IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	S152737
Plaintiff/Respondent	)	Contra Costa County 040292-5
vs.	)	
JOSEPH S. CORDOVA	)	
Defendant/Appellant	)	

APPELLANT'S REPLY BRIEF

An Automatic Appeal from the Judgment of the Contra Costa superior Court,

Honorable Peter L. Spinetta, Judge.

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I. DUE TO THE PERVASIVE NEGLIGENCE AND INDIFFERENCE OF GOVERNMENT AGENTS IN THE INVESTIGATION OF THIS MATTER, APPELLANT WAS NOT CHARGED WITH THE INSTANT CRIMES UNTIL TWENTY-THREE YEARS AFTER ITS COMMISSION, THEREBY PREVENTING HIM FROM MOUNTING AN ADEQUATE DEFENSE AT TRIAL IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. SUMMARY OF APPELLANT'S ARGUMENT

Cannie Bullock was murdered 23 years before appellant was charged with the crime. From the outset, the investigation of the crime by law enforcement was haphazardly, indifferently, and negligently conducted.

On the very first day of the investigation, the police were convinced that the crime had to have been committed by one of Linda Bullock's acquaintances. In fact, within hours of the discovery of Cannie's body, Debbie Fisher, Linda's close friend and sometime housemate, informed the police that Ms. Bullock knew who did the crime. (7 RT 1499-1503.)

In spite of this information, the police did very little to capture the killer. Instead of pursing these leads, the police conducted only a few ineffectual interviews with Ms. Bullock, interviews in which it was clear that she was hiding the truth. In the days following the murder, Ms. Bullock was uncooperative and under the influence of some sort of intoxicant. The

police did virtually nothing to pierce her silence. Instead of holding Ms. Bullock as a material witness, or arresting her for criminal negligence in Cannie's death, the police seemed simply give up on her in spite of the fact that they were convinced she held the key to the entire investigation. Soon after the crime, Linda Bullock went into hiding, in an apparent attempt to avoid further inquiries about her daughter's murder. There is no indication that the local authorities ever contacted the Federal Bureau of Investigation of other state authorities to help find her. The police simply gave up.

The balance of the investigation was equally perfunctory. In spite of the fact that they knew that Ms. Bullock's circle of friends was largely limited to the bikers that frequented the local bars of San Pablo, the police did very little canvassing at these establishments in an attempt to identify possible suspects in the murder. As the result of an internal conflict within the San Pablo Police Department, the investigation essentially ended a little over a month after it began, with all of the detective work of the San Pablo Police Department being contracted to the County Sheriff. There was no evidence that the Sheriff did anything to find Cannie's killer for the next 23 years. Nor was there any indication that any local authority made any attempt to contact any state or federal law enforcement agency for assistance. It was not until 1996 that any attempt was made to further investigate the case, and even then the investigation consisted of creating a

very limited DNA profile.

The government's indifference in pursuing the investigation of this case caused appellant to suffer prejudice from the loss of material witnesses and evidence, compromising his ability to defend himself. The pre-indictment delay of 23 years violated appellant's right to due process of law pursuant to both the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of California.

B. SUMMARY OF RESPONDENT'S BRIEF ARGUMENT

Citing to *People v. Nelson* (2008) 43 Cal.4th 1242, respondent acknowledged that prosecution delay that was both unjustified and prejudicial may infringe upon a defendant's state and federal due process protections. Respondent maintained that a violation of due process under the United States Constitution must involve a governmental delay that "was undertaken to gain a tactical advantage over the defendant." (RB p. 40; *People v. Caitlin* (2001) 26 Cal.4th 81, 105; *United States v. Lovasco* (1973) 431 U.S. 783, 795.) However, respondent further acknowledged that California due process protections, in turn, may be infringed upon when the government negligence or intentional inaction results in a time lapse before charging. (RB p. 40; *People v. Nelson* (2008) 43 Cal.4th at p. 1255.)

Regarding the standard and procedure that the trial court must follow in determining whether a defendant was deprived of hie due process rights

by any such delay, a defendant seeking relief "must first demonstrate resulting prejudice, as by showing the loss of material or other missing evidence or fading memory caused by lapse of time."(RB 41; *People v. Abel* (2012) 53 Cal.4th 891, 908.)

Respondent argued that such prejudice is not presumed. (RB at p. 41; *People v. Abel, supra,* 53 Cal.4th at pp. 908-909.) Prejudice must be "actual" and it is not demonstrated where defendant relies upon "possibilities" (RB 41; *United States v. Marion* (1971) 404 U.S. 307, 326. Nor can prejudice be speculative. (*People v. Belton* (1992) 6 Cal. 4th 1425, 1433; *People v. Archerd* (1970) 3 Cal.3d 615, 640.)

Respondent further argued that even if prejudice is established the "prosecutor may offer justification for the delay and the court considering of the motion to dismiss must balance the harm to defendant against the justification for the delay." (RB 41; *People v. Catlin, supra,* 26 Cal.4th at p. 107.) If prejudice is not established the trial court may deny defendant's motion without inquiry into the cause of delay. (RB 41; *Senna v. Superior Court* (1985) 40 Cal.3d 239, 249.) Respondent further argued that mere negligent delay requires a greater showing of prejudice than a purposeful delay. (RB 42; *People v. Cowan* (2010) 50 Cal.4th 401, 431.)

Regarding the instant case, respondent specifically argued that appellant based his claim on this sort of speculation in that there was "no

showing that any people cited as potential defense witnesses would have cooperated and offered helpful evidence. " (RB 43.)

Into this category of potential "speculative" witnesses, respondent placed the Bullock neighbors (RB at p.43-45), relatives of third party suspect Flores (RB at p. 45), the medical staff attending at the time of Flores death (RB at p. 46), and Linda Bullock's social contacts. (RB at pp. 46-47.)

In addition, respondent argued that any prejudice from lost penalty phase witnesses from appellant's Viet Nam-era service days, as well as lost military, medical, and educational records is also pure speculation. (RB at p. 47.)

In addition, respondent disagreed with argument that appellant was prejudiced by his own faulty memory stating that the record demonstrated that appellant had a good memory of the events that transpired as far back as the time of Cannie's death. (RB at p. 47-48)

Respondent also argued that "the fact that the passage of time allowed the prosecutor to generate DNA evidence identifying appellant as Cannie's rapist and killer does not constitute prejudice for due process purposes." (RB at p. 48; *In re Chuong D.*(2006) 135 Cal.App.4th 1303, 1311.)

In addition, respondent argued that "even if there was some minimal

prejudice accrued as a result of the delay, the prosecution bore little if any burden of justification" in that the delay was neither intentional nor negligent, but rather an "investigational" delay. (RB at p. 48-49.)

To support these arguments, respondent cited *People v. Nelson, supra,* 43 Cal. 4th at p. 1256, a case where it took 26 years to solve a crime because the state of DNA science was not sufficiently developed to make an identification until that long after the crime. (RB at p. 49.) Respondent also argued that the police investigation into Cannie's murder "was hampered by her mother's drug and alcohol and attempts to evade contact with investigators." (RB at p. 50.) Respondent also justified the delay by citing to the same manpower shortage in the San Pablo Police Department that was referenced in Appellant's Opening Brief. (AOB at pp. 54-55.)

Respondent further argued that once new DNA technology became available, "law enforcement responded promptly and aggressively." (RB at p. 51.) Respondent closed its argument by stating that any showing of prejudice did not outweigh the justification for delay. (RB at p. 52-53.)

C. APPELLANT'S REPLY ARGUMENT

1. Introduction

Respondent's general exposition of the controlling law was correct. In *People v. Catlin, supra,* 26 Cal.4th at p. 107, this Court stated that a defendant seeking to dismiss an indictment on speedy trial/due process

grounds must demonstrate prejudice arising from the delay. After a showing of prejudice has been made, the prosecutor may offer a justification for the delay; the trial court then balances the harm to the defendant against the reasons for the delay. (See *People v. Nelson, supra,* 43 Cal.4th at p. 1250; *People v. Archerd, supra,* 3 Cal.3d at pp. 639-632; *People v. Pellegrino* (1978) 86 Cal.App.3d 776, 779-781.) The defendant has the burden to "affirmatively demonstrate that the delay (whether under either the speedy trial or due process rationale) has prejudiced his ability to defend against the charge." (*People v. Martinez* (2000) 22 Cal.4th 750, 766.)

In a broad sense the trial court's task "is to determine whether pre-charging delay violates the fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." (*People v. Boysen* (2007) 165 Cal.App.4th 761, 777; *People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 914.)

It is true that prosecutors are under no obligation to file charges as soon as probable cause exists but before they are satisfied that they can prove the case beyond a reasonable doubt. (*People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 915) However, if defendant has met his burden of showing that delay in prosecution has caused a defendant prejudice, the trial court must balance the harm to the defendant against the justification

for the delay. The facts and circumstances must be viewed in light of (1) time involved, (2) who caused the delay, (3) the purposeful aspect of the delay, (4) prejudice to the defendant, and (5) waiver by the defendant. (*Id.* at p. 911.) This balancing task is "a delicate one," and "a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. The more reasonable the delay, the more prejudice the defense has to show to require dismissal." (*Id.* at p. 915.)

The first part of respondent's argument was that regardless of any paucity of the police investigation or their indifference to solving the crime, appellant was unable to prove any "specific" prejudice from the 23 year delay. (RB at pp. 42- 48) Appellant also strongly disagrees with the trial court's holding that even if the police were negligent by failure to properly conduct the investigation, it was "pure speculation" that had the investigation been done properly, it would have led to an arrest or identification of a suspect. (7 RT 1524-1525.) As will be show below, respondent's argument flies in the face of common sense and the spirit of the law.

The second part of respondent's argument was that the delay in charging was justified. (RB at pp. 48-52.) Appellant again agrees neither with respondent's analysis nor with the ruling of the trial court which stated that it did not believe that a showing of negligence had been made, yet at

the same time stated that it was not clear whether or not the police failed to properly follow up on leads. (7 RT 1524.) As will be shown, the initial police investigation in this matter was more than just negligent or improperly conducted. Instead, it was characterized by inexcusable indifference constituting an intentional disregard for solving the case. Considering the grave nature of the charges, and the fact that the perpetrator of this egregious crime had not been apprehended, the police simply gave up on the investigation within a very short time of the crime. They knew from the outset that the victim's mother, Linda Bullock, held the key to solving the crime, but instead of using all of the legitimate means at their disposal to compel Ms. Bullock's cooperation, they simply accepted Ms. Bullock's post-crime state of intoxication and refusal to cooperate.

The wholly inadequate police investigation was so intertwined with the true prejudice suffered by defendant, appellant's response to all of respondent's arguments will be contained in the following unified rebuttal argument.

2. The Government's Intentional Lack of Interest in Investigating this Case Caused a 23 Year Delay in Prosecution that Made the Showing of "Particularized" Prejudice Both Impossible and Unnecessary

Respondent's chief argument is that appellant is not entitled to due process relief because he failed to state any specific prejudice he suffered

because of the delay of 23 years. It similarly argued that the claims of prejudice appellant did make were "speculation." (ARB at p. 6.) Respondent's argument defies the reality of the natural effect of the passage of twenty-three years on human memory. There is *nothing* at all speculative about what the passage of almost a quarter of a century does to the ability to investigate and defend against a capital charge such as this. Respondent's contention that there was no proof that the witnesses referenced in the AOB could have produced any evidence beneficial for the defense is, itself, the speculation as to the issue of prejudice

The respondent's argument also makes an artificial and counterintuitive distinction between cases where the content of the missing evidence is known and those where it is not. Respondent essentially argued that prejudice can only be shown if law enforcement authorities did sufficient investigation so a lost witness or a lost piece of evidence could be specifically identified. However, conversely, if the investigation was so incomplete or nonexistent that such an investigation becomes impossible, no prejudice can be shown. Respondent's argument, therefore, would reward laziness and bad faith on the part of the state.

In addition to defying common sense, respondent's position is not supported by the law. Respondent completely failed to recognize the legal relationship between the length of the prosecutor's delay in bringing the

charges and the degree of particularization of prejudice required by the defense. Delays in prosecution far less shorter than seen in this case create situations in which the articulation of the precise prejudice impossible because the precise effect of this prejudice can no longer be ascertained.

This Court recognized this in *People v. Horning* (2004) 34 Cal.4th 871, a case not cited by respondent. *Horning* fully recognized that the longer the delay in prosecution, the harder it is for a defendant to "particularize" prejudice with specific allegations. "[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim, because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify."[1] (*Id* at 893.) Further, this Court, citing to *Doggett v. United States* (1992) 505 U.S. 642, 651-652, made clear that the "presumption of pre-trial delay has prejudiced the accused intensified over the time." (*Horning, supra,* 34 Cal.4th at p. 893.)

Doggett was a speedy trial case in which 8 ½ years had passed from defendant's indictment in federal district court to his arrest.[2] The High

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1. Appellant cited to *Horning* for this point in his AOB. (AOB at p. 49.) Respondent did not respond to this citation in its Brief.

2. Both *Horning* and *Doggett* were post-charging delay speedy trial cases, but the logic is the same in a pre-accusational due process case as in the instant case. Further, as stated in *People v. Hannon* (1977) 19 Cal.3d 588, 604-

Court called this 8 ½ year period "extraordinary" and held that the governments delay in proceeding with case caused a violation in defendant's tight to a speedy trial under the United States Constitution.

In February 1980, Doggett was indicted for conspiracy to distribute cocaine. (*Doggett v. United States, supra,* 505 U.S. at p. 648.) Government agents promptly went to Doggett's house to arrest him but discovered that, Doggett, unaware of any charges pending against him, had left the country. (*Id.* at pp 647-648.) Agents made plans through a computer program to locate Doggett on his return to the United States. However, the police allowed the computer entry bearing Doggett's name to expire leaving no computerized record of his wanted status. (*Ibid.*)

In September 1981, the government located Doggett in Panama, where he was under arrest for another crime. U.S. agents requested that Panama "expel" him to the United States. (*Doggett, supra,* 505 U.S. at p. 649) However, Panama released Doggett, who returned to the United States and settled into a crime free family life. (*Ibid.*) Evidence revealed that after his unhindered return to the United States in 1982, the government was at times aware of Doggett's whereabouts, especially when he traveled

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605, 607, the California Constitution does not distinguish between pre-charging and post charging delays and the same balancing test is the same for both. (See also *People v. Martinez, supra,* 22 Cal.4th at p. 766.)

overseas. No attempt was made to apprehend him until 1988, when the Marshal's Service ran a routine credit check on several thousand people subject to warrants. Doggett's name, address, and place of employment came up in a matter of minutes leading to his arrest. (*Id.* at pp. 649-650.)

Accepting the recommendations of the magistrate, the district court found that while the delay in prosecution was "clearly attributable to the negligence of the government," Doggett had made no "affirmative showing" that the delay "had impaired his ability to mount a successful defense or otherwise prejudiced him." Therefore, the district court denied Doggett's motion to dismiss the case against him for a violation of the speedy trial provisions of the Fifth Amendment. (*Doggett v. United States, supra,* 505 U.S. at p. 650.) The court of appeals affirmed.

However, the United States Supreme Court overruled the decision of the court of appeals. It rejected the government's claim that Doggett's claim was defeated by the failure to identify particularized prejudice. Instead, the Court held that after a lengthy delay in prosecution created by the prosecutor's negligence, the delay becomes "presumptively prejudicial"[3] without additional showing of any specific prejudice. (*Doggett v. United*

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3. The term "presumptively prejudicial" has been defined as the prejudice needed to trigger the balancing test of prejudice against the reasons for the delay to determine if defendant's due process or speedy trial right(s) have been violated. (*People v. Horning, supra,* 34 Cal.4th at p. 892.)

States, supra, 505 U.S. at p. 652.) The High Court held that though Doggett was unable to demonstrate any specific prejudice, the "extraordinary" delay of 8 ½ years between indictment and arrest had an innately prejudicial effect on Doggett's ability to prepare his case and, further, diminished his memory and that of other witnesses. (*Id.* at p. 654.)

The High Court held that a delay of this length created a situation in which the fairness of the entire system was "skewed" against a defendant. (*Ibid.*) The Court specifically acknowledged that the most serious form of prejudice that a defendant can suffer because of prosecutorial delay is the *possiblity* that the accused's defense will be impaired by dimming memories or loss of exculpatory evidence. (*Ibid.*; see *Barker v. Wingo* (1972) 407 U.S. 514, 532.)

The Court then concluded by stating

> Between diligent prosecution and bad faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad faith delay would make relief virtually automatic, neither is negligence automatically tolerable because the accused cannot demonstrate exactly how it has prejudiced him. It was on this point that the Court of Appeal erred, and on the facts before us it was reversible error. (*Id.* at p. 657)

Because *People v. Hannon, supra,* 19 Cal.3d at 607 made it clear that California law applied the same standards to speedy trial/due process questions both pre- and post- charging, *Doggett's* analysis applies to the

instant case. While a lengthy delay doesn't necessarily compel reveal of the conviction, neither is its effect rendered moot by a failure to cite to "particularized " prejudice, especially after a delay of 23 years, as in the instant case.

Even if was true that appellant was unable to state with particularity the specific prejudice he suffered by the unreasonable and inexcusable delay, under the above law and the common sense that spawned it, such a showing was not necessary.

As stated both above and in the Appellant's Opening Brief, the delay in prosecution was *not* a function of the lack of scientific methodology. Although the development of such methodology ultimately caused the prosecution to commence, the reason for delay was governmental difference and neglect. The police almost immediately reached the conclusion that Linda Bullock knew who killed her daughter, or at very least possessed information that could lead to Cannie's killer. In spite of this, she was allowed to simply disappear. Her "social contacts" went largely uninvestigated, or disappeared with her.

This was a classic case which had to be acted upon quickly and with sufficient manpower to put into effect all police strategies, such as the use of informants, rewards, mass canvassing of all motorcycle and similar type outlaw gangs, and perhaps most importantly, the type of interdepartmental

cooperation that is essential to solving cases such as this one. Instead, the agents of the government contented themselves to impose the most cavalier restrictions on both the scope and depth of their investigation, leaving justice in the hands of Cannie's criminally incompetent mother and a dysfunctional small town police department. The lack of results of this incomprehensibly weak investigation of such a grievous crime was utterly predictable. Further, the responsibility for this wholly unsurprising lack of results must fall completely upon the government, which in 1979 deliberately chose to invest so little of its resources and time into this crime.

The investigation was essentially terminated not long after it began, when the San Pablo Police, beset with internal difficulties, stopped doing any active detective work, instead contracting with the Sheriff's Department. (7 RT 1512.) The San Pablo's Police Department's indifference to this case was so great that it was several years before the San Pablo Police even followed up with the Sheriff, only to be told nothing had been done. (7 RT 1513.)

There was utterly *no* showing that any effort was made to investigate this case after the San Pablo Police Department washed its hands of it. Respondent's attempt to justify such indifference and neglect by citing a short-handed local department constituted a misapprehension as to how law enforcement should, and usually behaves in cases such as this. Respondent,

being a critical part of the law enforcement process, is fully aware that an abundance of assistance is available to local police over-stressed by a complicated investigation requiring more resources than available to them.

At no point did respondent ever explain why the police did not contact the federal agencies such as the Federal Bureau of Investigation, the Drug Enforcement Agency, or the Bureau of Alcohol Tobacco and Firearms, all whom had far greater resources and far greater contacts, especially concerning the very type of outlaw people implicated in this case. These agencies had access to the type of undercover agents and informants that were necessary to solve this type of crime. Nowhere in respondent's brief, nor in the reporter's transcript, was there any indication as to why such help was not sought by local authorities.

While appellant is reluctant to speculate as to *why* law enforcement chose to take such an indifferent approach to the death of an eight-year-old girl, the following does not require speculation. Cannie's murder received scant attention and even less concerted interdepartmental effort to solve it. That was the *choice* of the prosecutor and his subordinates, alone. They cannot now be allowed to re-write history and say that they did their best and that the delay was justifiable.

Areas of prejudice condemned by respondent for their lack of specificity (RB at pp 42 et seq) were as specific as appellant could be

considering the length of the government created delay and the dearth of substantive investigation by those who should have been responsible for gathering the evidence appellant is now faulted for not having. *Doggett* is this controlling case as to the issue of the specificity of prejudice that defendant must set forth. Twenty-three years passed from the time of the murder to the time of appellant's arrest, almost *three times* the delay found constitutionally unacceptable in *Doggett.* Unless a crime took place at the exact time defendant could conclusively establish an alibi with official records (incarceration, serving overseas, etc), it is *impossible* to establish an alibi after almost a quarter of a century.

Respondent's claim that appellant remembered what he was doing around the general period of the crime (RB at pp. 47-48) does not mean that appellant could possibly remember exactly where he was during the few minutes of the actual commission of the crime. More importantly, it certainly does not mean that any possible alibi witnesses would have any memory of that time at all.

