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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GARY DEAN STORY,<br><br>Defendant and Appellant. | H030020<br>(Santa Clara County<br>Super. Ct. No. 210711) |

In an indictment filed April 24, 2002, the Santa Clara County District Attorney accused Gary Dean Story of the felony murder of Betty Vickers. The murder occurred on October 22, 1976.[1] (Pen. Code, § 187.) Subsequently, on July 27, 2005, the District Attorney filed an amended indictment in which defendant was accused of Ms. Vickers's murder.[2]

Following a jury trial, on October 4, 2005, defendant was found guilty of first-degree murder. On March 9, 2006, the court denied defendant's motion for a new trial. The court sentenced defendant to life imprisonment with the possibility of parole.

On March 22, 2006, defendant filed a notice of appeal.

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[1] The indictment accused defendant of Vickers's murder with "malice aforethought and during the perpetration and attempt to perpetrate rape and burglary . . . ."

[2] The amended indictment accused defendant as follows: "he did unlawfully and with malice aforethought, kill BETTY YVONNE VICKERS, a human being."

On appeal, defendant raises four issues. First, he contends that because the quarter-century delay in prosecuting this case resulted in the loss of all physical evidence in the case, he was denied his due process right to a fair trial. Thus, the trial court erred in refusing to dismiss the indictment. Second, the admission of four incidents of violent sexual conduct pursuant to Evidence Code sections 1108 and 1101, subdivision (b) violated his federal and state constitutional rights. Third, the judgment of conviction must be reversed because there is insufficient evidence to sustain the conviction for first-degree murder. Finally, the cumulative effect of the errors in this case so infected the trial with unfairness as to make his conviction a denial of due process. We agree with defendant's second contention. Furthermore, we find the error prejudicial. Accordingly, we reverse defendant's conviction.

We set forth the facts of this case with these issues in mind.

*Facts*

On October 22, 1976, Betty Vickers's partially nude body was found lying face down on her bed. An autopsy conducted at the time revealed that Ms. Vickers had been strangled.

*Circumstances Surrounding the Murder*

According to Pamela Victory, a friend of defendant, Ms. Vickers worked at the Palo Alto office of the Wall Street Journal. It was there that Ms. Vickers met defendant, who also worked there. According to Ms. Vickers's housemate, Arlene Bockholdt Baker, and friend, Shirley Ann Kovach Mitchell, in the evenings, Ms. Vickers would often socialize with a group of friends at the bar at a restaurant called the St. James Infirmary.[3] Ms. Vickers's social group included Ms. Baker, Ms. Mitchell and Patricia Courter Knight. Occasionally, defendant would show up at the St. James Infirmary as well. At some

[3] At trial, many of the witnesses were referred to by both maiden and married names. For the sake of clarity we refer to them by their current names.

point, Ms. Vickers introduced defendant to her group of friends as her coworker. Defendant, who was married at the time, was not part of Ms. Vickers's social group at the bar. However, defendant would sometimes come up and chat with members of the group for a little while before leaving.

During 1975 and part of 1976, Ms. Vickers lived with Ms. Baker in a two bedroom house in Mountain View. Sometime around August or September 1976, Ms. Vickers moved to an apartment due to Ms. Baker's pending marriage.

Ms. Baker recalled two occasions when defendant was at their home in the summer of 1976. One time, defendant followed Ms. Vickers home from a softball game. Defendant and Ms. Vickers spoke on the front lawn for a while before defendant left. The second time occurred one morning that summer. Shortly after Ms. Baker woke up, Ms Vickers met her in the kitchen. Ms. Vickers informed Ms. Baker that defendant had spent the night and was still asleep in her room. Ms. Baker indicated her disapproval. Ms. Vickers responded saying that nothing had happened, and that she was menstruating. According to Ms. Baker, Ms. Vickers explained with a laugh that all they did was sleep and added something to the effect of "I didn't let him get any. I guess I showed him."

Ms. Baker testified that Ms. Vickers moved out of the house in early September 1976. She noted that when they lived together, it was common for Ms. Vickers to leave the deadbolt unlocked on the front door. She added that it was not unusual for Ms. Vickers to have a drink or two of wine or beer after coming home from having been out at a bar.

After leaving Ms. Baker's house, Ms. Vickers moved into an apartment on Dana Street in Mountain View. Suzanne Bonfield Lujan rented a ground floor apartment directly below the apartment into which Ms. Vickers had moved. The apartment complex was built around a central pool with the ground floor apartments facing the pool. Each ground floor apartment had a small deck in front. The deck was separated from the

main walkway by low hedges. The deck was accessible from the apartment by a sliding glass door and screen door.

