request to an instruction pinpointing the theory of the defense. (*People v. Wharton* (1991) 53 Cal.3d 552, 570.) Such an instruction may direct attention to evidence or amplify legal principles from which the jury may conclude that guilt has not been established beyond a reasonable doubt. (*People v. Hall* (1980) 28 Cal.3d 143, 159; *People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Wright* (1988) 45 Cal.3d 1126, 1136-1137.)

In *People v. Woodward* (1873) 45 Cal. 293, 294, this court held with regard to an instruction analogous to the defense special instruction in issue here that it was error to refuse an instruction informing the jury that a defendant who merely stands by at the time of the offense is not guilty of aiding and abetting the commission of the crime.

This Court has explained the importance of pinpoint instructions as follows:

> Ordinarily, the relevance and materiality of circumstantial evidence is apparent to the trier of fact, but this is not always true, and the courts of this state have often approved instructions pointing out the relevance of certain kinds of evidence to a specific issue. (*People v. Sears*, *supra*, 2 Cal.3d at p. 190.)

In *People v. Wright*, *supra*, this Court clarified this rule by holding that the defendant has no right to direct the jury's attention to specific evidence or testimony. Nevertheless, *Wright* specifically held that CALJIC No. 2.91 (regarding eyewitness testimony) and CALJIC No. 4.50 (regarding alibi) are proper pinpoint instructions. Each of those

instructions calls attention, in a generic form, to the evidence upon which the defense theory is based and admonishes the jurors that if they have a reasonable doubt after considering such evidence, they must acquit. (See Evid. Code, § 502; *People* v. *Simon* (1996) 9 Cal.4th 493, 500-501 (as to defense theories, the trial court is required to instruct on who has the burden and the nature of that burden).)

In *People v. Saille* (1991) 54 Cal.3d 1103, this Court further explained that a defendant is entitled to a pinpoint instruction upon request. "Such instructions relate particular facts to a legal issue in the case or 'pinpoint' the crux of a defendant's case, such as mistaken identification or alibi. [Citation.] They are required to be given upon request when there is evidence supportive of the theory, but they are not required to be given sua sponte." (*People v. Saille*, *supra*, 54 Cal.3d at p. 1119; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1019, Brown, J. concurring.)

XII.

THE CUMULATIVE EFFECT OF THE ERRORS WAS PREJUDICIAL AND REQUIRES A REVERSAL OF THE JUDGMENT OF CONVICTION AND DEATH SENTENCE

(Respondent addressed this argument in Argument XI of Respondent's Brief, at pages 218-219)

Respondent argues that appellants have failed to demonstrate there were any errors whatsoever and that there is therefore no basis for invoking the cumulative error doctrine. (RB 218-219.)

To the contrary, prejudicial errors were committed at appellant's trial and these errors adversely affected the trial's outcome, as appellant has explained in the opening and this reply brief. Appellant respectfully refers the reader to her discussion regarding the cumulative effect of the errors at pages 371-375 of the opening brief.

JOINDER

XVIII.

APPELLANT JOINS IN ALL CONTENTIONS RAISED BY HER COAPPELLANT THAT MAY ACCRUE TO HER BENEFIT AND, IN PARTICULAR, JOINS IN ARGUMENTS MADE AGAINST THE CALIFORNIA DEATH PENALTY

In her opening brief, appellant Michelle Lyn Michaud stated that she joined in all contentions raised by her coappellant that may accrue to her benefit and that she joined, in particular, in her coappellant's arguments against the California Death Penalty. (Rule 8.200, subdivision (a)(5), California Rules of Court ["Instead of filing a brief, or as a part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal."]; *People v. Castillo* (1991) 233 Cal.App.3d 36, 51; *People v. Stone* (1981) 117 Cal.App.3d 15, 19 fn. 5; *People v. Smith* (1970) 4 Cal.App.3d 41, 44; AOB 376.)

With regard to the arguments against the California Death Penalty, appellant now states in addition: In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.*, at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.*. at p. 303 fn. 22.) In order to avoid detailed briefing on such claims in future cases, the

Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.*, at p. 304.)

Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then, appellant has joined in her coappellant's arguments against the California Death Penalty and thus identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of her death sentence and requests the Court to reconsider its decisions rejecting them. Appellant contends that these arguments are squarely framed and sufficiently addressed in Appellant's Opening Brief, and therefore makes no reply.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted on behalf of defendant and appellant MICHELLE LYN MICHAUD that the judgment of conviction and sentence of death must be reversed.

DATED: July 20, 2012

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Rule 8.630, subdivision (b)(1), California Rules of Court, states that an appellant's reply brief in an appeal taken from a judgment of death produced on a computer must not exceed 47,600 words. The tables, the certificate of word count required by the rule, and any attachment permitted under Rule 8.204, subdivision (d), are excluded from the word count limit.

Pursuant to Rule 8.630, subdivision (b), and in reliance upon Microsoft Office Word 2007 software which was used to prepare this document, I certify that the word count of this brief is 27,514 words.

DATED: July 20, 2012

Respectfully submitted,

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PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the within entitled action. My business address is 321 Richmond Street, El Segundo, California 90245.

On _____, I served the **Appellant's Reply Brief on behalf of Michelle Lyn Michaud** in People v. James Anthony DaVeggio and **Michelle Lyn Michaud** (CSC No. S110294; Alameda County Superior Court No. 134147) on the parties named below by placing true copies thereof, enclosed in sealed envelope(s) addressed as stated on the attached mailing list, with postage/delivery fee fully prepaid, at El Segundo, California, with the U.S. Postal Service or United Parcel Service, as indicated.

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5. Alameda Cnty Superior Court
   Appeals Division
   1225 Fallon St., Rm G-4
   Oakland, CA 94612
   Attn: Marie Mayupao

6. Alameda Cnty Superior Court
   Clerk's Office
   1225 Fallon St.
   Oakland, CA 94612
   Attn: Hon. Larry Goodman

7. California Appellate Project
   101 Second Street Ste 600
   San Francisco, CA 94105
   Attn: Morey Garelick

I declare under penalty of perjury that the foregoing is true and correct. Executed on _____, at El Segundo, California.

_____