Further, the passage of such a lengthy period of time that he was incarcerated makes it absolutely impossible for the defense team to properly investigate what the police should have investigated 23 years before. The defense could not possible reconstruct the disreputable cast of characters that surrounded Linda Bullock nor the nomadic biker gangs who

intimidated her into silence. After such a period of time, there people may as well have never existed. Even if by some twist of fate, the defense team could turn up one or more of these people, it would probably be impossible to place them in San Pablo at the time of the crime, let alone at the scene of the crime. This sort of investigation should have been done by the government, in 1979, not by a defense investigator 23 years after the fact. (*People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 915)

Because appellant met his burden of showing that delay in prosecution has caused him prejudice, the trial court must balance the harm to the defendant against the justification for the delay. The facts and circumstances must be viewed in light of (1) time involved, (2) who caused the delay, (3) the purposeful aspect of the delay, (4) prejudice to the defendant, and (5) waiver by the defendant. (*People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at p. 915)

All of these factors favor appellant's claim. The delay in prosecution spanned 23 years and was caused solely by governmental indifference. This indifference was purposeful in the sense that a conscious decision was made by governmental authorities *not* to press the investigation in spite of fact that the police had a good idea how and where they could find their suspect. As stated above, the prejudice to appellant was manifest, and the delay was in no way waived by him.

3. The Cases Cited By Respondent in Its Brief Were Unavailing to Its Argument Due to Their Factual Dissimilarity to the Instant Case

In its Brief, respondent claimed that *People v. Nelson, supra,* 43 Cal.4th 1242 "controll(ed)" the instant fact situation. On the surface, the facts of *Nelson* bear some facial similarity to the instant case, but in their most relevant aspect are fundamentally distinguishable in both the nature of the prejudice and reason for the delay. On February 23, 1976, Ollie George a 19 year old college student, disappeared after having car trouble at a local shopping center in Sacramento. (*Id.* at pp. 1247-1248.) Two days later, her body was found in a remote Sacramento County location. She had been raped and drowned in mud. (*Id.* at p. 1248.)

In early March of the same year, defendant was interviewed by the police. While he gave a "confused account" of his activities at the time of the murder, the police did not have sufficient evidence with which to accuse him of the crime. (*People v. Nelson, supra,* 43 Cal.4th at p. 1248.) However, the police fielded "hundreds of tips," and "interviewed over 180 potential witnesses" (*Ibid.*) Further, the police followed up on other leads, but were ultimately unable to focus the investigation on any single suspect. (*Ibid.*) After exhausting all other alternatives, the authorities ultimately left the case open but "inactive." (*Ibid.*)

The *Nelson* case was ultimately solved in the same manner as the instant case. (*People v. Nelson, supra,* 43 Cal.4th at p. 1248.) In the years following the murder of Ms. George, Nelson had been convicted of crimes and was imprisoned in the state prison system for a lengthy period of time. As in the instant case, while Nelson was in prison a DNA sample was taken from defendant and entered into the inmate data bank. (*Ibid.*) In 2001, a DNA match was made of a latent semen stain found on Ms. George's sweater and the known DNA sample taken from defendant. (*Id.* at pp. 1248-1249.) Based primarily on this DNA testing, Nelson was convicted of Ms. George's rape and murder. (*Id.* at 1249.)

This Court in *Nelson* stated that the delay in that case was completely justified in that it was only after the DNA comparison was there sufficient cause to bring charges against Nelson. (*People v. Nelson, supra,* 43 Cal.4th at p. 1256.) This Court held that

> the due process clause does not permit courts to abort criminal prosecutions simply because they disagree with the prosecutor's judgment as to when to seek an indictment,...A prosecutor abides by elementary fair play and decency by refusing to seek an indictment until he or she is completely satisfied that the defend ant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt. (*Ib*id.)

Appellant disputes none of this. This Court's holding in *Nelson* protects both the public and the accused against rushed and hasty

prosecutorial decisions. As stated in *Nelson*, such a delay is "not so one-sided," but protective of the interests of all. (*People v. Nelson, supra,* 43 Cal. 4th at p. 1256.)

However, the fact that *Nelson* and this case both involve "cold case" hits almost a quarter of a century after the crime does not mean that *Nelson* justifies the sort of truly one-sided delay of the instant case. The critical difference between the two cases resides in the nature of the pre-DNA match investigation in each case. In *Nelson,* the police did everything within their power to solve the case. They followed up on hundreds of tips, interviewed over 180 witnesses, and followed any number of leads until they could go no further. There was no sign of police indifference or lack of effort. Further, there was no indication that the police were presented with substantial leads that they did not pursue, or had developed theories that were not fully examined with the tools available to them in 1976.

As stated above, this was definitely not the situation in the instant case. According to the police, they were convinced from the outset that Ms. Bullock knew much more than she was stating. They knew that their suspect was in Ms. Bullock's "social circle" and likely one of her male sexual partners. Yet, as also stated, there was nothing that even resembled the type of investigation performed by the police in the *Nelson* investigation.

The other cases cited by respondent to arguethat appellant's claim of prejudice was speculative were also factually dissimilar to the instant case in both the nature of the prejudice suffered and the length of the delay. They do not support the argument urged by respondent that appellant is not entitled to relief either because he did not demonstrate that he suffered any prejudice or that the police were not responsible for the delay.

People v. Catlin, supra, 26 Cal.4th 81, was used by respondent to argue that no prejudice can be shown in the instant case because of appellant's inability to show that witnesses named would have been able to provide material evidence. (See RB at p. 44.) However, a close inspection of the underlying facts of *Catlin* demonstrate why its precedential value in this case in extremely limited.

In *Catlin,* defendant's fourth wife, Joyce, died in 1976 of gross pulmonary thrombosis. While paraquat poisoning was considered as the cause of this thrombosis, the state of medical testing in 1976 did not allow for accurate detection of this particular poison. (*People v. Catlin, supra,* 26 Cal.4th at p. 99.) Six years later, defendant's mother died of poisoning as well. (*Id.* at pp. 101-102.) By 1982, the state of forensic testing allowed for the isolation of paraquat in the human body. (*Id.* at p. 102.) In addition, unlike in the death of Joyce Catlin, not only was there evidence of the use of paraquat, but there was other evidence that defendant had the motivation

and intent to kill his mother. (*Ibid.*)

Defendant was arrested in 1985, for the murder of both of Joyce and his mother. At a pre-trial motion, defendant moved that the murder charge for the death of Joyce Catlin be dismissed because the nine year delay between the murder and formal charges it was a violation of the due process clause of both the state and federal constitution. (*Id.* at p. 106.)

Defendant's claim of prejudice rested chiefly upon the argument that two of the persons that who attended Joyce's autopsy in 1976 (a pathologist and a coroner's employee) had died before charges were ultimately brought against Catlin nine years later. (*People v. Catlin, supra,* 26 Cal.4th at p. 108.) However, there was no evidence presented that either of these gentlemen would have provided any relevant defense testimony at the trial. Further, defendant claimed that the loss of certain tissue samples taken from Joyce at the autopsy had been lost. However, once again, defendant was not able to articulate how the preservation of this tissue would have aided defendant as there was uncontested evidence at the trial that defendant's thrombosis could only have been caused by paraquat poisoning (*Id.* at p. 109.) This Court held that there was nothing in the testimony of these witnesses that could have disputed this. (*Ibid,* see also *People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th at pp. 915-916.)

Unlike in the instant case, the claim in *Catlin* rested on the

unavailability of two specific witnesses and the loss of a particular tissue sample. It was decisively proven that neither the witness nor tissue absence was at all relevant to the case, therefore the length of the delay, and its usually inherent prejudice, was irrelevant. Further, as Catlin had almost constant access to his victims, the importance of an alibi as to his whereabouts at the time of the murders was slight, unlike in the instant case. Nor was there any indication that the police in *Catlin* failed to do a proper initial investigation of the charges.

While the facts of *Horning* did not result in relief to the defendant, they bear review on the issue of the impact of the length of delay, especially in the absence of "particularized prejudice." In September, 1990, the dismembered body of Sammy McCullough was found in the San Joaquin River Delta. (*People v. Horning, supra,* 34 Cal.4th 879.) In December of the same year, the District Attorney of San Joaquin County filed a complaint charging defendant with Mr. McCullough's murder. (*Id.* at p. 890.) In March of 1991, defendant was arrested in Arizona on other charges of which he was convicted and sentenced to four consecutive life sentences. (*Ibid.*) However, in May 1992, defendant escaped from Arizona state prison and committed several more crimes. (*Ibid.*)

This escape triggered a review of status of defendant's case by the San Joaquin District Attorney who decided to extradite defendant on a

charge of capital murder in May 1993. (*People v. Horning, supra,* 34 Cal.4th at p. 891.) Defendant claimed that the two and one-half year delay between the filing of the original complaint and his May 1993 arraignment violated his speedy trial rights. (*Ibid.*)

In addition to strongly questioning exactly when defendant's speedy trial rights were triggered, this Court indicated that a good part of the delay in formally charging defendant was that he was in hiding, with the government being responsible for perhaps a year of the delay. (*People v. Horning, supra,* 34 Cal.4th at pp. 892-893.) Further in comparison with the 8 ½ year delay in *Doggett*, this Court held that the relatively short delay in this case took it out of the realm of the "presumptively prejudicial" delay of *Doggett*, especially when the delay was in large part caused by defendant himself.

In drawing a distinction between the 8 ½ year delay in *Doggett,* and the much shorter delay in *Horning,* the *Horning* Court clearly imparted a central truth about the instant case. A delay of over a quarter-of- a- century is a very, very long time, and a claim that there was no prejudice unless it can be specifically shown is a very difficult claim to maintain. This is especially true in the instant case where after the passage of so much time it is simply absurd to expect a defendant to be able to remember he was for the very short time period it took to commit the crime.

In its Brief, respondent also cited to *People v. Able* (2012) 53 Cal.4th 891 to stand for its argument that appellant failed to demonstrate that the delay in prosecution resulted in prejudice such as the loss of a material witness or other missing evidence, or fading memory caused by lapse of time. (*Id.* at p. 908; RB at p. 41.) However, once again, the facts of *Abel* strongly limited its value as precedent in the instant case.

On January 4, 1991, in the City of Tustin, Armando Miller was robbed of a substantial amount of money and shot to death in front of the Sunwest Bank. (*People v. Abel, supra,* 53 Cal.4th at 898.) For over two years there were absolutely no leads. (*Id.* at p. 899.) However, on August 3, 1993, the police received an anonymous tip that defendant was the killer. This tip caused the case to be re-opened. Over the next year, the police attempted to corroborate the information given by the tipster. (*Ibid.*) In May 1995, the authorities decided that there was enough evidence to charge defendant with capital murder. (*Ibid.*)

Defendant moved for a dismissal of the case on due process grounds, claiming the delay caused him prejudice thorough his own loss of memory and the loss of memory an alibi witness. (*People v. Abel, supra,* 53 Cal.4th at p. 909.) Defendant claimed he was working as a mortgage agent at the time of the killing was in another city at time of killing. (*Ibid.*) He claimed that he was with a client, Elaine Tribble that day, and had delivered

mortgage documents to her. (*Ibid.*)

However, there was no evidence that Ms. Tribble's memory of such an event would have been better if there were no delay. To the contrary, she stated that she could not remember if any mortgage papers had ever been returned to her and, in any event, she would not have kept them. Further, the pre-trial evidence made it clear that defendant had an excellent memory of what happened on January 4, 1991. (*People v. Abel, supra,* 53 Cal.4th at p. 909.) Therefore the trial court was correct in holding that defendant failed to meet its initial burden of showing some sort of prejudice, and certainly the length of the delay, if there was one, was insufficient to trigger a *Doggett* presumption. (*Id.* at pp. 910-911.)

The facts of *Abel* have no meaningful similarities to those of the instant case. Not only was the delay approximately one-tenth the length of the delay in the instant case, but defendant's claim of prejudice in *Abel*, as was the case in *Catlin* and *Horning*, was based upon a very specific set of facts that were found to be incorrect.

Respondent similarly cited to *People v. Belton, supra,* 6 Cal.App.4th 1425 to support its contention that the 23 year delay in the instant case did not create a due process violation. (RB at p.41.) However, once again, the facts of respondent's cited case bear little or no resemblance with those of appellant's case. In *Belton*, defendant was an inmate in

Pelican Bay State Prison when a homemade weapon was discovered in his possession. (*Id.* at p. 1428.) Seven months later, a information was filed in Del Norte Superior Court. (*Ibid.*) Defendant moved to dismiss the information on the ground that they delay between the crime and the information inured to his prejudice. (*Id.* at p. 1434.)

Defendant claimed that there were various witness who might support his account that the weapon in question was planted in his legal papers by his cellmate. (*People v. Belton, supra,* 6 Cal.App.4th at p. 1141.) The trial court found both a lack of prejudice in that defendant's investigator never even tried to find these witnesses, and there really was no delay to speak of considering the fact that 60-80 criminal files came to the small Del Norte District Attorney's Office from Pelican Bay every week, and faster processing just was not possible. (*Ibid.*) Again, these facts have absolutely nothing in common with the facts of the instant case. The "delay," was a matter of months, not 23 years. In addition, the clam of prejudice was completely unsupported, either by the passage of time or any "particularized" claim.

Respondent's citations to other cases to stand for the argument that the *Catlin* balancing test clearly mandated the denial of the Motion to Dismiss were similarly unavailing, as the facts of these cases were also so dissimilar to the instant facts as to have no precedential value. Respondent

cited to *People v. Cowan, supra,* 50 Cal.4th 401 (RB at pp. 50, 52) to stand for the proposition that neither the trial nor reviewing courts should be second guessing or "Monday morning quarterbacking" the prosecution as to when it is proper to bring formal charges. However, a closer examination of the facts of *Cowan,* reveal that case to be of no precedential value in this matter.

On September 4, 1984, the bodies of Clifford and Alma Merck were found in their burglarized Bakersfield home. (*People v. Cowan, supra,* 50 Cal.4th at p. 415.) By 1985, law enforcement agents had gathered evidence linking several items of property stolen from the Merck home to defendant. (*Id.* at p. 428.) However, an extensive fingerprint analysis of latent prints found in Merck home came up negative for defendant's prints. (*Ibid.*)

In late 1985 or early 1986, a Bakersfield Police detective presented the case to the Kern County District Attorney. (*People v. Cowan, supra,* 50 Cal,.4th at p. 428.) However, after reviewing the file, two deputy district attorneys told the detective that they could not issue a complaint without evidence directly linking defendant to the murders. (*Ibid.*) In addition, later in 1986 yet a third deputy district attorney opined that there was not enough evidence to take the case to a jury. (*Ibid.*) Some additional investigation was done but by 1987 the case was essentially deactivated because of lack of evidence, including fingerprints, to tie defendant to the killings. (*Ibid.*)

In 1994, the authorities tried matching the latent prints found inside the Merck home to that of certain suspects. This time, a government criminalist was able to match two latent prints with defendant's rolled thumb and middle fingerprints. (*People v. Cowan, supra,* 50 Cal.4th at pp. 428-429.) The case was then re-presented to the District Attorney, who now decided that there was sufficient evidence to arrest and charge defendant. (*Id.* at p. 429.)

At the pre-trial hearing to dismiss, defendant claimed that because of the ten year delay between the murders and his arrest it was impossible for him to recall where he was and who he was with at the time of the murder. (*People v. Cowan, supra,* 50 Cal.4th at p. 427.) The trial court denied the motion to dismiss. It found that it could find no conduct by the authorities that caused the delay. The court stated that the delay was attributable to an inadvertent failure in 1984 to match the latent prints to defendant's rolled prints. (*Id.* at p. 429.) The trial court also held that as late as 1987, there were several people under investigation for the crime but without the fingerprint match, there was not enough evidence to proceed against any of them. (*Ibid.*)

Using the *Catlin* balancing protocol, this Court found the showing of prejudice "relatively weak." (*People v. Cowan, supra,* 50 Cal.4th at p. 431.) It rejected the defense argument that the original fingerprint examiner's

memory had faded in the past ten years by pointing out that this was irrelevant as both the latent prints and defendant's rolled prints were available to a defense expert at the time of the ultimate changing in 1994 and the trial in 1996. (*Ibid.*) Regarding defendant's claim that the delay irreparably damaged his ability to construct an alibi defense, this Court noted that defendant was aware he was a suspect when contacted by the police in early 1985. As such, if defendant had an alibi, it was only logical that he would have attempted to investigate it at that time, only a few months after the murder. (*Id.* at p. 432.) Regarding his specific claim as to the fading memory of certain witnesses who could attest whether after the murder he possessed the property of the victims, the reviewing court stated that these witnesses gave memorialized statements to the police during the early states of the investigation in 1984 and 1985. (*Id.* at p. 433.)

Regarding the length of the delay, this Court held that this was a situation where after substantial investigation, the prosecution simply did not have enough evidence to go forward to trial with any degree of confidence. (*People v. Cowan, supra,* 50 Cal.4th at 434-435.) This Court echoed its holding in *People v. Nelson, supra,* 43 Cal.4th at 1256 stating that "a court should not second-guess the prosecutor's decision regarding whether sufficient evidence exists to warrant brining charges." (*Cowan* at p. 435.)

Therefore, combining the weak showing of prejudice with a very reasonable showing of the necessity for any investigative delay, this Court affirmed the trial court's ruling that the defense was not persuasive in its argument that the *Catlin* protocol mandated the granting of its motion to dismiss on due process grounds. (*People v. Cowan, supra,* 50 Cal.4th at p. 436.)

Again, the facts and circumstances of the instant case are so different that the cited case has no precedential value. Appellant did not discover that he was a suspect until 23 years after the crime, negating any chance for an effective alibi defense. Further, in the instant case, there were no "memorialized" statements to help refresh the recollection of the witnesses that appellant claimed might have helped him, if there was no delay.

There is a point at which the appellate courts of California no longer accept the prosecutors justifying a lengthy delay by contending that they were simply not comfortable with the strength of their case. In *People v. Boysen* (2007) 165 Cal.App.4th 761, there was a 24 year delay between the commission of the murder and filing of charges against defendant. On April 6, 1980, the bodies of Elsie and Robert Boysen were found in their San Diego County home. (*Id.* at p. 765.) Both had been shot to death with a 9mm semi-automatic handgun. (*Id.* at p. 766.)

At the time of the murders, the victims' son David lived with his

wife approximately 10 miles from the murder scene. (*People v. Boysen, supra,* 165 Cal.App.4th at p. 766.) David's wife initial told the police that both of them were home the night of the murders. (*Ibid.*) The police did a thorough investigation of the murder and were able to identify various possible suspects. (*Id.* at pp. 766-767.) However, they were unable to establish a case against any one in particular. (*Ibid.*)

Continued police investigation revealed that David was having serious financial problems and by the end of 1981, Davud had become the focus of the investigation into the murder of this parents. (*People v. Boysen, supra,* 165 Cal. App.4th at p.767.) In 1982, the police reinterviewed Linda, who by then was separated from David. She now stated that David was *not* with her the entire evening of the murder, that she he was gone from 6:00 p.m. to 10:30 p.m. (*Id.* at p. 768.) When she saw him leave their condo that evening, David was wearing overalls, his favorite T-shirt and brown tennis shoes. When he arrived home at 10:30 p.m., he was wearing a bathing suit. Linda stated she never saw the overalls, shirt or tennis shoes again. (*Ibid.*)

Linda also explained to the police that about two weeks before the murders, David learned that his parents had changed their wills to leave their estate to their church, and not to David and his sister, as the wills were originally written. (*People v. Boysen, supra,* 165 Cal.App. 4th at p. 768.) In addition, Linda told the police she once caught David srtealing money

from his parent's house. She said that David falsely reported a burglary to the police to cover his crime. (*Ibid.*)

Later in 1982, the police submitted the case to the district attorney. After a thorough review, the district attorney's office declined prosecution. (*People v. Boysen, supra,* 165 Cal.App.4th at p. 768.) It was not until 2004 that the police decided to reopen the case through the newly created San Diego County District Attorney's Office Cold Case Homicide Unit. (*Id.* at p. 768-769.) No additional evidence was discovered regarding defendant's culpability, although certain third party suspects were eliminated from consideration as the murderer. (*Id.* at pp. 769-770.) In May 2004, a complaint was filed against defendant for the murder of his parents. Five months later, the information was filed. (*Id.* at p. 771.) Defendant subsequently moved for the dismissal of the charges based upon prejudicial, unjustified preoccupation delay. (*Ibid.*) The trial court found that defendant was prejudiced by the delay between the crimes and the commencement of prosecution. After balancing that prejudice against the justification for the delay offered by the prosecution, the trial court found the delay denied defendant's right to due process of law and dismissed the case against him. (*Ibid.*)

The court of appeal affirmed the decision of the trial court. While acknowledging the laws general disinclination to instruct the prosecutor as

to when to proceed with charging of a case, the court of appeal stated "[o]ur sense of fair play is offended when, with little or no justification, the government waits decades to bring a prosecution and that delay has demonstrably placed the defense at a profound disadvantage. This is especially true in cases, like the present one, in which the reasons for the prosecutor's delay cannot be reconstructed by either party." (*People v. Boysen, supra,* 165 Cal.App. at p. 774.)