On one Sunday morning in early September 1976, Ms. Lujan and her friend Janet Rogers Nielson encountered defendant. The two women were sitting on Ms. Lujan's couch next to the open sliding glass door that led to the deck, when Ms. Lujan noticed defendant walking back and forth on the walkway in front of her apartment. Defendant stopped in front of Ms. Lujan's apartment and started yelling to the two women through the open sliding door. According to Ms. Nielsen, when defendant got their attention, he stepped over the hedge and onto Ms. Lujan's deck without being invited. This prompted Ms. Lujan to close and lock the sliding screen door between the deck and the apartment.

Defendant demanded to know where Ms. Vickers was. When the two women said they did not know Ms. Vickers, defendant argued with the two women through the closed screen door. Defendant reacted to their denials with hostility and accused the two women of lying. Repeatedly, he demanded to know where Ms. Vickers was and refused to accept the women's protestations of having no knowledge of Ms. Vickers by pointing to some empty moving boxes on the ground near the front of Ms. Lujan's apartment. Ms. Lujan responded that the boxes had been dropped from the landing in front of the upstairs apartment. After arguing with the women for roughly three minutes, defendant gave up and left. Promptly, the women closed and locked the sliding glass door to the deck.

Later that evening, around 10:00 p.m. or 10:30 p.m., Ms. Lujan was home alone, "frosting" her hair. She heard a knock on the front door. She looked through the peephole in the door but saw no one there. Ms. Lujan went back to what she was doing. Less than a minute later, she heard another knock, but again no one was visible through the peephole. Within a minute, she heard a third knock, followed by silence. Ms. Lujan opened the door and saw defendant crouched down in the doorway with a pathetic look on his face.

Defendant smelled of alcohol. He began explaining to Ms. Lujan that he was supposed to meet Ms. Vickers, but she had stood him up. Ms. Lujan noted that defendant's demeanor was completely different from how it had been earlier that day. Defendant was doing his best to be charming and was trying to flirt with her. Ms. Lujan did not want to converse with defendant, but when she opened the door he had placed his foot over the threshold. Ms. Lujan was extremely uncomfortable, but had no choice but to converse with defendant because she could not shut the door. After listening to defendant for about 20 minutes, the timer went off for her hair tinting. She was able to excuse herself, and defendant withdrew his foot and allowed her to close the door.

Ms. Lujan moved out of the downstairs apartment in late September 1976. One or two months later, the police contacted Ms. Lujan and Ms. Nielson. Both women identified defendant from a photographic lineup and a physical lineup.

Ms. Vickers's friends, Ms. Mitchell and Ms. Knight, testified about Ms. Vickers's life in the days leading up to the murder. Ms. Mitchell testified that she frequented the St. James Infirmary along with Ms. Vickers and Ms. Knight. Ms. Vickers had been dating Carl Stanley, Jr., who was also known as "Smokey." Mr. Stanley was a firefighter. He tended bar at the St. James Infirmary when he was off duty. Ms. Vickers was in love with Mr. Stanley, but Mr. Stanley was in love with someone else and broke off the relationship. Ms. Vickers had just begun dating another man named Frank, shortly before her murder.

On the evening of October 21, 1976, Ms. Mitchell, Ms. Vickers and Ms. Knight arranged to meet at St. James Infirmary. Ms. Mitchell drove Ms. Knight to the bar. They arrived at the bar around 8:00 p.m. or 8:30 p.m. Ms Vickers arrived later.

According to Ms.Vickers's half-sister Jean Fontes, Ms. Vickers had dinner that night at her home in Pacifica. Ms. Vickers did not leave until around 8:00 p.m. or 8:30 p.m.

Ms. Vickers arrived at St. James Infirmary around 9:00 p.m. or 10.00 p.m. Ms. Fontes and Ms. Mitchell testified that Ms. Vickers had no marks, bruises, or injuries visible on her face or neck when they saw her that night.

After Ms. Vickers arrived at the bar, she sat down at a table with her group of friends and had a drink. At some point, defendant, who was also at the bar that night, came over to the group and said hello. Ms. Knight, who conceded that she had drunk a lot that night, did between two and four lines of cocaine and "you name it," thought she recalled someone coming up to the table, standing over them and talking to them.[4] Ms. Knight was not sure if defendant sat down. She could not "guarantee that because it's been so many years." At one point, defendant turned to Ms. Knight and asked her if she wanted to go to Denny's with him and have breakfast. Ms Knight declined. Then, defendant turned to Ms. Vickers and asked her something. Ms. Knight saw Ms. Vickers shake her head. Then, Ms. Vickers resumed her conversation with someone else at the table and turned her back to defendant.