The court of appeal agreed with the trial court that defendant had presented "extensive evidence" of prejudice caused by the delay and further commented that it would be hard to find a case that would not be prejudiced by a twenty-four year delay. (*People v. Boysen, supra,* 165 Cal.App.4th at p. 778.) The court was able to specifically enumerate several witnesses who were no longer available but police records showed would have made good defense witnesses. (*Id.* at p-p. 778-780.) The court of appeal also found that the re-opening of the investigation in 2004 yielded no evidence connecting defendant to the crime. (*Ibid.*)

In summary, none of the cases cited by respondent stand for the proposition for which they were cited; that a delay of 23 years caused by governmental indifference and deliberate inaction cannot constitute a due process violation unless the defendant can cite to some specific "particularized" prejudice. As indicated in *Doggett* and *Horning*, there are

certain situations which simply do not lend themselves to such a simplistic analysis in that too much time was allowed to pass by government inaction "because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." (*People v. Horning, supra,* 34 Cal.4th at p. 892.) Further, this Court, citing to the High Court case of *Doggett v. United States* (1992) 505 U.S. 642, 651-652, made clear that the "presumption of pre-trial delay has prejudiced the accused intensifies over time." (*Horning, supra,* 34 Cal.4th at p. 893.)

The instant case is precisely one of those situations. There is no reason to believe that with a proper investigation, Cannie's killer would not have been revealed in rather short order. Unlike in cases cited by respondent, the police investigation in the instant case was an investigation in name only. Whenever faced with any sort of impediment to finding Cannie's killer, the police gave up. When Ms. Bullock retreated into drugs and alcohol to avoid surrendering what she knew of the crime, the police let her go, unmolested by the pressure that an organized, multi-departmental investigation could have been brought to bear. Unlike in the cases cited, the police in the instant case knew where the answer could be found, yet did made no sincere attempt to discover these answers, never exhausted the leads, nor involve other law enforcement agencies before the trail went cold. Respondent fully admitted that the police investigators believed that

killer was known to Cannie and believed Linda was withholding information because of her ties to the Hell's Angels, fear of police and continuous state of intoxication. (RB at p. 35) Yet nowhere did respondent indicate what they did to put any pressure on Ms. Bullock to cooperate.

Respondent's description of the balance of the investigation speaks for itself. What respondent called an adequate investigation was anything but. A young girl was brutally raped and murdered in a small town. Even relying on respondent's description of the investigation, instead of pulling out all of the stops, the search for a suspect was cursory, to be charitable. According to respondent, the investigation consisted of the following. It stated stated the police spoke to "all of the neighbors" but only identified seven specific people that were interviewed. (RB at pp. 34-35.) Respondent further stated the authorities took physical samples from Rudy Sandoval and submitted them to crime law but didn't say why they did so or what type of samples were submitted. (RB at p. 35) The police placed Sandoval in some sort of lineup that was shown to Linda Bullock but did not indicate what she was asked nor what was her reaction. (*Ibid.*) Respondent also indicated that the police "scrutinized" William Flores as a potential suspect but there was no indication what was meant by this. (*Ibid.*) There was some sort of interview of a bartender, and the person who had brought Linda back to the house from the bar (RB p. 36), but nowhere in the record was there

any indication what those interviews revealed or what sort of follow up was attempted.

This was a non-violent, self reported white-collar crime simply having to wait a few years to be fully investigated by an understaffed fraud unit of a local police department. (See *People v. Dunn-Gonzalez, supra,* 47 Cal.App.4th 899.) The murder in this case instant case was not only a terrible crime, but one which required *immediate* and *intense* investigative attention because of the strong possibility that the perpetrator or perpetrators were individuals with no strong ties to the San Pablo area. In solving violent crimes, speed is of the essence. The police had a workable theory. Instead of doggedly following up on it, they lost interest. The government accepted the fact that Linda Bullock didn't want to cooperate. She was never arrested for child neglect nor was there any evidence that the weight of the law was ever arrayed against her.

The personnel problems in the police department does not ring as a true excuse. Such a crime had to have been on top of any short list of priority cases. The fact that several officers may have left the local police force cannot be considered a legitimate excuse for allowing a child killer to remain at large. There was no indication that the California Department of Justice or the Federal Bureau of Investigation were ever called in to help. Linda "disappearing" not excuse. It is impossible to believe that this woman

could not be found if the resources of the state and federal law enforcement had been brought to bear on a case that certainly merited the allocation of these resources.

Therefore, the extraordinarily long delay in commencing the appellant's prosecution was not, as respondent portrayed it, a function of the need to develop sufficient DNA technology to solve the case. The delay was a direct result of intentional governmental neglect and indifference as to who killed Cannie Bullock. The government's delay in commencing the prosecution violated appellant's right to federal and state due process, and as such, the entire of judgment against appellant must be vacated.

II. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ALLOWING EVIDENCE RELATING TO APPELLANT'S 1992 AND 1997 CONVICTIONS OF SEXUAL ASSAULT UPON NINA S. AND CURTIS B.

A. SUMMARY OF APPELLANT'S ARGUMENT

1. Factual Summary

Appellant was convicted in two separate acts of criminal sexual assault on a child. On September 26, 1992, Debbie Taylor dropped off her two children, twelve year old Nina and three year old Brandon, to spend the night at the home of appellant in Lakewood, Colorado. (17 RT 3808-3809.)

Nina went to bed, alone, but was later woken by appellant rubbing her chest and buttocks. (17 RT 3810.) She told appellant to stop, and he immediately complied with her wishes. He then hugged her and asked her to please not tell anyone or he would go to jail. (17 RT 3810.) Appellant went into the bathroom and Nina called her mother to pick her up. (*Ibid.*) When her mother arrived, Nina told her what happened. (17 RT 3811.) Appellant eventually pled guilty to attempted sexual assault of a child. (17 RT 3906.)

On November 22, 1997, Curtis Baker, then ten years of age, attended a party with appellant and others at a house in Denver, Colorado. (17 RT 3905.) While the party was still going on, Curtis and nineteen-year-old Pamela Baughman fell asleep together in an upstairs bedroom. (17 RT 3912-3913.) A short time thereafter, Curtis was awakened by appellant placing his hand down the boy's boxer shorts and rubbing his buttocks. Curtis immediately ran downstairs to tell his father what happened. (17 RT 3914-3915.) Appellant eventually pled to the sexual assault of Curtis. (17 RT 3907.)

2. Legal Argument

After hearing the prosecutor's Motion in Limine to Introduce Evidence of Defendant's Prior Offenses Under Evidence Code section 1108, the trial court ruled that both the above two unrelated sexual offenses could be introduced in the guilt phase of appellant's trial under section

1108 to show appellant's "propensity to commit sexual offenses." (8 RT 1819.) In addition, the trial court ruled that the two sets of crimes were sufficiently similar in nature to be admissible under Evidence Code section 1101 (b) to raise an inference of intent, but not sufficiently similar to raise an inference of identity. (8 RT 1819; 1822-1823.)

In his AOB, appellant cited to the seminal case of *People v. Falsetta* (1999) 21 Cal.4th 903, arguing that the reason that section 1108 does not violate state or federal due process is because of the inclusion in that section of the requirement that a "careful analysis under Evidence Code section 352 must be conducted by the trial court to assure that the defendant has not suffered undue prejudice. (*Id.* at p. 911; AOB at p. 69.)

Appellant further argued that *Falsetta* also made it clear that the trial judge's obligation to consider exclusion of this type of evidence under Evidence Code section 352 is to be taken seriously. This Court directed that this discretion be "broad" and went so far as to state that there is "no reason to assume" that the trial courts will find that the "prejudicial effect of a prior sex offense will rarely if ever outweigh its probative effect." (*People v. Falsetta, supra,* at p. 919; AOB at p. 70.)

Appellant cited to several cases, including this Court's decision in *People v. Loy* (2011) 52 Cal.4th 46 to support the argument that the question of the similarity of charged and uncharged crimes is both relevant

and critical to the trial courts exercise of discretion under both sections 1108 and 1101 (b). (AOB at p. 70.) Appellant proceeded to argue that according to these cases, the non-violent sex crimes committed in 1992 and 1997 do not possess sufficient similarity to the instant crime to support an inference of propensity, hence, the non-charged crimes should not been admitted pursuant to section 1108. (*See People v. Loy, supra,* 52 Cal.4th at pp. 63-64; People *v. Miramontes* (2010) 189 Cal.App.4th 1085, 1096; *People v. Escudero* (2010) 183 Cal.App.4th 302, 306; *People v. Hollie* (2010) 180 Cal.App.4th 1262; AOB at pp. 70-73.)

Appellant also relied upon this Court's decision in *People v. Abilez* (2007) 41 Cal.4th 472. (AOB at pp. 75-78.) The *Abilez* Court used a similarity analysis in determining that defendant's proffer of evidence of co-defendant's propensity to commit the crime in question was inadmissible to prove co- defendant's identity in the charged sexual murder under section 1108 and 1101 (b). This Court cited to *Falsetta* in explaining its decision.

> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible *remoteness*, the degree of certainly of its commission and the likelihood of confusing, misleading, or distracting jurors from the main inquiry, *its similarity to the charged offense,* its likely prejudicial impact on the jurors, the burden on the defendant in defending against

> the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (Emphasis in original text) (*People v. Abilez, supra,* 41 Cal.4th at p. 502 citing to *People v. Falsetta, supra,* Cal.4th at p. 917.)

This Court then found that the remoteness and lack of similarity of the 1973 sex crime, unlawful intercourse with a minor to the charged offense of sodomy and murder of an older woman, precluded the use of the 1973 crime under section 1108. (*People v. Abilez, supra,* 41 Cal.4th at p. 502.)

Appellant also cited to *People v. Harris* (1998) 60 Cal.App.4th 727, a case in which the court of appeal, using the factual similarity precepts of *Falsetta,* reversed a conviction because the prosecutor was allowed to introduce evidence of a prior violent rape the occurred 23 years before the charged offense. (AOB at pp. 78-79.) The charged offense consisted of accusations that defendant, a mental health nurse, used his position to sexually preying upon several patients. (AOB at p. 78.) Appellant pointed out that *Harris* relied both upon the remoteness of the uncharged offenses and their lack of similarity in making its decision. (*Ibid.*)

Appellant also argued that the degree of similarity to create an

inference of intent under section 1101(b) was not present in this case. (AOB at p. 82 et seq.) Further, he argued that as intent was never an issue in the instant case, the admission of intent evidence would have little probative worth compared to the prejudicial harm. (AOB at pp. 84-85.)

B. SUMMARY OF RESPONDENT'S BRIEF ARGUMENT

In its Brief, respondent argued that the trial court did not abuse its discretion in permitting evidence of the 1992 and 1997 incidents. (RB at p. 58.) It stated that "the two subsequent offenses were highly probative proof appellant was sexually attracted to young children, and acts on his pedophilic impulses when presented with the opportunity to do so without detection and when his victims are alone and otherwise vulnerable." (*Ibid.*)

Respondent also argued that there were many similarities between the subsequent offenses and the instant offense. These included the fact that all of the crimes were sexual in nature, they all occurred at night, the victims were all in their bedclothes, they were of similar age, and the crimes occurred while all were "in moments of high vulnerability." (RB at pp. 58-59.)

Respondent also argued that these points of similarity "were particularly relevant in light of appellant's defense that he did not rape and kill Cannie, but that his semen was somehow transferred into her vagina by contact sometime after he had sexual intercourse with Cannie's mother on

an unspecified occasion. Appellant's propensity to sexually assault children certainly bore upon the credibility of the proposed defense theory." (RB at p. 59.)

Regarding the application of Evidence code section 352, respondent also argued that a relatively insignificant time was spent presenting the 1108 evidence and little risk of undue prejudice to appellant. (RB at p.60.) Respondent also concurred with the trial court's finding under Evidence Code section 352 that the sexual touching of two children was unlikely to be prejudicial. (RB 55, 60.) Further, respondent argued that neither the temporal remoteness between the subsequent offenses and instant offense nor the fact that the uncharged offenses took place after the charged offenses is a significant factor in that the trait of pedophilia remains constant over long periods of time. (RB at pp. 60-61.)

Respondent further argued that appellant's reliance on *Abilez* and *Harris* was misplaced, stating that the non-charged and charged crimes in both cases were far more dissimilar than those in the instant case. (RB at pp. 61-63.)

In addition, respondent claimed that even if the trial court erred in the exercise of its discretion in this matter, the error was harmless, arguing that the standard to be used in reviewing the error should be based upon *People v. Watson* (1956) 46 Cal.2d 818, 836, which states that the harmless

error analysis is limited to a determination whether it is reasonably probable appellant would have obtained a more favorable result had the evidence not been admitted. (RB at pp. 64-65.)

C. APPELLANT'S REPLY ARGUMENT

1. General Law of Admissibility of Uncharged Crimes Pursuant to Evidence Code section 1108

People v. Falsetta, supra, 21 Cal.4th 903 set forth the parameters under which the trial court must determine whether or not uncharged sexual offenses are admissible to prove defendant's propensity to commit the charged sexual offense. As clearly stated by this Court, the trial court must

> [e]ngage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainly of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, [its similarity of the main offense to the charged offense], its likely prejudicial impact on the jurors, the burden on the defendant against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*People v Falsetta, supra,* 21 Cal.4th at p. 917.)

The prejudice of section 352 is "evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal. 4th 141, 187-189.)

Evidence Code section 1108 represented a radical shift away from the law that pre-existed it regarding propensity evidence. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 181-183.) Prior to section 1108, it was universally accepted in California law that other crimes evidence could not be used to establish that a defendant had a propensity to commit a crime. (1101(a)) This is still the rule as to every type of crimes with the exception of sex crimes. This Court explained that the reason that the Legislative carved out this exception to the rule for sex crimes was because that evidence of prior sexual acts was "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest between the accuser and defendant at trial. (*People v. Falsetta, supra,* 21 Cal.4th at p. 912.)

2. Standard of Review

In its Brief, respondent emphasized the "broad" discretion of the trial court in deciding whether to admit such evidence. (RB at p. 58.) However, the analysis that must be performed by the trial court in deciding how to exercise this discretion may be neither reflexive nor *pro forma*. Before other crimes evidence, especially evidence as inherently prejudicial as a sex crime, may be admitted for consideration by the jury hearing the instant offense, an "extremely careful analysis" is necessary. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

Therefore, while this trial court's discretion is certainly entitled to a degree of deference by this Court, the decision of the trial court can pass appellate muster only if evidence admitted remains within the parameters of the legal standard set by existing law. An "action that transgresses the confines of applicable principles of law is outside the scope of discretion and we call such action an "abuse of discretion." (*Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.) Therefore, as stated by this Court, "to determine whether a court has abused its discretion , we must...consider the legal principles and policies that should have guided the court's actions." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.)

As stated in *People v. Harris*, *supra,* 60 Cal.App.4th at p. 736 "[t]he discretion intended...is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." Further, "to the extent the trial court's ruling depends on the proper interpretations of the Evidence Code, however, it presents a question of law and the review is *de novo.*" (*People v. Walker* (2006) 139 Cal.App.4th 782, 792.) "Section 1108 passes constitutional muster if and

only if section 352 preserves the accused rights to be tried for *the current offense* (emphasis provided by court). (*People v. Harris* (1998) 60 Cal.App. 4th at p. 737.)

3. Analysis of Instant Case Under section 1108

Respondent essentially predicated its entire argument on the applicability of section 1108 in this case on the free-standing fact that the charged and uncharged crimes all involved *some* sort of sexual crime against children. (RB at pp. 58-59.) Appellant maintains that the disposition of this issue is not as simple as respondent would like this court to believe. Appellant fully agrees that the most important factor of section 1108 law is the similarities of the charged and uncharged offenses to one another. However, respondent was wrong in its simplistic conclusion that the age of the victim was the dispositive factor in this case.[4] Respondent's attempt to draw additional similarities, apart from the age of the victims, are strained and fail the test of common-sense and logic (RB at p. 59.)

As stated above, the reason why the Legislature carved out the section 1108 exception to the general law of Evidence Code section 1101(a), was because of the "serious and secretive nature of sex crimes and

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4. In fact, the trial court in its ruling stated that the the uncharged offenses were admissible under 1108 to show appellants "propensity to commit sexual offenses" not propensity to commit crimes against children. (8 RT 1819-23.)

the often resulting credibility between the accuser and defendant at trial." (*People v. Falsetta, supra,* 21 Cal.4th at p. 912.) Therefore, while it is true that both the uncharged and charged crimes were committed against children of the same general age, the other similarities cited by respondent were either part of the universal "secretive" nature of such crimes, or simply a coincidence without any probative significance.

For example, the fact that all crimes were committed "at night" does not constitute a *modus operandi*. Most sex crimes are committed under the cover of darkness. Further, if as respondent argued, both the charged and uncharged crimes were crimes of opportunity (RB at p. 58), it would hardly matter that the crimes were committed at a particular time of the day. Further, respondent's argument that the fact that the victims were in bed clothing was a "similarity," is without merit. (*Ibid.*) If the cirmes were committed at night, it is only logical that the victims would have been dressed in sleeping clothes.

Respondent further argued that the assaults all came "in moments of high vulnerability." (RB at p. 59.) Again, due to the inherently "secretive nature" of sex crimes, the great majority of *all* sexual crimes, regardless of the nature of the victim, occur at such moments. The very nature of sexual offenses is that they occur in a private so that the perpetrator is isolated from the intervention of third parties.

Respondent failed to recognize the truly dispositive difference between the instant offense and the uncharged offenses in the instant case. This difference is so great that it refutes any inference that can be made that the commission of the uncharged offenses show a propensity to commit the instant offense. While both sets of crimes had some sexual components, the *core* feature of the instant offense was the extreme violence with which it was committed. Cannie was raped and murdered, not simply inappropriately touched. The fact that a defendant has a inclination to inappropriately touch a child, does not lend itself to a logical inference that the same defendant is a murderer and rapist of a child victim. Therefore, the 1992 and 1997 offenses, which occurred 13 and 17 years after the charged offense, respectively, had very little or no probative value as to the commission of rape and murder of Cannie Bullock. The undue prejudice of branding appellant as a pedophile, albeit a non-violent one, easily was "evidence that poses an intolerable risk to the fairness of the proceedings or reliability of the outcome." (*People v. Booker* (2011) 51 Cal. 4th 141, 187-189.) Such a branding essentially destroyed any hope that the jury would carefully listen to or consider appellant's defense that his DNA was transferred to Cannie through a non-sexual vector. (AOB at pp. 18-22.) Therefore, respondent's claim that the charged offense was more "inflammatory" that the non-charged offenses is a distinction without a

difference.

The overriding importance of the violent/non-violent dichotomy as it relates to admissibility pursuant to section 1108 can been seen in any number of cases from both this Court and the court of appeals. Very recently, *People v. Jandres* (2014) 226 Cal.App.4th 340 dealt with an appeal of defendant's conviction forcible rape of Adriana "Doe," an 18 year old young woman. Adriana testified that she had been drinking the night the alleged sexual assault when she was approached by defendant in front of a 7-Eleven. She stated defendant grabbed her and forced her to a more isolated location where he violently raped her until a police officer approached to investigate, whereupon he ran away. (*Id.* at 347.)

Acting upon a prosecution motion, pursuant to section 1108 the trial court allowed before the jury evidence regarding an offense that appellant allegedly committed against an 11 yr old girl, "Madeline." According to pre- trial motion testimony, Madeline was lying on a couch in her grandmother's house when the defendant broke in. He sat down next to her, put his hand over her mouth, picked her up, and walked across the dining room. At some point while doing so, defendant put his finger inside Madeline's mouth. Madeline began to scream and defendant dropped her and fled. (*People v. Jandres, supra,* 226 Cal.4th at p. 346.)

After hearing Madeline's testimony, the trial court ruled that it was

admissible under section 1108 "as evidence of a sexual offense" reasoning that "touching an 11-year-old, picking that person up and carrying them toward exiting the room, clearly has sexual intent to it and, therefore, is a proper basis as 1108 evidence." (*People v. Jandres, supra,* 226 Cal.App.4th at pp. 346-347.) The trial court further expressly rejected excluding this evidence under Evidence Code section 352 because it would not cause "any confusion of issues, undue consumption of time, nor does the prejudice outweigh the probative value." (*Id.* at p. 347.)

The appellate court had two issues to decide. The first was whether the assault against Madeline was a sexual crime pursuant to Legislative intent. (*People v. Jandres supra,* 226 Cal.App.4th at p. 354.) The reviewing court held that the jury could reasonably find that the uncharged incident constituted a sexual offense under Penal Code section 647.6 (child molest) because of the insertion of defendant's finger in her mouth. (*Ibid.*)

However, the appellate court reversed defendant's conviction, ruling that the trial court erred by admitting Madeline's testimony under Evidence Code section 1108. (*People v. Jandres, supra,* 226 Cal.App.4th at p.354.) The court reiterated that section 1108 "passes constitutional muster if and only if section 352 preserves the accused rights to be tried for the current offense." (*Id.* at p. 355; *People v. Harris, supra,* 60 Cal.App.4th at p. 737.) The *Jandres* court cited to *People v. Nguyen* (2010) 184 Cal.App.4th

1096, 1117 in stating the factors to be considered in making this 352 analysis.

> (1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to show defendant did in fact commit the chaired offense; (2) whether the propensity evidence is stronger and more inflammatory that evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time. (*Jandres, supra,* at p. 355.)

The *Jandres* Court then held that the uncharged sex offense must have some tendency in reason to show that the defendant is predisposed to engage in conduct *of the type charged.* (*People v. Jandres, supra,* 226 Cal.App.4th at p. 355, emphasis provided by court; see also *People v. Earle* (2009) 172 Cal.App.4th 372, 397.) It further confirmed the charged and uncharged offenses may be so dissimilar as to mandate exclusion under Evidence Code section 352. (*People v. Jandres, supra,* 226 Cal.App.4th at p. 356.)

The *Jandres* Court stated "at issue in defendant's trial is whether he forcibly raped Adriana as she testified, or had consensual sex with her, as he maintained. Thus, the pertinent inquiry is whether evidence that defendant exhibited a sexual interest in an 11 year old by putting his finger

in her mouth rationally supports an inference that defendant is predisposed to rape an 18 year old woman." (*People v. Jandres, supra,* 226 Cal.App.4th at p. 356.) Citing to *People v. Earle* (2009) 172 Cal.App.4th 372, 396-398, *Jandres* held that a non-violent but sexually based crime does not support the inference that the person who committed it has a propensity to commit a violent sexual assault. (*Ibid.*) As such *Jandres* concluded that the prejudicial effect of Madeline's testimony exceeded its relativedly low prejudicial value and should have been excluded by the trial court. (*Id.* at p. 357.)

As such, *Jandres* has substantial precedential value in the instant case. What respondent completely ignored is that the sexual touching of the children in the prior offenses were a completely different type of crime from the murder. Cannie was not just touched; she was forcibly raped, then she was beaten and strangled after she was violated. In spite of respondent's argument, the only thing that these crimes had in common were that they were sexually motivated and committed against children.[5] However, appellant is not on death row because he was charged with an act of pedophilia. He is on death row because he was convicted the special

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5. In *Jandres,* the 18 year old rape victim was only 7 years older than Madeline. Further, Adrianna "Doe" stood only 4' 11", hence may have been easily confused for a child. In spite of this, the *Jandres* did not consider the similarities in age and stature a significant factor.

circumstance of committing *murder* during the course of a violent sexual crime.

As stated in *Jandres,* the fact that a crime may have a sexual component does not mean that it allows for the inference that the defendant who committed that crime has a disposition toward violent rape and murder. In fact, the uncharged crime in *Jandres* had far greater similarities to the charged crime against Adrianna that was the case here. In *Jandres,* there was an element of violence in the attack on Madeline. In the instant case, appellant went so far as to apologize to Nina and beg, not threaten, her to not tell the police. Therefore, if *Jandres* overturned defendant's conviction, so much more should the instant conviction be overturned, because the uncharged offenses involved no violence or threats of violence, whatsoever.

The fact that Nina and Curtis were a few years older than Cannie[6] does not create the level of similarity needed to create an inference of appellant's predisposition to commit violent sexual offenses or sexual murder. There is an enormous difference between harboring a sexual attraction toward a particular class of victim, and acting upon that attraction through rape and murder.

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6. In *Jandres,* Adrianna and Madeline were 7 years apart. In the instance Cannie and Nina were 4 years apart, only a three year difference.

To create the inference of predisposition to commit the charged offenses from the facts of the non charged offenses there must be a far greater degree in similarity between the charged and uncharged offenses than seen in the instant case. All of the cases cited by respondent to support its argument that such an inference is warranted are factually dissimilar to the instant case in that the similarities between the charged and uncharged crimes were far more similar than in the instant case.

In *People v. Jones* (2012) 54 Cal.4th 1, 49 (RB at pp. 56-57), defendant was charged with the forcible rape and murder of an elderly woman and setting fire to her house to cover up the crime. (*People v. Jones, supra,* 54 Cal.4th at p. 11.) Defendant's position at trial was not that he did not do the acts in question, but that he went to the victim's home to check on her safety. He was intoxicated and accidentally fell on her, killing her. Defendant claimed he had no intention of having sex with the victim before he went over to her house and if such an intent arose, it occurred post-mortem. (*Ibid.*) Therefore the central issue for the jury to resolve was intent. (*Ibid.*)

The non-charged 1108 offense admitted by the trial court was a very similar crime of forcible rape on a 16 year old girl committed six years prior to the instant offense (*People v. Jones, supra,* 54 Cal.4th at p. 18.) This crime was admitted for the purpose of proving defendant's propensity

to commit violent sex crimes to refute his argument as to lack of intent. *(Ibid.)*

This Court held that the uncharged assault was admissible under section 1108 because it was probative to prove that defendant had the propensity to commit violent sexual offenses, thereby disproving the defense that he did not intend to rape the victim in the instant case. (*People v. Jones, supra,* 54 Cal.4th at p. 51.)

The value of any such propensity evidence is to serve as circumstantial evidence that defendant committed the instant offense. (*People v. Jones, supra,* 54 Cal.4th at p. 49.) Clearly, as in *Jones*, for circumstantial evidence of a prior offense to have any relevant probative value to the instant offense it must be of a similar general type of crime, unlike in the instant case. Further, the fact that the victims were not of the same age was irrelevant to this Court, damaging respondent's argument that age similarities between charged and uncharged victims are critical to the section 1108 analysis.

People v. Lewis (2009) 46 Cal.4th 1255 was also improperly relied upon by respondent to support contention that sufficient similarities existed in the instant case. (RB at pp. 58, 60.) In *Lewis,* defendant was charged with forcibly raping Patricia Miller and then murdering her by slashing her throat. (*Id.* at p. 1260.) Defendant maintained that he had consensual sex

with Miller, whom he had befriended, and that he neither rape nor murdered her. (*Id.* at p. 1268.)

Over the objection of defense counsel, the trial court allowed the prosecutor to admit testimony about appellant's rape of Christa B., under both Evidence Code sections1101(b) and 1108, to show defendant's propensity to commit sexual assaults. (*People v. Lewis, supra,* 46 Cal.4th at pp. 1284-1285.) Christa testified that defendant gained entry to her apartment under the guise of "chatting" with her and proceeded to violently overpower her, threatening to slash her throat if she did not submit to his brutal assault. (*Id.* at p. 1276.)

This Court rejected the defense argument that the probative value of the Christa B. rape was greatly outweighed by its prejudicial impact. This Court based its ruling upon the strong similarities between the charged and uncharged crimes.

> The probative value of the evidence was strong. First, the two sexual assaults shared many similarities. Defendant was acquainted with both victims before the assaults, and therefore may have chosen them because they would be more inclined to grant him access to their homes, where the assaults occurred. Both attacks occurred late in the evening after defendant socialized and ingested drugs with the victims, suggesting they were induced to let down their guard. Both victims were physically small in stature and therefore less able to resist a physical assault. The hands of both victims were pinned above their heads. Both victims were strangled. Defendant threatened to slice Christa B.'s throat, and Miller's throat was cut. Second, the prior offense occurred only four

> years earlier, and defendant had been incarcerated for much of the intervening time. Finally, the independent sources of the evidence, particularly the police detective's testimony that Christa contemporaneously reported the same details of the prior offense that were set forth in her testimony at defendant's trial, increased the probative value of the evidence. (*People v. Lewis, supra,* 46 Cal.4th at p. 1287.)

The critical connection between the charged and uncharged offenses in *Lewis* was the violent nature of both crimes, the type of force used to facilitate their commission, and the relatively short period of time between their commission. Because of both the similarities and nearness in time, the uncharged crime supported an inference of defendant's propensity to commit crimes of savage violence, with his preferred method of force a slashing knife. The facts of the instant case were essentially the polar opposite of *Lewis;*, hence, respondent's reliance on *Lewis* was completely misplaced. It cannot be logically maintained that people who have the propensity to touch young children have the propensity to kill them, or even for that matter, vaginally rape them. Touching children when they sleep, while certainly a serious matter, is a far, far cry from child murder.

Respondent also cited to *People v. Villatoro* (2012) 54 Cal.4th 1152 for the proposition that the instant trial court's analysis under section 352 was properly conducted. (RB at p. 57.) However, not only is *Villatoro* off point as to respondent's argument, it actually supports it. In *Villatoro,* the

defendant was charged with five sets of sexual crimes against five different women, most of whom were prostitutes. The crimes all occurred within 3 years of one another, and all involved defendant picking women up in his car, using some sort of deadly weapon to threaten them into submission, and then violently raping them and robbing them before letting them go. (*Id.* at p. 1156-1158.)

The question in *Villatoro* was not whether uncharged offenses could be admitted under section 1108, but whether it was appropriate to give the jury a modified section 1108 jury instruction that would allow it to consider the five sets of charges together to with the purpose of determining whether defendant had the propensity to commit violent sexual offenses. (*People v. Villatoro, supra,* 54 Cal.4th at pp. 1158-1159.)

In reaching its holding that section 1108 was applicable in a case where all the crimes were charged, this Court expressly approved of *People v. Harris*, *supra,* 60 Cal.App. 4th 727, which was discussed at length by appellant in his Opening Brief to support appellant's position that the trial court erred in allowing before the jury the non-violent touching crimes against Nina and Curtis.[7]

In *Harris*, defendant, a mental health nurse, was accused of sexually

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7. See AOB at pp. 78-80 for a more complete discussion of *Harris*.

preying upon women who were vulnerable to his advances due to their mental illnesses. (*Id.* at p. 730.) Defendant never used any violence against these women. (*Id.* at 731-732.) The defense to these allegations was that the women in question were hallucinating due to their mental condition. (*Ibid.*)

Over the objection of defense counsel, pursuant to section 1108, the trial court permitted the prosecutor to introduce evidence of a vicious rape and assault with a deadly weapon committed by defendant 23 years before the charged offenses. (*Harris* at p. 733-735.) The court of appeal overturned defendant's conviction because the evidence of the prior rape and assault with a deadly weapon charge was inadmissible due to the section 352 provision of section 1108. In doing so, the court of appeal focused upon both the remoteness of the earlier rape and the dissimilarity between it and the charged crimes in making its determination of section 352 prejudice. While making it clear that there is no "bright line rule" as to the amount of time that passed between the charged and uncharged crimes before there is prejudice, *Harris* held that "23 years is a long time." (*Harris* at p. 739; see *People v. Burns* (1987) 189 Cal. App.3rd 734, 738.) Further, the fact that there was no evidence that defendant was involved in any serious wrongdoing in this 23 year period supported the notion that the admission of the evidence of the prior rape was prejudicial in the trial of the charged offenses. (*Ibid.*)

Regarding the issue of similarity, the *Harris* court made clear that the commission of a violent sex offense says virtually nothing about a defendant's propensity to commit other types of non-violent sex crimes. (*Harris* at p. 740.) The court of appeal drew a comparison with the similarities required for admission of other crime evidence under Evidence Code section 1101(b), stating that while the similarity in section 1108 cases need not to be of the same degree as in 1101 (b) cases, there has to be at least a "meaningful similarity" between the two sets of crimes in 1108 cases for there to be any probative value even in a propensity sense. (*Ibid.*)

In its brief, respondent claimed that *Harris* was factually too dissimilar to advance appellant's cause. (RB at pp. 62-63.) However, respondent's argument is largely based upon respondent's insistence that similarity in the victim's ages is dispositive of the section 1108 issue. Respondent further argued that unlike in the instant case, the uncharged offense in *Harris* was not only "totally dissimilar" to the charged offense but was "remote, inflammatory and nearly irrelevant and likely to confuse the jury and distract it from the consideration of the charged offenses." (*People v. Harris, supra,* 60 Cal.App.4th at pp. 740-741.)

Respondent's attempt to distinguish *Harris* from the instant case essentially made appellant's case for him. As described above, despite respondent's insistence, the charged and uncharged offenses in the instant

case are just as dissimilar as they were in *Harris*. The charged offense involved a brutal rape-murder, and the uncharged offenses involved a surreptitious non-painful touching, two completely different types of events. The fact that the victims in the instant case were all children, should have no more impact than the fact that the crimes in *Harris* were all committed against adult women.

Respondent's claim that the uncharged offense in *Harris* was inflammatory as opposed to the uncharged offenses in the instant case ignores the reality of how those who sexually touch children are viewed. Such persons are *universally* despised by society. Even if prison, they are considered pariahs who have to be isolated from the general population lest they be harmed or killed. Even after their release, society's outrage is expressed in draconian laws ostracizing such offenders by publishing their names in sex offender registries and enacting laws restricting where they may live and work. Branding appellant as such an individual virtually guaranteed that the jury would ignore his defense of non-sexual transfer of his DNA and convict him for what he had done in the past.

Respondent made the same argument as to appellant's reliance on *People v. Abilez, supra,* 41 Cal.4th 472. (RB at pp. 61-62), stating that *Albilez* can be distinguished from the instant case because the charged and uncharged crimes were committed 20 years apart and were committed upon

victims of different ages. (RB at pp. 61-62.) As stated in the AOB at pp. 75-78, Abilez was charged with the sodomy-murder of a 68 year old woman. During trial, he proffered evidence that his co-defendant had attempted to have sex with a minor 20 years prior to the charged offense. This Court upheld the trial court's denial of Abilez's request to present this evidence on the ground that the offenses were too dissimilar to one another and that no logical inference could be made that because the co-defendant attempted to have sex with a minor, he was predisposed to kill and sodomize an elderly woman. (*Id.* at p. 500-502.)

Abilez is directly on point in the instant case. The charged and uncharged offenses were just as dissimilar and almost as far apart in time. Once again, respondent based its entire argument on the similar ages of the victims in the instant case and ignored the fact that the two sets of crimes were completely dissimilar.

Respondent's reliance on *People v. Loy, supra,* 52 Cal.4th at p. 63 is, for the same reasons mentioned above, completely misplaced. (RB at p. 59.) Loy was charged with the violent sexual assault and murder of a twelve-year-old girl. The cause of death was asphyxia due to compression of the face and/or neck and/or body. (*Loy, supra,* 52 Cal.4th at p. 53.) The uncharged offenses were that on two separate prior occasions defendant committed violent sexual assaults against women by means of choking. (*Id.*

at pp. 54-55.)

This Court upheld the trial court's admission of the uncharged offenses to show propensity. It did so by identifying 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 that 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,* Cal.4th at pp. 63-64.) The *Loy* Court found evidence of the choking to be highly relevant and therefore "weighing in favor of admission." (*Ibid.*)

The emphasis of this Court in *Loy* was the violent way both crimes were committed and the fact that both victims were raped and choked. The similarity or lack thereof in age of the victims in the charged and uncharged crimes was of very minor importance. It was the similar violent conduct that created the inference of propensity.

In the instant case, the uncharged offenses had nothing at all in common other than the fact that both the charged and uncharged crimes statutorily qualified as sexual offenses. In fact, those crimes were as far apart in similarity as any two crimes could be and yet still fit into the broad legislatively created category of sexual crimes.

This is not to say that there are not situations in which uncharged improper sexual conduct with children cannot serve to establish an inference of predisposition to commit a similar charged offense. *People v. Miramontes*, *supra,* 189 Cal.App.4th 1085 is an example of a fact situation in which the charged and uncharged victim were all of the same youthful age *and* the crimes were sufficiently similar to create an inference of propensity. Defendant was charged with three sets of sexual assaults on three separate male children, ages 7, 12, and 11, respectively. Defendant was acquainted with the victims from past experience and the assaults consisted of relatively non-violent touching of the children and lewd behavior in their presence. (*Id.* at p. 1090; AOB at p. 72.) The court of appeal ruled that evidence of the same type of crimes committed in the exact same manner upon two victims of a similar age was admissible in that it logically created the inference that defendant had the propensity to commit non-violent acts of sexual abuse on children. (*Id.* at p. 1093-1094.)

Considering all of the above authorities, appellant's right to due process of law under both the federal and state constitutions was violated by the trial court's failure to exclude evidence of appellant's 1992 and 1997 convictions.

Respondent further claimed that any error committed by the trial court was harmless (RB at p. 64) and that any error involved the

misinterpretation of the state evidence code (section 352), so the standard for determining prejudice is that of *People v. Watson* (1956) 46 Cal.2d 818, 836, as opposed to the more stringent review of constitutional violations mandated by *Chapman v. California* (1967) 386 U.S. 18, 24. (RB at pp. 64-66.)

Respondent is mistaken in its analysis. The seminal case of *People v. Falsetta, supra,* 21 Cal.4th at p. 915 made it clear that the improper application of section 1108 invokes a violation of a defendant's right to due process of law. *Falsetta* directly stated that only the *proper* application of section 352 "saved" section 1108 from violating a defendant's right to due process of law. (*Id.* at p. 919.) Therefore, the improper application of section 352 in this particular instance is elevated to constitutional error.

The admission of the uncharged offenses statement was unquestionably an error in federal constitutional law, and reversal is mandated unless respondent can prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Cage, supra,* 40 Cal.4th at pp. 991-992.)

An error is considered "harmless" beyond a reasonable doubt when it does not contribute to the verdict because it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other

grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn 4.) Obviously, to make this determination, the reviewing court must look to the evidence that the jury actually heard in a given case. (*Ibid.*)

Recently, in *People v. Jackson* (2014) 58 Cal.4th 724, Justice Liu, in his separate and concurring and dissenting opinion reviewed the current state of the *Chapman* standard for harmless error as it has been applied by this Court. He stated that the standard required before federal constitutional error can be said to be harmless "has long been understood to indicate the very high level of probability required by the Constitution to deprive an individual of life or liberty." (*Id.* at p. 792; *Victor v. Nebraska* (1994) 511 U.S. 1, 14.) As Justice Liu stated, while the standard of "beyond a reasonable doubt" is not one of absolute certainty, it is intended to be "very stringent: it is not satisfied so long there is a doubt based upon reason." (*People v. Jackson, supra,* 58 Cal.4th at p. 792; *Jackson v. Virginia* (1979) 443 U.S. 307, 317.) As Justice Liu observed, "The stringency of this standard reflects not only its protective function but also its amenability to principled application." (*People v. Jackson, supra,* 58 Cal.4th at p. 792.)

Accordingly, Justice Liu opined that under *Chapman,* a reviewing court "need not calibrate its certitude to some vaguely specified probability, instead the court must be convinced that the error was harmless to the *maximal level of certainty within the realm of reason*, a level that admits no

reasonable doubt." (*Ibid* emphasis in original text.)

Obviously, the burden falls upon the party who benefited by the error, the prosecution. (*Chapman, supra,* 386 U.S. at 24.) Therefore, as stated by Justice Liu "it is not defendant's burden to show that the error *did* have adverse effects; it is the state's burden to show that the error *did not* have adverse effects." (*Jackson, supra,* at p. 793 (emphasis in original text).) Because it may be difficult to determine whether a particular error contributed to the jury's verdict given the counterfactual nature of the inquiry, "the allocation of the burden proving harmlessness can be outcome determinative in some cases" (*Gamache v. California* (2010) 131 S. Ct 591, 593.)

Justice Liu discussed the United States Supreme Court's opinion in *Riggins v. Nevada* (1992) 504 U.S. 127, 138, in which the Court reversed a capital conviction because defendant was unconstitutionally forced to take anti-psychotic drugs during the course of his trial. In *Riggins*, the United States Supreme Court made no finding that the medication actually affected the defendant's outward appearance, testimony, ability to follow the proceedings, or communication with counsel. The High Court stated that it was enough that such effects were "clearly possible,"and it was the state's burden to show that the error did not have such adverse effects.

In the instant case, under those principles, the respondent must prove that the error in allowing the jury to hear evidence of the uncharged offenses was harmless to the extent that there was absolutely no doubt based upon reason that the error did not have an adverse effect on the verdict. As the branding of appellant as a pedophile doomed appellant's defense, respondent cannot meet this burden. As such, the entire conviction must be vacated.

4. Evidence of the Uncharged Crimes Is Not Admissible Under Evidence Code section 1101 (b).

Respondent claimed that appellant forfeited any claim of error related to the admission of other crime evidence under Evidence Code section 1101(b) because the trial court ruled the uncharged offenses were admitted under section 1108 and not under 1101(b). (RB at pp. 67-69.)

Appellant is perfectly willing to accept respondent's representation that the trial court chose not to admit the uncharged offenses under section 1101 (b). If such was the case, appellant need not argue that the trial court was incorrect by doing so. Therefore, the trial court's error was based on its incorrect application of section 1108, which was fully discussed above.

In the event that this Court does wish to consider the trial court's admission of the uncharged crimes under subdivision (b) of section 1101, respondent is incorrect when it stated that the similarities of the charged

and uncharged crimes were sufficient to allow for the admission of the uncharged offenses.

As a general proposition, in California, evidence of a person's character or trait thereof is not admissible to prove that person's conduct on a specific occasion. (Evidence Code section 1101(a).)[8] However, Evidence Code section 1101(b) created an exception to this general rule by stating that section 1101 (a) does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition, such as motive, intent, common plan or scheme or identity. *(Evid. C. § 1101, subd. (b); People v. Ewoldt* (1994) 7 Cal.4th 380, 393.) Respondent maintained that under section 1101(b), the uncharged offenses were relevant to prove appellant's identity as Cannie's killer, as well has his intent and motive. (RB at p. 69.)

Appellant fully explained in his Opening Brief why this was not the case. (AOB at pp. 82-86.) For section 1101 (b) to create an inference of either intent or identity, the non-charged and charged crimes must possess a sufficient degree of similarity in the way they were committed to create that inference. Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an

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8. Evidence Code section 1108 is also an exception to this general rule, to the extent it is appropriately applied.

element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.[Citations omitted.]" (*People v Ewoldt, supra,* 7 Cal.4th at p. 394, fn 2.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.' [Citations.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879; see *People v. Ewoldt, supra,* 7 Cal.4th at 402.)

The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. "[T]he recurrence of a similar result ... tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act .... (2 Wigmore, supra, (Chadbourn rev. ed. 1979) §§ 302, p. 241.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.' [Citations.]" (*People v. Robbins, supra,* 45 Cal.3d at p. 879 ; see *People v. Ewoldt, supra,* 7 Cal.4th at 402.)