Around 1:15 a.m., Ms. Vickers, Ms. Mitchell, and Ms. Knight got up to leave the bar. Defendant got up and walked out behind the three ladies. While they were walking outside to their cars, Ms. Knight noticed defendant lean over and whisper something in Ms. Vickers's ear. Ms Vickers responded by shaking her head. Before Ms. Vickers got into her car, she asked Ms. Mitchell if she would accompany her home. Ms. Mitchell did not know why Ms. Vickers asked, but Ms. Mitchell had to decline because she was driving Ms. Knight home and they all had to work the next morning. Ms. Mitchell and

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[4] Initially, Ms. Knight's testimony was that someone came up to the table, but she had no idea who the man was. Thereafter, once the prosecutor reminded her that she had given a statement to one of the District Attorney's investigators in which she indicated that she first met defendant on the night Ms. Vickers was murdered, Ms Knight remembered that it was defendant that had tried to "hit on" her.

Ms. Knight saw Ms. Vickers get in her car and drive off in the direction of her house. They saw defendant get in his car and drive off in the same direction.

After Ms. Lujan moved out of her apartment, Nina Oliver Hitchcock moved into the apartment below Ms. Vickers at the end of September or beginning of October 1976. Ms. Hitchcock testified that the apartments were not particularly sound proof. Typically, she could hear Ms. Vickers walking around in the upstairs unit. Ms. Hitchcock explained that Ms. Vickers seemed to have the same schedule as she did in that they both woke up around 5:30 a.m. for work. Ms. Hitchcock would usually hear Ms. Vickers get up before her own alarm clock would ring.

In the early morning hours of October 22, 1976, Ms. Hitchcock woke up upon hearing footsteps in Ms.Vickers's apartment. Assuming that is was Ms. Vickers waking up at 5:30 a.m., Ms. Hitchcock got up and went to the kitchen to make her morning coffee. When Ms. Hitchcock looked at the kitchen clock, however, she saw that it was actually 3:00 a.m. Ms. Hitchcock wondered why Ms. Vickers was up so early. She went back to bed. Ms. Hitchcock heard no other sounds from Ms. Vickers's apartment from then up to the time she left for work.

The police were summoned to Ms. Vickers's apartment around 5:42 p.m. on October 22. A friend had gone to check on Ms. Vickers when she did not show up for work. Officers found Ms. Vickers's body lying face down on the right side of her double bed. Ms. Vickers's face was not on the pillow, and the sheets on the right side of her bed were pulled up to and covering her legs up to her waist. The left side of the bed appeared untouched, without any indentation or appearance of having been disturbed. The apartment was not ransacked and there were no signs of a forced entry into the apartment.

Ms. Vickers was wearing a long football jersey shirt as a nightgown. The jersey was pulled halfway up her back. Ms. Vickers's body was cold to the touch. Her arms and joints were stiff, indicating rigor mortis, and her body displayed dorsal lividity, or pooling of the blood in the part of the body closest to the bed.

A used tampon was lying on the bed next to the body. Ms. Vickers's panties had been removed from her waist and were discovered under a pillow above where her head rested. There was a large stain on the bottom sheet near the body. There were no signs of a robbery or a struggle in the apartment or forced entry at the door.

*Physical Evidence*

Mountain View police officers collected a number of items from Ms. Vickers's apartment including a tampon on the bed, a pair of panties from under the pillow, the bed sheets, wine glasses and a wine bottle, and cigarette butts from two different brands of cigarette only one of which had lipstick stains. Two of the officers testified at defendant's trial that none of the physical evidence could be located.

Two investigators from the district attorney's office testified that they searched for the physical evidence after the case had been reopened in 2001. Notwithstanding the policy of the police department to never destroy evidence in homicide cases, the only evidence they could find were two three-by-five evidence cards.

Dr. Richard Mason, a clinical pathologist, conducted an autopsy on Ms. Vickers's body. At the time of her murder, Ms. Vickers was five feet six inches tall, weighed 109 pounds, and was 26 years old. Based on the fact that Ms. Vickers was seen alive at 1:30 a.m. and was in full rigor mortis with fixed lividity when she was found at 5:45 p.m., Dr. Mason concluded that Ms. Vickers was killed not too long after she left the St. James Infirmary.