No such similarity existed between the charged and uncharged crimes in this case. The "result" of the charged crime was rape and murder. As stated above, the uncharged comes were completely dissimilar in both

commission and operation. They involved surreptitious touching, stopped as soon as the victim objected. Further, there was no issue of inadvertence, self defense or other innocent mental state as to the charged crime. In a case such as this, the intent was painfully obvious from the scene of the crime.

To create an inference of identity, the similarities between the charged and uncharged crimes must be far greater than those that may be relied on to prove intent. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller* (1990) 50 Cal.3d 954, 987.)

The charged offense involved rape and murder. The uncharged offenses involved touching. The fact that both sets of offenses were committed against children does not even begin to meet the similarity requirements of *Miller*.

Therefore, neither Evidence Code section 1108 nor 1101 (b) can justify the admission of the 1992 and 1997 touching offenses in the instant trial. The admission of these non-charged offenses caused defendant to be branded in the jury's mind as a child molester, a branding that eliminated any chance appellant had to a fair trial. As such, the entire judgment must be reversed.

III. APPELLANT'S RIGHTS TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO ORDER DISCOVERY OF REQUESTED MATERIAL EVIDENCE

A. SUMMARY OF APPELLANT'S ARGUMENT

1. Factual Background

As stated in Appellant's Opening Brief, by 2002, the discriminatory factor of DNA testing had greatly improved over the type of DNA testing that was unavailable before that time. (AOB at pp. 11-14.) On February 2, 2002, David Stockwell, the lead DNA analyst at the sheriff's laboratory, tested the samples obtained from Cannie's body during the 1979 autopsy, using testing kits which targeted 13 separate loci and one additional gender discriminatory site. (16 RT 3624-3625.) He was successful in creating a profile from those samples for both the non-sperm fraction and the sperm fraction. (16 RT 3636-3637.) The profile of the non-sperm fraction was matched to the known 13 site DNA profile of Cannie Bullock. (16 R 3638.) After the extracts were examined, they were returned to the San Pablo Police Department on April 23, 2002. (16 RT 3602.)

Following the creation of the DNA profile for the sperm fraction of the extracts taken from Cannie, Mr. Stockwell uploaded that profile into the

FBI's CODIS database of DNA samples taken from convicted offenders. (16 RT 3638.) Not long afterward, Mr. Stockwell was informed that a profile in the CODIS data base shared the same 13 site profile as the one he had submitted from the Cannie Bullock case. (16 RT 3639.) The matching profile was that of appellant, who was then incarcerated in Colorado. (16 RT 3574-3576.) A warrant was issued to allow for a blood sample to be taken from appellant. DNA from that sample was extracted and amplified and a profile created which matched the sperm fraction profile.. (16 RT 3642.) Mr. Stockwell determined that one would expect to see Mr. Cordova's profile in 1 in 3.6 quintillion Hispanics, 1 in 3.1 quintillion African Americans, and 1 in 670 quadrillion Caucasians. (16 RT 3642.)

Mr. Stockwell did two more tests at the request of the San Pablo Police Department. One was on a sample obtained from a vaginal smear taken at the autopsy. The tests were done in February and March of 2003. The results were the same as the 2002 tests. (16 RT 3645.) The final test done by Mr. Stockwell was done in from May to July, 2004 with the evidentiary material that was taken from a deep vaginal swab. The results, again, were the same. (16 RT 3647.)

In addition to the testing done by Mr. Stockwell, similar testing of samples from the autopsy was done by Alan Keel at Forensic Science

Associates, a private forensic laboratory. (16 RT 3777.) Mr. Keel used a new test kit, the Identifiler, that tested alleles at 15 genomic sites as opposed to the 13 sites of the Cofiler and Profiler Plus kits. Mr. Keel also did DQ-alpha and genetic marker testing similar to that previously done in 1996. (16 RT 3779.) The results of the testing established that Mr. Cordova matched the profile of the sperm fraction from the autopsy samples. Mr. Keel calculated the statistical frequency for this profile as 1 in 13 billion trillion for Hispanics, 1 in trillion trillion for African-Americans, and 1 in 134 trillion for Caucasians (16 RT 3783-3784.)

In an informal discovery letter dated January 4, 2005, appellant requested of the prosecution the following discovery regarding the DNA testing done by Forensic Science Associates (hereinafter referred to a "FSA.")

> Instances of unintended DNA transfer or sample contamination: Please provide copies of all records maintained by the laborator(ies) that document instances of unintended transfer of DNA or sample contamination, such as any instances of negative controls that demonstrated the presence of DNA or the detection of unexpected extra alleles in control or reference samples, and any corrective measures taken. (3 CT 601, 606.)

In a July 12, 2005 response letter, the prosecutor refused to tender

this discovery, stating that it did "not believe that the information you are requesting is relevant, nor is it under our custody or control." (3 CT 620.) On November 14, 2005, appellant filed a Motion to Compel Discovery. (3 CT 583; AOB at p. 87.) Appellant contended that he that was entitled to this requested discovery because it was relevant to the history of the quality of work done by FSA. (3 CT 586; AOB at p. 87.) He also argued that the American Society of Crime Laboratory Directors, the organization which provides accreditation for forensic laboratories, requires accredited crime laboratories that conduct DNA testing to create and maintain records documenting instances of contamination which occurred during testing. (4 CT 767; AOB at p. 88.)

In its opposition to the Motion, the prosecution asserted that FSA did not keep such a separate list nor was there a legal requirement for FSA to create one in response to a defense request. (3 CT 627; AOB at p. 88-89.)

At a hearing on December 8, 2005, the trial court found, in reliance on the prosecutor's argument, that the gathering of information from FSA documenting contamination in its cases would require examination of hundreds of files over many years, records that occupy "a whole wall of binders at the FSA labs." (2 RT 219-221.) The court also questioned whether appellant was entitled to the discovery sought under either PC

1054 or the United States Constitution (2RT 227), stating appellant had made no showing that the information sought was exculpatory and calling appellant's request "a fishing expedition." (2 RT 228; AOB at p. 90.) The court opined that, in reality, what the defense was seeking was for the prosecution to produce the records of all of the FSA projects so the defense could determine if there had been any instances of contamination. Pending the testimony of Dr. Edward Blake of FSA, the trial court tentatively ruled that appellant was not entitled to that information either under Penal Code section 1054 or the United States Constitution. (2 RT 232; AOB at p. 90.)

Dr. Blake then testified that he founded FSA in 1978. While he might remember a few anomalous results "off of the top of his head" (2 RT 347), his laboratory kept no separate compendium of unintended transfers or other contamination in its testing. (2 RT 345.) He stated that he was in possession of about one thousand case files and it would take up to a week to cull out the separate instances of contamination requested by appellant. (2 RT 349-350.) Dr. Blake then estimated that out of these one thousand files, perhaps twelve have "some sort of misadventure." (2 RT 357; AOB at p. 91.)

Defense counsel argued that while they still maintained appellant was entitled to all of the information requested, they were willing to limit

the temporal scope of the discovery to all instances of unintended of transfer or contamination that occurred between sixty days before or sixty days after FSA's testing done in the instant case. (2 RT 385; AOB at p. 91.)

In spite of this reasonable offer of comprise, the trial court ruled that the defense had failed to make a sufficient showing that evidence of any errors in testing done by FSA in other cases might be relevant to this case (2 RT 394), and tentatively denied appellant's request for the material from FSA. (2 RT 399-400.)

After another round of briefing (AOB at pp. 91-94), on June 5, 2006, the trial court made its final ruling on this issue, stating that the discovery sought by the appellant were files "completely unrelated" to the instant case and as such the prosecution had "no right and no ability to review those files or compel the laboratory in question, Forensic Science Associates, to produce them." (4 RT 972-973.) The court further held that the cost and labor involved in the review of these files "would be considerable." (4 RT 973.) The court also reversed its prior ruling and held that FSA was *not* part of the "prosecution team" with respect to the files in question and that these files were not in the actual or constructive possession of the prosecutor. "Accordingly, the defendant's request to

produce the files, to compel the DA (sic) to review them for exculpatory information, is denied. This denial is without prejudice to the defendant seeking to subpoena said files or records directly from FSA, with appropriate notice, if any is required, given to the subjects of those files." (4 RT 973; AOB at pp. 94-95.)

2. Summary of Appellant's Legal Argument

Appellant argued that this Court has made clear that "a defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses." (*People v. Memro* (1985) 38 Cal.3d 658, 677; AOB at p. 95.) This axiomatic principle of discovery applies particularly to DNA evidence, as recent advances in DNA technology have raised it to a "gold standard of proof" in many cases. (AOB at p. 96.)

Appellant further argued that where the prosecution presented trial testimony that the DNA deposited on or in a rape victims body "matched" a control sample donated by defendant, it is essential for the prosecutor to turn over to the defense *any* evidence that will tend to demonstrate that the DNA evidence was not as conclusive as the government would have the jury believe. (AOB at p. 96.) This is especially true where the DNA constituted the entire case against a defendant. (*Ibid.*)

Appellant additionally argued that there was no question that the evidence sought from FSA was exculpatory to the extent that it might have revealed instances where testing by that laboratory yielded anomalous or erroneous results and instances where technicians failed to follow the laboratory's protocols and techniques. (AOB at p. 97.)

Appellant argued that a prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the "prosecution team" knowingly possesses or has the right to possess. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App. 4th 1305, 1315; AOB at p. 98.) Appellant argued that in this case FSA was part of the "prosecutorial team" as they were hired by the prosecutor to act on the government's behalf. (AOB at p. 100.)

Appellant also argued that there was no public policy consideration that granting the discovery would "unduly hamper the prosecution or violate some other governmental interest." (*People v. Avila* (2006) 38 Cal.4th 491, 606; AOB at p. 100.)

Finally, appellant argued that by refusing to order the prosecution to turn over the requested discovery to the defense, the trial court violated both the due process clause of the federal and state Constitutions and the principles of statutory discovery under Penal Code section 1054 et seq.

(AOB at pp. 104 seq.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued that appellant's right to discovery under the United States Constitution was significantly limited by the materiality requirement set for in *Brady v. Maryland* (1963) 373 U.S. 83 in that "the prosecutor will not have violated his constitutional duty of disclosure unless his [or her] omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." (*United States v. Agurs* (1976) 427 U.S. 97, 108, disapproved on other grounds in *United States v. Bagley* (1985) 473 U.S. 667, 676-683; RB at p. 76.) Respondent further argued that Evidence Code section 1054.1 "does not expand the prosecutor's discovery obligations beyond what is required by federal due process." (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 906; RB at p. 76.)

More specifically, respondent argued along the same lines as did the trial prosecutor that "[e]ven if FSA's entire history of DNA casework files were considered readily accessible prosecution team documents, appellant has failed to demonstrate that they would have been exculpatory or impeaching." (RB at p. 77.) Respondent stated that Mr. Keel of FSA testified that he know of no instances of reported contamination occurring within 60 days of either before or after the instant testing. (*Ibid.*) In

addition, there was other testimony that unintended transfer was "rare," and had taken place perhaps 12 times in over a thousand cases at FSA. (*Ibid.*)[9]

Respondent cites to several other factors to "prove" that the FSA testing was accurate and not contaminated These included

1. The testimony of FSA employees Alan Keel and Dr. Blake touting the "robust quality control procedures" in place in their laboratory.(RB at pp. 78-79.)

2. Other laboratories with no connection to FSA performed similar testing and arrived at the same result. (RB at p. 79.)

3. FSA witnesses testified that the autopsy swabs contained a high density of sperm, which weighed against the theory of inadvertent contamination. (RB at p. 79.)

Respondent cited to *People v. Salazar* (2005) 35 Cal.4th 1031, 1048 for the proposition that in addition to proving that evidence must be favorable and material, it must also be suppressed by the government. Respondent argued that the material sought by the defense was not suppressed by the government because it was not possessed by a member

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9. In other words, Mr. Keel's testimony was an admission that unintended transfer had occurred in approximately 1 in 83, instances, or a bit over 1 percent of the time – a statistic, which, if confirmed by the evidence sought by the defense, might have given jurors food for thought on the reliability of the astronomical match probabilities presented to it.

of the "prosecution team." (RB at pp. 80-85.) Additionally, respondent argued that appellant did not demonstrate that FSA records were otherwise unavailable to the defense, as they could have subpoenaed them. (RB at p. 85-87.)

Respondent also claimed that for a *Brady* claim to succeed, the suppressed evidence must be "material," which means that there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (*People v. Salazar, supra,* 35 Cal.4th at pp. 1049-1050.) Respondent claimed that there was no reasonable probability that information about the circumstances surrounding a handful of contamination events in 20 years of unrelated FSA case work would have resulted in a more favorable trial outcome for appellant. (RB at 87-88.) The chief reason given for this claim was the fact that several other DNA tests done by other laboratories also obtained profiles matching appellant's. (RB at 88-89.)

C. APPELLANT'S REPLY ARGUMENT

The prosecutor's argument, which the trial court relied upon it its denial of discovery, was basically two-fold; that (1) FSA was not part of the "prosecution team," so the prosecutor had no duty, or for that matter, ability to disclose the requested information, and (2) the information

sought was not material to the defense. Neither one of these arguments abide by the basic principles of due process and a fair trial for the accused under either federal or California law.

1. FSA Was Part of the Prosecution's "Team"

Respondent's argument (RB at pp. 80-85), completely missed the key element of the relationship of FSA and the prsoecution. The prosecution *hired* FSA to do the work that is normally done by prosecutorial agencies. While certainly FSA had a non-law enforcement function outside of their contract with the prosecution in this case, that function was irrelevant to his issue.

The determination whether a person or entity is on the "prosecution team" does not hinge upon whether that person carries a badge or whether the entity is normally part of everyday law enforcement. The question is whether the person or agency has been "acting on the government's behalf" (*Kyles v. Whitley, supra,* 514 U.S. at p. 437) or "assisting the government's case." (*In re Brown* (1998) 17 Cal.4th 873, 881.) There is no rational argument that can be made that FSA was not acting on the government's behalf or assisting the government's case.

Holding otherwise would create a precedent that would allow the government to completely evade its constitutional and statutory discovery

responsibilities by "privatizing" both its forensic and investigative trial work by hiring private concerns to do government work, allowing the work product of these concerns to be used at trial without the concomitant discovery required by the law.

The creation of a pseudo-private strawman to avoid the government's constitutional responsibilities is not otherwise permitted in the law. The police cannot avoid their Fourth Amendment obligations by employing private citizens to engage in illegal entries and searches for them. (*People v. North* (1981) 29 Cal.3d 509, 515.) Neither may they do the same in order to avoid their obligations under *Miranda.*(*In re Deborah C.* (1981) 30 Cal.3d 125, 131.) Yet respondent asks this Court to carve out an exception to the state agent law for this one purpose.

Respondent readily admitted that as a general proposition, a laboratory that performs scientific work for the prosecution is considered part of the prosecution team for discovery purposes. (RB at p. 81; *In re Brown* (1998) 17 Cal.4th 873, 880.) Further, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf" in a given case. (RB at p. 81; *Kyles v. Whitley* (1995) 514 U.S. 419, 437.)

However, instead of acknowledging FSA as a part of the prosecution

team, making the prosecutor responsible for all properly requested discovery in the possession of FSA, respondent attempted to exempt the prosecution from that responsibility. It did so by stating that even though FSA may have been part of the prosecution team for some purposes, it was not for other purposes, and therefore the prosecution did not have full access to the discovery sought from FSA. (RB at p. 82.)

To support its position, respondent cited to *People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305. In *Barrett,* the defendant, an inmate in the California prison system, was charged with the murder of a fellow inmate. (*Id.* at p. 1309.) By way of discovery, defendant requested voluminous discovery from the California Department of Corrections (CDC) concerning general policies, procedures and data kept by the CDC concerning the operation of its prisons. (*Id* at p. 1310.)

The court of appeal held that while the while the information gathered by prison investigators about the murder placed the CDC on the "prosecution team" for certain purposes, they were not members of that team as it related to the day-to-day running of the prison system. Therefore, the prosecution was not responsible for gathering the discovery sought as to general polices, procedures, etc. (*People. v. Superior Court* (*Barrett*), *supra,* 80 Cal.App.4th at p 1317-1318.) Respondent equated the "hybrid"

status of the CDC vis a vis the prosecution in *Barrett* with the status of FSA vis a vis the prosecution in the instant case, arguing that FSA was not a part of the prosecution teams as it pertained to the discovery of records of errors and anomalies in its DNA testing. (RB at pp. 82-83.)

Respondent's attempt to analogize FSA's role in the instant case with that of the CDC in *Barrett* does not stand the test of logic or common sense. FSA was pro-actively brought into the instant case to assist the government in mounting a case against the appellant by retesting certain biological samples. Therefore, their role in the instant case was as a full, albeit temporary, member of the prosecution team. Furthermore, unlike the records of day to day operations retained by the CDC in *Barrett*, evidence of shortcomings in the laboratory's DNA testing procedures was directly relevant to the reliability of those procedures and the test result in appellant's case.

Respondent requests, in essence, that this Court adopt a position that the prosecution should be allowed to benefit from its relationship with FSA by using their inculpatory test results, yet should also be inoculated from surrendering information that might impeach those results by designating FSA as part of the "team" only as to the operation that yielded inculpatory

results.[10]

The respondent cannot have it both ways. If the prosecution teams up with a private concern to do forensic work in a specific case, it cannot be allowed to selectively disavow that "team" status to avoid turning over exculpatory material concerning the work done.

Respondent also cited to *In re Steele* (2004) 32 Cal.4th 682, 697, which stated "...information possessed by an agency that has no connection to the investigation or prosecution of the criminal charge against the defendant is not possessed by the prosecution team, and the prosecutor does not have the duty to search for or disclose such material."

Steele is completely inapposite to the respondent's argument, and in fact strongly supports appellant's position. In *Steele,* petitioner requested postconviction discovery of information from the files of the CDCR concerning the activities of the *Nuestra Familia* prison gang, pursuant to Penal Code section 1054.9. The purpose of this discovery was to assist petitioner in developing a habeas claim: that petitioner, as a state prison inmate, risked his life by providing information to authorities about that very dangerous prison gang. (*In re Steele, supra,* 32 Cal.4th at p. 689.) This

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10. It should be noted that the prosecution readily complied with appellant's same request for discovery from the other laboratories that performed DNA testing in this case. (1 RT 202.)

Court made it clear that the documentation sought was material in that it was relevant to mitigation in the penalty phase and that if the defense had requested this information at the time of the trial, the defense would have been entitled to it. (*Id.* at pp. 697-698.) This Court stated that the

scope of the prosecutor's duty to disclose exculpatory information extends beyond the contents of his file and encompasses the duty to ascertain as well as divulge any favorable evidence known to others acting on the government's behalf. (Citation omitted) As a concomitant of this duty, any favorable evidence known to others acting on the government's behalf is imputed to the prosecution. The individual prosecutor is presumed to have knowledge of all such information in connection with the government's investigation. (*Id.* at p. 697.)

2. The Information Withheld From Counsel Was Material

Respondent's claim that the discovery sought was not material also ran contrary to the spirit and letter of the law. Respondent claimed that the documents sought in discovery was not "material" in that there was no reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (RB at p. 87.) This position was chiefly based upon the assertion that other laboratories had done similar tests to those done by FSA and those tests bore out the FSA

conclusion. (RB at pp. 88-89.) Respondent argued "[i]n short, the proof of appellant's culpability would have been just as stark and compelling had FSA not participated in the case investigation at all..." (RB at p. 89.)

In addition, respondent claimed that the testimony of its own witnesses "proved" that the material sought would have made no difference to the jury. Respondent cited to the testimony of FSA employees Alan Keel and Dr. Blake, who both stated that possible inaccuracies in testing in other files had no bearing on the testing. (RB at pp. 78-79.) To support this position, respondent also argued that other laboratories with no connection to FSA performed similar testing and arrived at the same result. (RB at p. 79.) Further, respondent further argued that the FSA witnesses testified that the autopsy swabs contained a high density of sperm, which weighed against the theory of inadvertent contamination. (RB at p. 79.)

What respondent failed to acknowledge was the prosecutions *entire* case consisted of DNA evidence. Without the DNA test results conviction would have been impossible. Yet, by this argument, respondent attempted to shield the prosecution from its discovery obligation by claiming that the evidence it felt was highly relevant at trial to inculpate appellant but not sufficiently material to require the prosecutor to live up to its discovery obligation to reveal exculpatory documentation. Such a double standard

cannot be allowed to operate. Respondent, in the capacity of the prosecutor affirmatively made the decision that the DNA testing by FSA was critical to securing a guilty verdict. It cannot be allowed to successfully argue that evidence which might lessen the inculpatory impact of that evidence is immaterial.

According to *United States v. Bagley, supra,* 473 U.S. at p. 682, evidence withheld by the prosecution is material where there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome (of the trial.)" The strongest argument that the discovery that was denied to appellant *was* material came from the mouth of the prosecutor, herself, during her summation. She made it clear that the testimony of the FSA experts was very important to her case. After discussing the other evidence against appellant, including the findings of the governmental police laboratories, the prosecutor argued:

> It wasn't over yet. What's the next step? Well the next step is what they tell you to do is important to do in DNA testing, that is to get independent testimony, independent testing from a lab that's not involved. So they decided on Forensic Science Analysts, a lab that actually works to exonerate suspects, a lab that actually works with the Innocence Project to free wrongfully convicted people, a lab with no bias toward the prosecution, and a lab that is run by Dr. Edward Blake,

> practically grandfather of DNA. He's been on it since the very beginning, was one of the people that helped develop the earliest test kits used in the forensic world. This is a man that has qualifications. This is a man that knows DNA. And they sent him not just one sample but two, a vaginal swab that hasn't been examined yet. And they told him don't do one DNA test on each of these evidence samples, do five. All of the tests that basically are available now, do them. And we want you do those evidence samples blindly, one at a time, not at the same time. Would have been easier to do them all at the same time, but we didn't want any question of contamination or bias in the interpretation of the results. So do first the vaginal and then the rectal, and then long after that do the blood sample of the defendant because, again, we do not want any question of cross- contamination or any question that there's bias in the interpretation of these results. And that's what Dr. Blake did. (18 RT 4251-4252.)

Therefore, according to the prosecutor own position, which she shared with the jury, the FSA testing had an "independent" and "important" significance over and above any other evidence, forensic or not.

This Court has made it clear that "a defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses. (*People v. Memro, supra,* 38 Cal.3d at p. 677.) In the instant case, there can be no question the discovery sought from FSA would have greatly aided in the cross-examination of both Mr. Keel and Dr. Blake in that it would have shown that the FSA methodology was not beyond reproach and/or that its technicians had a history of performing their duties in an unprofessional

way. The fact that Dr. Blake minimized the significance of his laboratory's errors (2 RT 345-346) only underscored the need to provide appellant with discovery that would have served to impeach Dr. Blake's high opinion of the accuracy of his own laboratory. Appellant's jury was entitled to hear that a laboratory who purported to be able to conclusively state that the statistical frequency of appellant's DNA profile was "1 in 13 billion trillion" (16 RT 3642) had "some sort of misadventure" in its testing approximately a dozen out of one thousand tests, a rate of 1.2%. (2 RT 357.)

3. Public Policy Considerations

There is no public policy exception against granting the discovery request in the instant case. While the trial court retains the discretion to protect against the disclosure of information which might "unduly hamper the prosecution or violate some other legitimate governmental interest," this is not one of those instances. (*People v. Avila, supra,* 38 Cal.4th at p. 606 [disclosure of juvenile record]; *People v. Luttenberger* (1990) 50 Cal.3d 1, 21 [disclosure of police personnel files].) If anything, there should be a public policy consideration *in favor* of discovery to insure the integrity of forensic testing that has become the "gold standard" of guilt of lack thereof in so many major crime trials. As stated by the High Court, with the

discrimination possible in today's testing "[i]t is literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases." (*District Attorney's Office for the Third Administrative District v. Osborne* (2009) 557 U.S. 52, 95-96.) Very few jurors possess the scientific acumen to fathom the intricacies of such expert testimony. It is the ultimate opinion of the expert as to whether the defendant "did it" that a jury uses to decide a person's liberty, or in this case, a person's life. It is no "fishing expedition" to gather information that is known both to exist and capable of dispelling the aura of godlike perfection that clings to practitioners of DNA science.

The fact that the gathering of this information by FSA may take some time and create some inconvenience is irrelevant. There is no public policy consideration that places the prosecution's convenience and ease over a defendant's right to due process of law. FSA chose not to keep the information sought in a separate file even though such record keeping was required as "generally accepted practice in the scientific community" by various scientific organizations, including one sponsored by the Federal Bureau of Investigation. (AOB at pp. 92-93.)

Respondent also maintained that appellant was not entitled to the discovery because they could not demonstrate that the FSA records were

not otherwise available through the subpoena process. (RB pp. 85-87.) Such a claim lacks logic in that considering the record as a whole, it is clear that FSA would have moved to quash the subpoena and the trial court, having found already that the defense's arguments about the relevancy of that material were "speculative" and its request for it a "fishing expedition," would have granted such a motion.

4. Prejudice

Once a reviewing court decides that there was constitutional error in depriving a defendant of material discovery, there is no need for any additional harmless error analysis. (*Kyles v. Whitney, supra,* 514 U.S. at p. 436.) Therefore, as appellant has proven that had the evidence been disclosed to the defense the result of the proceeding would be different, there can be no argument of harmless error. (*Ibid.*)

IV. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PURSUANT TO THE UNITED STATE'S SUPREME COURT DECISION IN *CRAWFORD V. WASHINGTON*

A. SUMMARY OF APPELLANT'S ARGUMENT

As more fully stated in the Statement of Facts at pp. 11-12 of appellant's opening brief, in 1996, the Contra Costa County Sheriff's

Laboratory forwarded certain vaginal swabs prepared at Cannie Bullock's autopsy to Cellmark for DNA analysis. (15 RT 3439; 3441-3447.) (AOB at pp. 11-12.)

Cellmark developed extracts of the sperm and non-sperm fractions for these swabs in 1996, and was able to ascertain a limited genetic profile from these fractions. (15 RT 3450; AOB *supra,* at pp. 11-12.) These extracts were used by the Contra Costa County Sheriff's Laboratory in 2002 to obtain the far more discriminating STR profile (16 RT 3635-3636; AOB, *supra*, at p. 15) and resulted in a "cold hit" match with the previously entered profile of appellant. (16 RT 3574-3576; AOB, *supra*, at p. 16)

Cellmark's testing was performed by Paula Yates, who created a file of her testing procedures and results. (15 RT 3450.) Ms. Yates was no longer employed by Cellmark at the time of appellant's trial and was not called to testify before the jury. Instead, another Cellmark employee, Dr. Charlotte Word, gave testimony about Ms. Yates's testing based on her file reports. (14 RT 3419 et seq; 14 RT 3444; AOB at pp. 120-121.)

In addition to testifying to the nature of the work done by Ms. Yates, Dr. Word rendered certain opinions based upon that work. She opined from the contents of the file that the microscopic analysis done by Ms. Yates indicated that the sperm deposited in Cannie Bullock's vaginal vault was

undiluted and was collected a few hours after it was deposited. (14 RT 3445; AOB at p. 121.) Dr. Word further opined that this pattern was not consistent with a female who came into contact with the sperm, spent 24 hours walking around and then took a shower or bath before the swabs were taken from the vaginal vault. (14 RT 3446; *Ibid.*)

Appellant argued that the admission of the testimony of Dr. Word as to the work done by Ms. Yates violated the confrontation clause of the Sixth Amendment which guarantees to all defendants "the right to be confronted by all witnesses against them." In *Crawford v. Washington* (2004) 541 U.S. 36, 59, the High Court held that Confrontation Clause permits admission of "[t]estimonial statements of witnesses absent from trial...only when the declarant was unavailable and only where the defendant has had a prior opportunity to cross-examine." (AOB at p. 121.)

Appellant also argued that in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 317-318, the United States Supreme Court specifically refused to carve out what might be termed a "forensic evidence" exception from *Crawford.* The *Melendez-Diaz* Court held that a forensic laboratory report created specifically as evidence at a criminal trial is "testimonial" for Sixth Amendment purposes so that the prosecutor could not admit the report without offering a witness to testify to the truth of the

report's contents. (*Ibid*; AOB at p. 123.)

Appellant further argued, the High Court in *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705 decided the question central to the instant case, that being

> Whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification - made for the purpose of proving a particular fact- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. (AOB at p. 123.)

In *Bullcoming*, the defendant was charged with an aggravated Driving While Intoxicated charge. The blood alcohol testing was done by Curtis Caylor, who signed the report as the "certificate of analyst." (*Bullcoming, supra,* 131 S.Ct at p. 2710.) However, Mr. Caylor did not testify. Instead, the prosecutor used the testimony of Garasimos Razatos, a scientist at the same lab where the actual testing was performed, to "qualify" Mr. Caylor's report as a "business record," a designation which the trial court employed to admit the report as evidence of the conclusions therein stated. (*Id.* at pp. 2712-2713.)

The *Bullcoming* Court held that the evidentiary process employed by the prosecution and approved by the trial judge was unconstitutional in that it violated the Confrontation Clause of the Sixth Amendment. The High

Court reiterated its holding from *Crawford* that the Confrontation Clause permitted admission of testimonial statements of witnesses absent from trial only where the declarant was unavailable *and* defendant had a prior opportunity to cross-examine him or her. (*Bullcoming, supra,* 132 S.Ct. at p. 2713.) To qualify as a "testimonial" statement, the statement must have the "primary purpose" of "establishing or proving past events potential to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; *Bullcoming, supra,* 131 S.Ct. at p. 2716, fn 6.)

Appellant argued that it was clear from an examination of the facts of the instant case and the above law that the testimony of Dr. Word violated appellant's Sixth Amendment right to confrontation of the witnesses arrayed against him. While the prosecutor did not attempt to introduce Ms. Yates' report, it was clear that Dr. Word used it as the basis for her testimony. This was in direct contravention of the holding in *Bullcoming*. Dr. Word was not present during the testing that Ms. Yates performed for Cellmark and took no role in performing the tests. Having Dr. Word testify did not constitutionally satisfy *Bullcoming,* as the report was clearly testimonial and Ms. Yates was never subjected to cross-examination. (AOB at pp. 124-125.)

B. SUMMARY OF RESPONDENT'S BRIEF

Respondent argued that appellant's claim has no merit because Dr. Word "provided independent expert opinions about the DNA testing conducted at Cellmark."As such, Dr. Word was the

> "witness against" appellant within the meaning of the Sixth Amendment to the United States Constitution, and appellant had a full and fair opportunity to engage her in cross-examination. The analytical data and chain of custody information from the laboratory's file, relied upon Dr. Word in forming her opinions, were not testimonial statements in view of recent decisional authorities from this Court has well as the United States Supreme Court. (RB at p. 90.)

Respondent essentially argued that the analytical data produced by Ms. Yates was "non-testimonial" under *Crawford,* hence the confrontation clause did not apply to them. (RB at pp. 97-100; *People v. Lopez* (2012) 55 Cal.4th 569; *People v. Dungo* (2012) 55 Cal.4th 608; *Williams v. Illinois* (2012) 132 S.Ct. 221.) This argument was based upon the lack of formality or solemnity in such documentation. (*People v. Lopez, supra,* 55 Cal.4th at pp. 582-583, RB at pp. 97-99; *People v. Dungo, supra,* 55 Cal.4th at p. 612, RB at p. 99.)

In addition, respondent argued the confrontation clause did not apply because the "primary purpose" of the data generated by Ms. Yates was not for the prosecution of an individual, but instead the purposes were varied

and went far beyond the prosecution of a targeted individual. (RB at pp. 99-101.)

Respondent also argued that appellant forfeited his claim because trial defense counsel made no objection to Dr. Word's testimony as it related to work performed by Ms. Yates at Cellmark. (RB at p. 94.)

C. APPELLANT'S REPLY ARGUMENT

Regarding appellant's failure to object below, the cases cited by respondent all post-date the trial in this matter. Therefore, appellant should be allowed to raise an objection to respondent's application of them even if there was no timely objection below. (See gen. *People v. Jennings* (2010) 50 Cal.4th 616, 652.) Further, in the last case the United States Supreme Court decided on this issue, *Williams v. Illinois,* the High Court was unable to arrive at a majority opinion as to the proper application of the confrontation clause in cases involving laboratory notes and testing results. These facts compel this Court to reexamine the facts of this case in light of the current law.

Crawford, a case involving the improper admission of a hearsay statement by petitioner's wife, explained that the Sixth Amendment confrontation right pertained to those who give "testimony," defined as " a solemn declaration or affirmation for the purpose of proving some fact."

(*Crawford v. Washington, supra,* 541 U.S. at p. 51.) *Crawford* offered several definitions of statements that would be testimonial in nature such as statements contained in affidavits, despositions, confessions, prior testimony, and statements that were made under circumstances which would lead an objective witness to believe that the statement would be for use at a later trial. (*Id.* at pp. 51-52.) However, *Crawford* never settled on a single definition of "testimonial." (*Ibid.*)

Five years after *Crawford,* the United States Supreme Court decided *Melendez-Diaz v. Massachusetts* (2009) 541 U.S. 305, the first case in what might be deemed the extension of *Crawford* to forensic testing. This case dealt with the testimonial nature of a sworn certificate of a cocaine analysis done by a analyst not present at trial. (*Id. at* p. 308.) The High Court ruled that such certificates were "within the core class of testimonial statements" making them inadmissible under *Crawford* in that they (1) they were a solemn declaration or affirmation made for the purpose of establishing or proving some fact, (2) that they were functionally identical to live in-court testimony and (3) made under circumstances which would lead an objective witness to reasonably believe it would be available for use at a later trial.(*Id* at p. 311.)

The next *"Crawford"* case decided by the Supreme Court also

involved a forensic application. *Bullcoming v. New Mexico* (2011) 131 S.Ct. 2705, was a driving while intoxication case in which the trial court allowed the admission a "certificate of analyst" from Curtis Caylor that stated the correctness of his lab reports conclusion that defendant had an illegal high percentage of alcohol in this blood. Caylor did not testify. Instead a fellow analyst was called to testify about the results. While familiar with the lab's testing procedure, the witness neither participated in nor observed the testing done by Caylor.

The High Court in *Bullcoming* held that the admission at trial of Caylor's laboratory report violated defendant's right to confront and cross examine Caylor. (*Bullcoming, supra,* 131 S.Ct. at p. 2710.) The Court stated while the certificate in *Bullcoming* was not sworn to and notarized, as the one in *Melendez* was, Caylor's statement was "formalized" in a signed document and the document made reference to court rules that would allow for its admission. (*Id.* at p. 2717.) Further, the Court held that the lab reports were testimonial because their purpose was to serve as evidence in a police investigation.

The last "forensic" *Crawford* decided by the United States Supreme Court was *Williams v. Illinois* (2012) 132 S.Ct. 221, a case heavily relied upon by respondent. *Williams* was a legally complex case because of the

lack of majority opinion, whose importance lies largely in the fact that it represents the last word from the High Court The factual situation in *Williams* was somewhat similar to the instant case. Illinois State Police forensic biologist Sandra Lambatos testified that a DNA profile (derived from semen on a vaginal swab of the rape victim) produced by an independent Maryland lab matched a DNA profile, derived from defendant's blood, produced by the Illinois State Police Laboratory.

Justice Alito wrote the plurality opinion for the Court, joined by three other Justices. In a separate concurring opinion, Justice Thomas provided the fifth vote that won the day for the State of Illinois, but on a rationale not adopted by the plurality opinion. The plurality decided on two alternative grounds that Lambatos's testimony did not violate defendant's federal Constitutional right to confrontation of the person who performed the Maryland testing. (1) The report was not admitted for its truth but only for the limited basis of explaining Lambatos's independent conclusion, based on her expertise, that the defendant's DNA matched the male DNA on the swab. (*Williams, supra,* 132 S.Ct. at p. 2228.) Alternatively, (2) there was no confrontation right violation because the Maryland laboratory's report was prepared for the primary purpose of finding a dangerous rapist who was still at large, and "not for the primary purpose of accusing a *targeted* individual." (*Id.* at p. 2243.) The fifth vote came from

Justice Thomas who agreed with the plurality's conclusion that Lambatos's expert testimony did not offend the confrontation right but for a completely different reason": that the Maryland laboratory report on which Lambatos relied "lacked the solemnity of an affidavit or deposition" and therefore was not "testimonial." (*Id* at 2260; *Dungo*, *supra,* 55 Cal.4th 619.)

In *Williams,* five justices specifically repudiated the concept that the report was not hearsay because it was not admitted for the truth. (*Williams v. Illinois, supra,* 132 S.Ct. 2264 et seq [dissent of Justice Kagen joined by Justices Ginsberg, Scalia, and Sotomayor].) Further, the alternative analysis of the *Williams* plurality, (that the report failed to satisfy the primary purpose test), also was rejected by a majority of the 9 justices. (It was only Justice Thomas's vote, on the grounds that the report lacked formality, that allowed the *Williams* Court to come down on the side of the state. (*Ibid.*) The Kagan dissent called the plurality's not-for-the-truth rationale as "a simple abdication to state law labels," stating "No wonder why five Justices rejected it." (*Id.* at p. 2272.) It further rejected the plurality's opinion that the Cellmark report was not testimonial. Justice Kagan succinctly yet powerfully stated "Have we not already decided this case," referring to the Court decision in *Bullcoming v. New Mexico*, referenced above. Justice Kagan rightfully saw no difference between the relevant facts of *Bullcoming* and *Williams.* (*Id.* at p. 2267.)

Justice Kagan also made clear that the plurality's test of needing a targeted individual to satisfy the primary purpose test does not bear the weight of logic and that "it is anybody's guess" where such as test "came from." (*Williams, supra,* 132 S.Ct. at p. 2273.) As stated by Justice Kagan "..it makes not a whit of difference whether at the time of the laboratory test, the police already have a suspect." Such is most definitely so in the instant case where there was no other conceivable purpose for Ms. Yates to do the testing other than to eventually arrest and prosecute the proper suspect.

Williams leaves the legal community suspended in mid-air as to the relation between scientific testing and the confrontation clause. *Williams* provided a decision that, while binding Mr. Williams, had no such precedential effect on any other case. as no five justices could agree to why the Maryland report was or was not testimonial. As such, any reliance on *Williams* by respondent is misplaced.

Therefore, as stated by Justice Corrigan in her *Dungo* dissent "the question remains: For the purposes of the Sixth Amendment confrontation clause, can a statement in an uncertified document be formal enough to qualify as testimonial?" (*Dungo, supra,* 55 Cal.4th at p. 636.) That is certainly the question in the instant case.

Subsequent to *Williams*, this Court decided *People v. Dungo* (2012) 55 Cal.4th 608. The facts of *Dungo* differed from the facts of *Melendez-Diaz* and *Bullcoming* in that they did not deal with forensic testing done by persons other than the witness, but rather, the use of the notes of the attending pathologist by a testifying pathologist who was not present at the autopsy. (*Id.* at pp. 612-615.) This Court ruled that because the hearsay in question involved only statements describing the attending pathologist's statements regarding his anatomical and physiological observations of the conditions of the body, his statements lacked the "solemn declaration or affirmation for the purpose of proving some fact" required by *Crawford* and its progeny to make a statement "testimonial" for the purposes of the confrontation clause. (*Id.* at p. 617; *Crawford v. Washington, supra,* 541 U.S. at p. 59.)

Further, *Dungo* held that in addition to the lack of formality, the statements of the attending pathologist were not testimonial because they were not made under circumstances which would lead an objective witness to reasonably believe that would be available for later use at trial. (*See Crawford v. Washington, supra,* 541 U.S. at pp. 51-52; *People v. Dungo, supra,* 55 Cal.4th at pp. 619-620.) This Court held that autopsies were statutorily mandated and were employed for any number of other reasons than the prosecution of a criminal defendant and as such the "primary

purpose" of the autopsy report was simply "an official explanation of an unusual death, and such official records are ordinarily non-testimonial." (*Dungo*, *supra,* at p. 621.)

Respondent's extensive reliance on *Dungo* to argued that the testing of Ms. Yates was "non-testimonial," hence outside the mandates of the confrontation clause is mistaken. In the instant case, Ms. Yates's testing went far beyond the mere recording of observations. It involved a formal process that involved the creation of complex microbiological samples and profiles. Further, there can be no question that, unlike in *Dungo*, this work was done for the "primary purpose" of prosecuting an eventual defendant for the death of Cannie Bullock. In fact, there could be no other purpose.

Therefore, in spite of respondent's arguments to the contrary, there is no reasoning in *Crawford, Melendez-Diaz, Bullcoming,* or *Dungo* that supports its position.

Respondent was incorrect when it claimed that both federal and state court precedent favors his argument. The reality is that *Williams* has left the law in a state of flux. Appellant therefore urges this Court to follow the lead of Justice Kagan to return to the United States Supreme Court precedent of *Melendez-Diaz* and *Bullcoming* and apply the confrontation clause in full effect to the report of Ms. Yates.

V. THE PROSECUTOR VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY IMPROPERLY MISLEADING THE JURY IN HER ARGUMENT

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 126.

VI. FORENSIC SCIENCE ASSOCIATES USE OF THE IDENTIFILER STR TEST KIT WAS A NEW SCIENTIFIC PROCEDURE AND THE TRIAL COURT ERRED IN REFUSING TO GRANT A FIRST-PRONG *KELLY/FRYE* HEARING TO DETERMINE WHETHER THE USE OF SAID KIT WAS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY THEREBY VIOLATING APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 130.

In addition, appellant respectfully requests that this Court strike footnote 40 of the Reply Brief. (RB at p. 124.) It is a gratuitous piece of evidence outside the record, both literally and temporally, presented for the sole purpose of weakening the trial testimony of defense witness Mark Taylor's trial testimony. The issue in the *Kelly* hearing was whether use of the new primers and linkers in the mix had been validated and shown to

work. Marc Taylor's later use of the system is not part of the record before the trial court and is therefore irrelevant to its decision. Nor does it qualify as a change in the landscape regarding the general acceptance of Identifiler. The bare fact of Mr. Taylor's use of a version of Identifiler ten years after the hearing says nothing about the validity or general acceptance of the system employed by Contra Costa County in 2003.

VII. THE TRIAL COURT VIOLATED APPELLANTS RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL AND RIGHT TO A FAIR DETERMINATION OF GUILT AND PENALTY BY ALLOWING THE PROSECUTOR TO PRESENT EVIDENCE THAT APPELLANT WAS DEFINITELY THE SOURCE OF THE SPERM FOUND INSIDE CANNIE BULLOCK'S BODY

A. SUMMARY OF APPELLANT'S ARGUMENT

During the guilt phase of the trial, appellant's counsel made an oral motion that the trial court enter an order to bar the prosecution's DNA experts from testifying that the sperm recovered from Cannie's body originated from appellant. (15 RT 3403.) Counsel argued that while said experts could testify as to the rarity of appellant's genetic profile among the general population, they should not be allowed to definitively state that the sperm recovered from Cannie was appellant's. (*Ibid.* The trial court ruled in favor of the prosecution and allowed testimony that appellant was the donor

of the sperm found in Cannie Bullock's body. (16 RT 3571.)

Ultimately, David Stockwell, of the Contra Costa County Criminal Laboratory, testified that because of the rarity statistics, he was able to form an opinion "to a reasonable degree of scientific certainty," that the source of the sperm found in the victim was appellant. (16 RT 3644.)

In his opening brief, appellant argued that *Brown v. Farwell* (9th Cir. 2008) 525 F.3d 787, the Ninth Circuit Court of Appeals addressed this issue, which has become commonly referred to as "source attribution," and forbade evidence that the source latent sperm was a particular individual. (AOB at p. 132-133.)

B. SUMMARY OF RESPONDENT'S ARGUMENT

Citing to *People v. Nelson* (2008) 43 Cal.4th 1242, 1262, fn 1, *People v. Cua* (2011) 191 Cal.App.4th 582, and *People v. Johnson* (2006) 139 Cal.App.4th 1135, 1146, fn 10. (RB at p. 142 et seq.) Respondent argues that the law is established that experts can testify to an opinion that identified a particular person as the source of DNA evidence.

C. APPELLANT'S REPLY ARGUMENT

While *People v. Nelson* stated that some authorities have found in favor of "source attribution," this Court has never stated such to be the case. The central authority upholding such a holding is *People v. Cua, supra,* 191

Cal.App.4th 582. *Cua* is inadequate authority for such a premises.

In *Cua,* the court's holding was issued in a case in which no objection was made in the trial court to the analyst's opinion and no record was made of the scientific and legal controversy surrounding the question whether such "source attribution" testimony is proper. In *Cua*, the defendant was charged with a double murder. The evidence against him included criminalists' testimony about the results of DNA testing on blood found in the victims' home and car. Most of the DNA testing results were presented with corresponding statistics, i.e., the probability of a random match between the evidence sample and that of the defendant or one of the victims. However, one criminalist testified simply that Cua was the single source of DNA found on the seat of the car and that one of the victims was the single source of DNA on a ring found in the car. Mr. Cua's trial counsel did not object to any of the DNA testimony.

Mr. Cua's appellate counsel, anticipating that any claims of error in admission of the DNA evidence would be forfeited by trial counsel's failure to object to them, argued on appeal that trial counsel had provided ineffective assistance by failing to challenge the DNA evidence, including the criminalist's testimony identifying Mr. Cua and the victim as the sole sources of the DNA on the car seat and the ring. The Court of Appeal, did,

in fact, find the error claims forfeited, and it also rejected the ineffective assistance of counsel claims. However, the court did not stop there, but went on to hold, in a decision which it certified for publication, that it is not necessarily error for an analyst to testify to an opinion that a given DNA sample came from one person, to the exclusion of all others. The court acknowledged that it could not determine the propriety of the analyst's source attribution testimony in the case before it because the record did not contain any statistical evidence of the random match probabilities of the two samples in question. The court did not specify the circumstances under which a conclusion of identity would be permissible, nor could it, because there is considerable disagreement among scientists about this very point.

The *Cua* case was not an appropriate vehicle on the admissibility of testimony attributing a DNA sample to a sole source. The question whether DNA profiles are sufficiently rare that it is appropriate to say that a particular profile is unique is far from being resolved, and the Court of Appeal's ruling upholding such source attribution testimony was based on a record lacking any discussion of the concerns of scientists that source attribution of a DNA profile is inaccurate and misleading.

Most scientists with expertise in the issues surrounding forensic

DNA typing believe that it is inappropriate to permit source attribution of profiles. (See, e.g., Balding, D.J., *When can a DNA profile be regarded as unique?*, Science and Justice 1999: 39(4): 257-260; Biederman, A., et al., *Decision theoretic properties of forensic identification: Underlying logic and argumentative implications*, Forensic Science International 177 (2008) 120-132; Buckleton, J., and Triggs, C., *Relatedness and DNA: are we taking it seriously enough?*, Forensic Science International 152 (2005) 115-119; see also Cole, S., *Forensics without uniqueness; conclusions without individualization: a new epistomology of forensic identification*, Law, Probability and Risk (2009) 8, 233-235 [discussing the problems with source attribution in forensic science in general].)

One reason for scientists' concerns is that the random match probability statistic, which can suggest that a profile is so rare as to be unique, does not necessarily reflect the probability of a match in the real world. The random match probability statistic (RMP) is actually an artificial number, the calculation of the probability that another identical profile will occur in a hypothetical population consisting entirely of unrelated individuals from a limited set of racial groups. (See *United States v. Jenkins* (D.C. 2005) 887 A.2d 1013, 1018.) The real world, however, includes many people who are related to one another; scientists do not know to what extent the existence of related individuals may affect the real

probability of the existence of two matching profiles. Studies of offender databases have, in fact, revealed the existence of profiles matching at up to twelve loci at frequencies substantially higher than the random match probability would predict.

Another concern is that identifying a profile as unique ignores not only the existence of relatedness but also the weight of non-DNA evidence in the case and the possibility of error or contamination in the collection, processing, and analysis of samples.

Some experts on probability and statistics have observed that courtroom testimony that a profile can be uniquely attributed to one person inevitably involves inferential steps based on assumptions beyond what is logically warranted by the analysis process, deliberately and illogically suppresses the uncertainty inherent in the probabilistic model represented by the RMP, substitutes the witness's own assumptions and belief about the truth for the evidence, and invades the province of the factfinder. (Biederman, A., et al., *Decision theoretic properties of forensic identification: Underlying logic and argumentative implications*, Forensic Science International 177 (2008) 120-132.

The appellate courts of California, including this Court, have long recognized that the statistical match probability is integral to the

determination of the significance of a DNA match. (See, e.g., *People v. Venegas* (1998) 18 Cal.4th 47, 82; *People v. Barney* (1992) 8 Cal.App.4th 798, 817.) The National Academy of Sciences endorsed this view in its landmark report on forensic science, "Strengthening Forensic Science in the United States: A Path Forward" (2009). As noted below, the NAS was critical of the tendency of analysts in many other forensic sciences to couch their opinions as conclusions that two exemplars matched to the exclusion of all others. The report emphasized that such conclusions of identity are questionable and often not supported by available research and data, and concluded that "the concept of 'uniquely associated with' must be replaced with a probabilistic association, and other sources of the crime scene evidence cannot be completely discounted." (National Academy of Sciences Report, "Strengthening Forensic Science in the United States: A Path Forward" (2009), p. 184.) Permitting a DNA analyst to testify that a profile is unique, especially since a statistic is available, would contravene both the prior reasoning of this Court and the recommendations of the NAS.

Whether the rule requiring a numerical statement of the likelihood of a match should be replaced with opinion testimony that a DNA sample is unique is a question that should be considered in a case in which a full record is made on the issues attending such a change. No such record was made in this case because trial counsel did not object to the admission of

the analyst's testimony. Furthermore, the ruling of the Court of Appeal that such testimony may be permissible provides little or no guidance in future litigation. The court did not state that the source attribution in the case before it was proper, and it could not do so in any event in the absence of any evidence of the random match probability for the two samples. It explicitly declined to establish criteria for when an expert can state an opinion that a DNA sample belongs to a particular individual to the exclusion of all other. Instead, the court wrote, "We hold only that the expert is not necessarily precluded from doing so and that the defendant here has failed to meet his burden to show that the court erred in not excluding the evidence sua sponte." (*People v. Cua, supra,* 191 Cal.App.4th 582, 601)

VIII. DUE TO THE TRIAL COURT'S IMPROPER INSTRUCTION TO THE JURY PANEL, APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR DETERMINATION OF THE PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 141.

IX. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NONSTATUTORY AGGRAVATION IN THE FORM OF APPELLANT'S PRIOR ACTS OF SEXUAL TOUCHING

A. SUMMARY OF APPELLANT'S ARGUMENT

The facts pertinent to this issue are the same as those central to the Argument II of the opening and reply briefs. In 1992 and 1997, appellant was convicted of two non-violent sexual assaults on minors. Argument II argued that the trial court committed reversible error in the guilt phase by allowing the prosecutor to present evidence of the convictions and their surrounding facts under Evidence Code section 1108 and 1101 (b) in the guilt phase. The argument herein pertains to the trial court's error in allowing the prosecutor to use these incidents as aggravating factors in the penalty phase as aggravating evidence under section 190.3 (a).

Appellant argued that evidence that does not apply to one of the listed aggravating factors of section 190.3 is inadmissible before the penalty jury in the prosecution case in chief (AOB at p. 147; *People v. Boyd* (1985) 38 Cal.3d 762, 775, citing to *People v. Easley*, 34 Cal.3d 858, 878.) Section 190.3 permits the prosecution at the penalty phase of a capital case to

introduce evidence of "[c]riminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Section 190.3 (b).) However, it does not permit the prosecution to introduce evidence of non-violent crimes that did not result in a felony conviction. (Section 190. 3. (c); *People v. Boyd, supra,* 38 Cal.3d at pp. 772-773.)

In the instant case, the trial court explicitly acknowledged that neither the 1992 nor 1997 incidents referenced in Argument II involved violence or the threat thereof, hence, were inadmissible under section 190.3 (b). (19 RT 4370.) However, the trial court ruled that these incidents were "circumstances of the offense" of the murder of Cannie Bullock. (*Ibid.*)

Appellant argued that while the "circumstance of the offense" extends to "that which surrounds materially, morally, or logically the crime" (*People v. Blair* (2005) 36 Cal.4th 686, 749), there are no cases reported that would even suggest that the factor (a) may be extended to non-violent, completely unrelated offenses that took place 13 and 18 years, respectively, after the murder. (AOB at p. 151.)

Appellant concluded his argument by stating the improper ruling of the trial court deprived him of his right to be sentenced according to the California statutory scheme, resulting in a manifest prejudice.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent argued that the trial court did not abuse its discretion in determining that evidence of appellant's "child molest" offenses of 1992 and 1997 was admissible in the penalty phase for two reasons, summarized as follows.

1. The Non-Violent Crimes Were Circumstances of the Offense Pursuant to Penal Code section 190.3 (a)

Respondent argued that the two non-violent crimes were admissible in that

> [T]hey could be considered circumstances of the underlying capital crime within the meaning of Penal Code 190, factor (a). The events were relevant and highly probative of appellant's identity as Cannie's rapist and killer by demonstrating his propensity to sexually assault children. As such, they were circumstances of the offense. (RB at p. 168.)

Respondent argued that this Court had "adopted an expansive reading" of the factor (a) language in Penal Code section 190.3. (RB at p. 176; *People v. Smith* (2005) 35 Cal.4th 334, 352.) It further argued that within the meaning of this factor, "penalty phase evidence is permitted beyond the immediate temporal and spatial circumstances of the crime to also encompass that which surrounds, materially, morally, or logically the crime." (RB at p. 176; *People v. Edwards* (1991) 54 Cal.3d 767, 833.) In

other words, respondent argued that "penalty phase evidence is admitted to the extent it gives rise to reasonable inferences concerning the circumstances of the crime and defendant's liability." (RB at p. 176; *People v. Riggs* (2008) 44 Cal.4th 248, 321-322.)

Citing to *People v. Smith, supra,* 35 Cal.4th 334, respondent also argued that the two molestation cases were relevant to the penalty phase because they provided evidence of appellant's mental state as to sexual contact with children. (RB at p. 176-177.) Further, respondent cited to *People v. Ramos* (1997) 15 Cal.4th 1133, 1170 to stand for the proposition that evidence that explains a defendant's identity, motive, intent, or methods, may be considered in aggravation pursuant to section 190.3 (a). (RB at p. 177.) Respondent also argued that under *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582, evidence of events that took place either before or after the capital crime can be admissible. (RB at p. 177.)

Respondent concluded this section of its argument by stating that "the Colorado events demonstrated appellant's propensity to sexually assault children, particularly those known to him and to whom he had opportunistic access." (RB at p. 178.)

2. The Colorado Molestations Qualified as Rebuttal Character Evidence

Respondent pointed out multiple instances of appellant's penalty phase witnesses testifying as to appellant's general "good character" and specifically, his respectful attitude toward around children and women. (RB at pp. 169-173.) Respondent argued that "as a direct and proportionate response to defense witnesses' testimony about appellant's courteous and respectful treatment of women, and about how his character was inconsistent with raping and killing a young girl, the People properly addressed the Colorado child molest convictions cross examination and then the implication of the evidence in its closing." (RB at p. 179.) Respondent further argued that the law governing the admission of such evidence is controlled by *People v. Valdez* (2012) 55 Cal.4th 82, 169-170 which stated

> Rebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence von which the defendant introduced evidence. The scope of proper rebuttal depends on the breadth and generality of the direct evidence. Evidence presented or argued as rebuttal must relate directly to a particular incident or character trait the defendant offers on his own behalf. When a defendant places his character at issue during the penalty phase of a capital trial, the prosecution may respond by introducing character evidence to undermine defendant's claim that his good character evidence weighs in favor of mercy and to present a more balanced picture of defendant's personality. (RB at pp. 179-180.)

Respondent argued that "the references to the Colorado child molestation cases arose during the direct and cross-examination of the defense cases. To the extent that the child molest convictions were referenced by the People, such evidence was directly responsive to defense witness testimony about appellant's good character." (RB at p. 180.) In addition, respondent argued that "by continuing to deny that he raped and murder Cannie during his penalty phase testimony, appellant placed his own character into issue." (RB at p. 181.)

In summary, respondent stated that the Colorado evidence was considered by the jury only to present "a more balanced picture of appellant's personality for the jury," a permissible usage for such testimony under *People v. Valdez, supra,* 55 Cal.4th at p. 170. (AOB at p. 181.)

3. Appellant Has Forfeited His Claim

Respondent argued that "Insofar as the prosecutor referenced appellant's Colorado child molest offenses to impeach appellant's character witnesses to and rebut defense character evidence, and the jury's consideration of the evidence for that purpose, appellant has forfeited that claim of error. While appellant argued at trial that the Colorado child molest events could not be considered as circumstances of the capital crime under factor (a) of Penal Code section 190.3, he did not oppose the use of

the Colorado crimes to rebut his own good character evidence." (RB at p. 174.)

C. APPELLANT'S REPLY ARGUMENT

1. The Non-Violent Crimes Were Not Circumstances of the Offense Pursuant to Penal Code Section 190.3 (a)

Not a single one of respondent's citations support their stated contention that crimes completely unrelated to the capital offense that took place 13 and 18 years, respectively, after said offense, constitute circumstances of the capital offense, under section 190.3 (a). No decision from this or any other federal or state court in California that even hints at such a broad reading of section 190.3 (a).

While it is true that this Court has expanded the temporal range of the circumstances of the offense beyond the immediate commission of the murder, it did not extend them indefinitely to *any* event that occurred at *any* time that has some arguably probative connection to the capital crime.

Each of the cases respondent cited to support its position involved an act or acts by a defendant that occurred close in time to the capital crime and that was directly related to the way the crime was committed. None of these cases involved temporally distant acts that had nothing at all to do with the charged capital crime, except perhaps to show appellant's general

attitude about a particular class of people. Nor did any of these cases involve incidents so temporally removed from the capital crimeas those admitted in Mr. Cordova's trial.

A review of the cases cited by respondent clearly supports appellant's position. In *People v. Lewis* (2006) 39 Cal.4th 970, 1051-1052 (RB at p. 178), this Court confirmed as a factor (a) "circumstance of the offense" defendant's terrorizing his murder victims not long before their murder. In *People v. Nicolaus, supra,* 54 Cal.4th at p. 581 (RB at p. 177), this Court allowed cross-examination of defendant into the anti-Christian philosophy of Nietzsche as a circumstances of the offense when the victim was of a particular sect of Christianity that defendant despised. In *People v. Osband* (1996) 13 Cal.4th 622, 708, this Court held that defendant's drug addiction at the time of the crime could be considered a circumstance of the offense when the prosecutorial theory was that the felony murder robbery was committed to steal money to pay for defendant's drug habit. (RB at at p. 177.)

In *People v. Edwards, supra,* 54 Cal.3d at p. 893 (RB 176-177), this Court held that a "massive but futile" air and ground search for defendant by law enforcement immediately after his commission of the capital crime was a factor (a) circumstance of the offense. Similarly, in *People v. Riggs*

(2008) 44 Cal.4th 248, 321-322 (RB at p. 176), this Court allowed evidence as to the difficulty in solving the charged murder as a circumstance of the offense. In *People v. Ramos, supra,* 15 Cal.4th 1133, also cited by respondent (RB at p. 177), this Court stated that evidence that defendant told his cellmate that he shot the victims and enjoyed hearing them beg for their lives was relevant to factor (a) in that it was relevant to defendant's lack of remorse during the commission of the crime.

Respondent's citation to *People v. Smith, supra,* 35 Cal.4th at p. 352 is similarly unavailing to its position. In *Smith* this Court held that the prosecution was entitled to call an expert to testify the general psychological nature of a sexual murder of a young child (the type of crime committed by defendant), and how certain items found in defendant's possession corresponded to said nature. This Court held that such testimony qualified under factor (a) in that it "surround(ed) materially, morally, or logically" the crime. (*Ibid.*)

However, in the instant case there was no evidence showing any sort of psychological connection between the Colorado incidents of touch and the rape-murder of Cannie. It is pure speculation that the touching incidents say anything at all about the instant crime and the prosecutor failed to call any expert who could make this connection.

In making its argument, respondent has lost sight of the meaning of "aggravating factors" as it pertains to the penalty phase of a death penalty trial. According to CALJIC 8.88 "an aggravating factor is any fact, condition or event *attending the commission of a crime* which increases its severity or enormity or adds to its injurious consequences over and above the elements of the crime itself." (Emphasis added; and see *People v. Adcox* (1988) 47 Cal.3d 207, 269.) This Court has never suggested that evidence of a non-violent crime *completely unrelated to the charged offense* that occurred over a decade after the charged offense could be considered an aggravating circumstance. They provided absolutely no insight into the capital, "increase[] its severity or enormity," or "add[]to its injurious consequences." They crime, nor did they provide any information that aggravated that crime. There was nothing about the Colorado crimes that "surrounds materially, morally, or logically" the crime. (See *People v. Tully* (54 Cal4th 952, 1042.)

Respondent also claimed that the evidence of the Colorado crimes should be admissible as a circumstance of the capital offense because they "demonstrat(e) (appellant's) propensity to sexually assault children, particularly those known to him and to whom he had opportunistic access. As respondent would have it, appellant's sexual predatory tendencies, as evidenced on the 1990's, were proof of his criminal motive and methods in

1979 and corroborated his identify as the perpetrator, especially in view of the special circumstances alleged (and proved) in this case..." (RB at p. 178.)

This position is both factually and legally incorrect. Factually, even if such a remote crime could ever be legally be considered a circumstance of this offense, the facts of the instant case would not allow for the operation of such a legal doctrine. As discussed more fully in Argument II, the Colorado crimes are so fundamentally dissimilar to the capital crime that no aspect of their commission can be of any way relevant to the capital offense. The argument that a person who improperly touched the Colorado children was likely the same person who brutally murdered and raped Cannie ignores the reality of such crimes. As stated in Argument II, the fundamental feature of the instant crime was brutal violence, while the fundamental feature of the Colorado crimes was a surreptitious touching. This argument is akin to claiming that temporally distant acts of non-violent thefts should be admissible in the penalty phase of a felony-murder robbery under factor (a) because they show a propensity to steal, or that acts of children disrespect toward police can be used to show hostility toward police in the penalty phase of a police killing capital case.

Not only is the evidence of the Colorado crimes factually irrelevant

to the instant crime, California death penalty law forbids its introduction. This Court has made it clear that general acts of bad conduct are not admissible in the prosecutions penalty phase case-in-chief unless they fall into one of the statutory aggravating factors of section 190.3. As stated in in *People v. Avena* (1996) 13 Cal.3d 394, 439

> In Boyd, we examined the 1978 death penalty law and concluded that not only must the jury "decide the question of penalty on the basis of the specific factors listed in the statute," but the evidence admitted at the penalty phase must be "relevant to those factors." (Citation omitted.) Although evidence in mitigation is not limited to statutory factors (Citation omitted), "[e]vidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and [would] therefore [be] irrelevant to aggravation." (Citation omitted.) Thus, "[aggravating] evidence irrelevant to a listed factor is inadmissible" (citation omitted), unless it is to rebut defense mitigating evidence admitted pursuant to section 190.3, factor (k)." (Citation omitted.)

As the Colorado offenses do not fall under any of the statutory factors, they are not relevant to the jury's determination of penalty.

Respondent's claim that the Colorado crimes should be considered factor (a) circumstances under the California death penalty statute because they show "propensity" has no basis in the law. As stated in Argument II, as a general axiom, uncharged offenses are not admissible to show a defendant's propensity to commit a charged offense unless there is specific

statute allowing for such an inference. (RB at p. 54.) Section 1108 allows the inference of propensity to be made under certain circumstances in the determination of guilt in a sexually related case. However, there is no law that permits the use of propensity evidence in the penalty phase of a capital trial if it does not otherwise fit into the statutory scheme.

2. The Evidence of the Colorado Crimes Was Not Admitted as Rebuttal Evidence, But Used in Rebuttal Only After the Court's Ruling Admitting It Under Factor (a)

Respondent also claimed that in additional to being circumstances of the offense, the Colorado crimes were admissible as rebuttal to the evidence of good character presented by appellant's witnesses. (RB at pp. 179-182.)

While respondent is correct that in certain cases evidence of bad character can be used to rebut "good character" evidence presented under section 190.3 (k), it has briefed a factual scenario that does not exist in the instant case. The evidence of the Colorado crimes were not admitted to rebut appellant's evidence of "good character" toward children. The ruling that the evidence would be admissible was made and the evidence was heard by the jury *prior to* any evidence presented by appellant in the guilt phase. As stated above, prior to the commencement of any penalty phase testimony, the trial court ruled that this evidence could be considered by the jury in the penalty phase as circumstances of the capital offense under

factor (a). Therefore, whether appellant decided to present any "good character" evidence or not, the evidence of the Colorado crimes would have been considered by the jury. The evidence of the Colorado crimes were not rebuttal in that it was not admitted to present a "more balanced picture of [appellant's] personality." (*People v. Valdez, supra,* 55 Cal.4th at p. 170.) Instead, the Colorado crimes served as an improper attack on appellant's general character, falling outside of any aggravating factor, which, in essence, appellant had to rebut through his own evidence.

This question of the order of presentation is not a difference without a distinction. It is critical to this discussion. The early ruling that the jury would be permitted to consider the Colorado crimes as evidence on the issue of penalty necessarily altered the defense's strategy with regard to the presentation of evidence in mitigation. Had the judge sustained the defense's objection to the evidence, counsel would undoubtably have avoided presenting evidence that would have invited evidence of those crimes as rebuttal. As it was, the alternative that remained to the defense was to present testimony which it hoped would counter the bad character evidence of the Colorado crimes. It did not invite rebuttal; it responded to evidence already in the record. It is circular and disingenuous to ignore the effect of the initial error in admitting the Colorado crimes evidence and argue that it was proper rebuttal to evidence offered defensively to mitigate

the harm caused by the admission of the evidence in the first place.

The theory for permitting rebuttal evidence is not that it provides a statutory factor, but that it undermines defendant's claim that his good character weighs in favor of mercy. (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791; *People v. Daniels* (1991) 52 Cal.3d 815, 882-883.)

People v. Valdez, supra, 55 Cal.4th at p. 169, a case respondent heavily relied upon, stated "[r]ebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence which defendant has introduced into evidence (in the penalty phase.)" *Valdez* at pp. 169-170 further stated that "[w]hen a defendant places his character at issue during the penalty phase of a capital trial, the prosecution may respond by introducing character evidence to undermine the defendant's claim that his good character weighed in favor of mercy and to present a more balanced picture of the defendant's personality." (See *People v. Loker* (2008) 44 Cal.4th 691, 709.) As stated in *Loker,* "[t]he scope of proper rebuttal is determined by the breadth and generality of the direct evidence." (*Ibid.*)

Under the above definitions and limitations, it is clear that the evidence of the Colorado cases was not rebuttal evidence at all. It was not introduced to counter appellant's evidence of good character as appellant had not yet put his character in issue when this evidence was admitted. It

was the prosecution that put appellant's character into issue, not appellant. Once the trial court made its final ruling allowing the prosecutor to present the Colorado evidence (19 RT 4457), it was appellant who was rebutting respondent's aggravating evidence in order to present a more balanced picture of appellant's character, not the other way around.

The trial court error could not be any clearer.

3. Appellant Has Not Forfeited His Claim

Respondent claimed that "While appellate argued at trial that the Colorado child molest events could not be considered as circumstance of the capital crime under factor (a) of Penal Code section 190.3, he did not oppose use of the Colorado crimes to rebut his own good character evidence." (RB at p. 174.)

In its Motion to Exclude Aggravating Evidence (8 CT 1991 et seq), the defense made it clear that appellant was objecting to the admission of evidence of the Colorado crimes in that they were not relevant to the penalty phase because they were not proper aggravation. This was reiterated at the hearing in this matter. (19 RT 4370.) Further, prior to the guilt phase, appellant strongly objected to the admission of the Colorado crimes for any purpose. (See Argument II, *supra,* AOB.) No further objection was needed when the prosecutor subsequently referred to that

evidence in her corss-examination of defense witnesses.

"An attempt to attack the merits of damaging testimony to which a party hasc unsuccessfully objected has long been recognized as a necessary and proper trial tactic, and it may not be deemed a waiver of a continuing objection." (*People v. Sam* (1969) 71 Cal.2de 194, 207.)

Furthermore, there was neither need nor opportunity for appellant to have raised an objection to a theory of admission that did not exist until respondent created it years after the trial ended. As such, respondent's argument has no merit.

4. The Error Was Not Harmless

The admission of the Colorado crimes was unquestionably an error in federal constitutional law and reversal is mandated unless respondent can prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24; *People v. Cage, supra,* 40 Cal.4th at pp. 991-992.)

Error is considered "harmless" when it does not contribute to the verdict because it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn 4.) Obviously, to make this

determination, the reviewing court must look to the evidence that the jury actually heard in a given case. (*Ibid.*)

Recently, *People v. Jackson* (2014) 58 Cal.4th 724, Justice Liu, in his separate and concurring and dissenting opinion reviewed the current state of the beyond a reasonable doubt standard for harmless error. He stated that the beyond as reasonable doubt standard required before federal constitutional error can be said to be harmless "has long been understood to indicate the very high level of probability required by the Constitution to deprive an individual of life or liberty." (*Id.* at p. 792; *Victor v. Nebraska* (1994) 511 U.S. 1, 14.) As Justice Liu stated, while the standard of "beyond a reasonable doubt" is not one of absolutely certainty, it is intended to be "very stringent: it is not satisfied so long there is a doubt based upon reason." (*People v. Jackson, supra,* 58 Cal.4th at p. 792; *Jackson v. Virginia* (1979) 443 U.S. 307, 317.) As observed by Justice Liu "the stringency of this standard reflects not only its protective function but also its amenability to principled application." (*People v. Jackson, supra,* 58 Cal.4th at p. 792.)

Accordingly, Justice Liu opined that under *Chapman,* a reviewing court "need not calibrate its certitude to some vaguely specified probability, instead the court must be convinced that the error was harmless to the

maximal level of certainty within the realm of reason, a level that admits no reasonable doubt." (*Ibid*, emphasis in original text.)

Obviously, the burden falls upon the party who benefitted by the error, the prosecution. (*Chapman, supra,* 386 U.S. at 24.) Therefore, as stated by Justice Liu "it is not defendant's burden to show that the error *did* have adverse effects; it is the state's burden to show that the error *did not* have adverse effects." (*Jackson, supra,* at p. 793 (emphasis in original text).) Because it may be difficult to determine whether a particular error contributed to the jury's verdict given the counterfactual nature of the inquiry, "the allocation of the burden proving harmlessness can be outcome determinative in some cases" (*Gamache v. California* (2010) 131 S. Ct 591, 593.)

Respondent tries to minimize the seriousness of the error by conceding that the Colorado offenses involved only "brief, nonviolent touching of the victim," in order to argue that they were "insignificant" in light of the facts of the assault and murder. But there is nothing insignificant about allegations that a defendant is a child molester. The response of the community and its representatives to child molesters of all degrees, makes it impossible to avoid the realization that such evidence is inherently inflammatory. Our society's outrage can be tracked in the ever

more punitive laws enacted, by the Legislature and by popular vote through the initiative process, against such offenders and the vocabulary used to designate them. By the community's fiat, they have been imprisoned for life as "sexually violent predators," released into the community subject to lifelong registration requirements, identified in offender databases available to anyone, and subjected to residency restrictions so draconian that many ex-offenders are made homeless because there is no roof under which society will allow them to live.

By allowing the jury to consider the Colorado crimes in aggravation, appellant was branded as a serial sex offender. Considering the implications of such a branding in today's society, respondent cannot meet its burden. As such, the judgment of death should be reversed.

X. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW WHEN IT INSTRUCTED THE JURY THAT THE IMPACT OF APPELLANT'S EXECUTION ON HIS FAMILY SHOULD BE DISREGARDED UNLESS IT ILLUMINATES SOME POSITIVE QUALITY OF APPELLANT'S BACKGROUND OR CHARACTER

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 154.

XI. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, REASONABLE DETERMINATION OF PENALTY AND FREEDOM OF EXPRESSION PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NON-STATUTORY AGGRAVATION IN THE FORM OF APPELLANT'S THREAT AT A PRISON ANGER MANAGEMENT SESSION TO KILL A DEPUTY PROSECUTOR

A. SUMMARY OF APPELLANT'S ARGUMENT

In its Motion Regarding Defense Penalty Evidence in Mitigation, filed on February 1, 2007 (8 CT 2068 et seq), the prosecutor proffered as aggravating evidence an alleged threat that appellant made while appellant was in the custody of the Colorado Department of Correction. (8 CT 2074.) This threat was made during a therapy session with his therapist, Lori Clapp. (*Ibid.*) Appellant objected to the use of this statement, and a hearing was held on February 1, 2007. At that hearing, the trial court held that the actions of the appellant did not amount to an aggravating factor under section 190.3 (b) and forbid the prosecution from using this evidence. (18 RT 4390-4397.)

As part of appellant's penalty phase case-in-chief, Vicki Cordova, appellant's sister-in-law, testified that she "never been[11] (sic) (appellant)

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11. From the context of the record, it is clear that the witness said "seen" not "been."

mistreat any woman or be violent with any woman...." (20 RT 4622.) On cross-examination, the prosecutor asked Ms. Cordova if she knew anything about appellant's "threat" to kill a female deputy district attorney. (20 RT 4636.) Counsel immediately objected to the prosecutor's reference to this "threat"stating that while the defense did put character in issue, evidence of this alleged threat exceeded bounds of permissible rebuttal. (20 RT 4637.) The trial court overruled counsel's objection. (20 RT 4637.)

Appellant argued that the trial court was mistaken when it held that evidence of appellant's statement that he wanted to kill the deputy district attorney was admissible to rebut evidence that appellant treated women with respect. (AOB at p. 160.) Appellant acknowledged that once defendant has put his character into issue at the penalty phase by presenting evidence thereof, the prosecutor may rebut that mitigating evidence with evidence that manifests to the jury a more accurate picture of defendant's character. (AOB at pp. 160-161.) However, as appellant argued, the prosecution is not allowed to go beyond the aspects of the defendant's background actually introduced by him, which was what happened in this case. (AOB at p. 161.)

The evidence presented by appellant was limited to the very narrow issue of how appellant treated women in public settings. However, the evidence introduced by the prosecution far exceeded the scope of appellant's evidence in that it purported to demonstrate to the jury a violent

disposition that extended to homicidal thoughts. (AOB at p. 160.)

Appellant also argued that the communication to Lori Clapp was privileged under Evidence Code section 1012, the patient-psychotherapist confidentiality statute.

B. SUMMARY OF RESPONDENT'S ARGUMENT

Respondent first argued that appellant forfeited his claim on appeal because at trial defense counsel argued exclusively that the evidence in question was inadmissible as factor (b) aggravating evidence but not that it was inadmissible because it exceeded the bounds of rebuttal evidence. (RB at p. 206.)

Respondent also argued that the trial court has "'broad discretion'" to allow rebuttal evidence and its decision to do so is reviewed for an abuse of discretion and will not be overturned 'palpable abuse.'" (RB at p. 207) As there was no abuse of discretion in receiving evidence as to the threat to the Colorado prosecutor, there was no error. (*Ibid.*) Respondent additionally argued that even defense counsel admitted that the evidence in question was admissible to rebut appellant's mitigating evidence of good character.[12]

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12. This argument can be disposed of out of hand. Counsel never said this. During a hearing regarding the admissibility of this evidence under factor (b), counsel did state that the evidence "may" be admitted as rebuttal. However, it was clear from the context of the argument that counsel was not conceding anything, but rather

(*Ibid*; 21 RT 4898.)

Respondent proceeded to recount the "good character" evidence appellant presented. (RB at pp. 207-212.) This included testimony from Abe Cordova, appellant's brother, that all the women who knew appellant "loved him," and that he could not believe that appellant could commit such a crime. (RB at p-p. 207-208.) Vicki Cordova, Abe's wife, testified that appellant was very respectful to her and was "like a magnet to the girls." (RB at p. 206.) She also expressed disbelief that he could have committed the instant crime. (RB at pp. 208-209.) Further, Kelly Cordova testified that appellant treated her like a wife should be treated and was good to kids, in spite of appellant having assaulted her 15 years before the trial. (RB at pp. 198-199.)

Respondent argued that the threat to the female prosecutor was properly introduced to rebut appellant's testimony that he was a "kind," "charming," and "happy-go-lucky" sort who could not have committed the capital offense. (RB at pp. 206-207.)

Respondent also argued that appellant's threat was not a privileged communication. (RB at pp. 212-214.) Firstly, appellant never raised the claim of privilege at trial. (RB at p. 212.) Secondly, the psychotherapist-

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was urging the court to focus on the (b) factor argument.

patient privilege does not exist when "the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger." (RB at p. 213.) Thirdly, respondent argued that the record is "largely devoid of information" as to whether or not the anger management class actually constituted a scenario under which the psychotherapist-patient privilege applied. (RT at pp. 212-214.)

Finally, respondent argued that any error committed by the trial court was harmless. (RB pp. 214-216.)

C. APPELLANT'S REPLY ARGUMENT

1. Appellant Did Not Forfeit His Claim

Respondent is factually incorrect in its assertion that appellant "exclusively" objected to the admission of appellant's statement to Lori Clapp on section 190.3 (b) grounds and not on the ground that it could not be used as rebuttal evidence. It is true that such was the nature of the objection at the penalty phase pre-trial hearing, with appellant prevailing on his argument. (AOB at p. 159; 18 RT 4390-4397.) However, during appellant's penalty phase case, witness Vicki Cordova testified, in part, that she had never seen appellant mistreat any woman or be violence with her.

(AOB at p. 159; 20 RT 4622.) On cross-examination, the prosecutor asked the witness whether she knew anything about appellant's "threat" to kill a female district attorney. (AOB at p. 159; 20 RT 4636.) Counsel immediately objected to this question, stating that evidence of the alleged threat exceeded the bounds of permissible rebuttal. (AOB at p. 160; 20 RT 4637.)

Therefore, appellant preserved the issue on appeal by making the proper timely objection.

2. The Trial Court Abused Its Discretion in Permitting the Prosecutor to Question Defense Witnesses About the Threatening Comments

As in Reply Brief Argument IX, *supra*, respondent essentially base its argument on *People v. Valdez, supra,* 55 Cal.4th at pp. 169-170, which stated "[r]ebuttal evidence is relevant and admissible if it tends to disprove a fact of consequence which defendant has introduced into evidence (in the penalty phase.)" *Valdez* further stated that "[w]hen a defendant places his character at issue during the penalty phase of a capital trial, the prosecution may respond by introducing character evidence to undermine the defendant's claim that his good character weighed in favor of mercy and to present a more balanced picture of the defendant's personality." (See *People v. Loker* (2008) 44 Cal.4th 691, 709.)

However, as stated in *Loker,* "[t]he scope of proper rebuttal is determined by the breadth and generality of the direct evidence." (*Loker, supra,*44 Cal.4th at p. 709.) Not any "good character" evidence presented by a defendant "will open the door" to any "bad character" evidence that the prosecutor can "dredge up." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 791, fn 24.) The relevance of evidence of character or a character trait to the penalty phase determination in a capital case is not whether defendant acted in accordance with that trait but whether the trait should be considered as a mitigating factor. (*People v. Visciotti* (1992) 2 Cal.4th 1, 69, fn 37.) Therefore, only rebuttal evidence that serves to counter the position that a particular character trait of the defendant's is mitigating is admissible.

The character traits presented by appellant's witnesses basically consisted of his popularity with women due to the positive way he treated them in public and family type settings. In addition, some of the witnesses indicated that knowing appellant's personality, they could not believe her would rape and murder a young girl. (RB at pp. 207-210.) The evidence of the comment made about the deputy prosecutor had little to do with these character traits in the sense that they did very little to reduce their value as mitigators. The alleged "threat" against the female district attorney was neither made directly to her nor in an indirect matter that would cause these

comments to be transmitted to her. In addition, it is highly speculative that by this single incident, appellant was in any way demonstrating a lack of respect for women, in general. As made clear by the evidence, the setting of these comments was an anger management group inside a prison, where the participants were encouraged to express their frustration.(AOB at p. 162.)

Also, as stated, appellant's comments were about his prosecutor, who happened to be a woman, not a woman who happened to be a prosecutor. (AOB at p. 161.) It is entirely consistent for an inmate, who generally respected women, to have made such comments, out of frustration, about the person who put him in prison. Therefore, there is nothing in appellant's statements about, but not to, the prosecutor, that would serve to lessen the mitigating value of appellant's aforementioned witnesses.

By improperly framing the admission of this isolated comment of anger and frustration in terms of rebuttal evidence to appellant's factor (k) evidence, respondent was able to circumvent section 190.3 prohibition against general "bad character" evidence that did not fit into one of the statutorily defined aggravating categories. (*People v. Avena* (1996) 13 Cal.3d 394, 439.)

3. Appellant's Threat Was a Privileged Communication

Appellant repeats its argument as stated in this brief, Argument IX at pp. 162-163 as if more fully stated herein. In addition, appellant asks the Court to consider Mr. Cordova's own description of the circumstances surrounding his remark during the anger management group therpay session, as quoted by respondent in its brief:

> She [Clapp] asked me what happened in court. Shec knew I was going to court.; And I told her what happened and that's when I told her I was mad enough that I coulds have killed the bitch.
>
> Q. Did you expect that was not going any further?
>
> A. No. Everything that-we signed a piece of paper that says everything we say is confidential. (RB at pp. 203-204; 20 RT 4846.)

4. The Trial Courts Error Was Not Harmless

Appellant restates his legal position on harmless error propounded in Argument IX, *supra,* at pp. 119-121.) The improper admission of appellant's comments to Ms. Clapp cannot be considered harmless in that they branded him as a person who would threaten to kill a public official for simply doing her duty. Both separately and in combination with the error in allowing before the penalty jury evidence of the Colorado crimes, appellant was deprived of his Eighth and Fourteenth Amendment rights to a fair determination of penalty and, as such, the death judgment should be

vacated.

CALIFORNIA'S DEATH PENALTY STATUTE AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

XII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE SECTION 190 .2 IS IMPERMISSIBLY BROAD

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 163.

XIII. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE §190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 165.

XIV. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY OR CAPRICIOUS SENTENCING, AND DEPRIVES APPELLANT OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME: IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 166.

XV. EVEN IF THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 176.

XVI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 176.

XVII. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

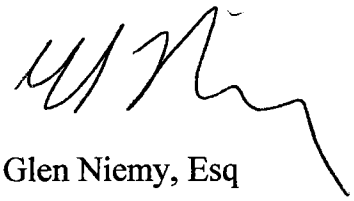
Appellant respectfully restates and relies upon his Argument made in his Opening Brief, AOB, *supra,* at p. 177.

CONCLUSION

Accordingly, appellant respectfully requests that the judgment be vacated.

March 13, 2015

Respectfully submitted,



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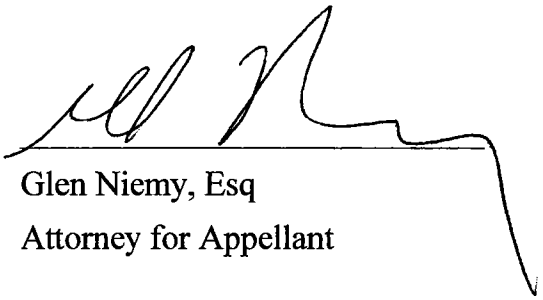
CERTIFICATE OF COMPLIANCE

I certify that the attached Appellants Reply Brief uses a 13 point Times New Roman font and contains 34, 680 words.

March 13, 2015



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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA)	Superior Court 040292-5
)	Supreme Court S152737
)	
Plaintiff,)	
)	
JOSEPH S. CORDOVA,)	
)	
Defendant.)	(Capital Case)
)	
)	
)	

DECLARATION OF SERVICE

Re: People v. Joseph Cordova
Superior Court 040292-5
Supreme Court S152737

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 3375, Portland, ME 04104. I served a copy of the attached **Appellant's Reply Brief** on each of the following by placing the same in an envelope addressed (respectively)

California Supreme Court (original and 14 copies)
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Each envelope, was then on March 16, 2015, sealed and placed in the United States mail, at Portland, Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of California and Maine that the foregoing is true and correct this March 16, 2015 at Portland, ME.

Glen Niemy