Dr. Mason noted that Betty Vickers's blood type was type O. Ms. Vickers had a blood alcohol level of .11 percent. Dr. Mason found that Ms. Vickers had a small amount of blood stained edema fluid in her mouth. She had pulmonary edema (foamy blood in the lungs), which indicated she had been strangled. In addition, Dr. Mason noticed an abrasion on the right side of her neck consistent with manual strangulation. Ms. Vickers had petechial hemorrhages on her face and the linings of her eyelids, and scattered bleeds over her right front chest and near her collar bone. There was an abrasion on the upper

part of her left breast, and bruising to her lower lip, upper left arm, and the bridge of her nose. Ms. Vickers had dramatic internal injuries to the larynx and strap muscles, other neck and internal hemorrhaging in the tissue on her front chest and collarbone area. Dr. Mason opined that these injuries reflected that the killer placed his elbows or knees on Ms. Vickers's upper chest as she was lying face up, and applied pressure to pin her down while manually strangling her as she resisted. Dr. Mason noted this type of manual strangulation could cause death by either cutting off the blood flow or the airflow and would take between 30 and 90 seconds to kill a struggling victim.

Dr. Mason noted that there were no visible injuries to Ms. Vickers's vagina, but he explained that it is not uncommon for the victim of a forcible rape to show no vaginal injuries. He did observe some redness in the perianal region that could have been either a rash or a friction injury. Dr. Mason examined Ms. Vickers's vagina and uterus, which showed that she was menstruating at the time of her murder. Dr. Mason took a smear sample from Ms. Vickers's vagina and tested it for the presence of sperm. He did not find any sperm in the sample. Dr. Mason did not test for the presence of semen. However, Dr. Mason observed a significant amount of "white discharge" in Ms. Vickers's vaginal area. Dr. Mason explained that testing for semen is different than checking for sperm; semen requires a chemical test for acid phosphatase, which is an enzyme produced by the prostate gland. Dr. Mason added that, if the rapist had undergone a vasectomy, there would be no sperm in the vagina, even if semen had been present.

Dr. Mason opined that Ms. Vickers was the victim of a rape and murder by forcible manual strangulation. On cross-examination, Dr. Mason admitted that his conclusion that Ms. Vickers was raped was based on the presence of the bloody tampon on the bed.[5]

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[5] In response to defense counsel's assertion that Dr. Mason was assuming Ms. Vickers was raped because there was a used tampon on the bed, Dr. Mason testified "Yeah. And, you know, you are going to climb on top of a woman what for, you know,

James Norris, a forensic science consultant and expert trained in forensic serology, was the Santa Clara County criminalist who examined the biological evidence in this case in 1976.[6] Mr. Norris explained that, in 1976, the science of forensic DNA testing had not yet been developed, and forensic experts relied on chemical testing for the presence of certain known enzymes. For blood, experts relied on the Kastle-Meyer enzyme test, and for semen experts relied on the acid phosphatase test.

Mr. Norris explained to the jury that the acid phosphatase test was considered a "presumptive" test because the enzyme acid phosphatase occurs at very high levels in semen, but it also occurs in a few other substances. He explained that vaginal secretions do contain acid phosphatase, but only in very low levels. Semen contains acid phosphatase levels 10 to 100 times higher than do vaginal secretions. In 1976, the Santa Clara County Crime lab was using a "desensitized" acid phosphatase test, developed from the prevailing scientific literature at the time, which would not give a rapid positive test for weak acid phosphatase levels, such as those found in vaginal secretions. The test would only give a rapid positive test for semen and for a few plants, such as fresh horseradish, which contained high levels of a different form of the acid phosphatase enzyme. However, he explained that unlike the semen enzyme, the plant form of the triggering enzyme is unstable and dissipates quickly. The plant enzyme would only give a positive result on the acid phosphatase test if tested within a few hours of staining.

Mr. Norris received the bottom sheet from Ms. Vickers's bed for testing. He explained based on his training and experience that a stain that was visible on the bottom sheet appeared to be a semen stain. He conducted a desensitized acid phosphatase test on a portion of the stain. The stain produced a rapid strong positive result. As a result, he

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just to thump her or beat her. You know, it's just not common in my experience. I'm sure there are people that get their kicks that way, but it looks like a rape/murder.

[6] Mr. Norris had no independent recollection of this case at the time of trial. Instead he testified from his notes and records.

opined that the stain was semen. Mr. Norris excluded vaginal secretions as the origin of the stains because they would not have given such a rapid positive result on the desensitized test. He excluded plant enzymes because they only give positive results when the stains are fresh, and the stained sheet from Ms. Vickers's bed had been stored for several days before testing.

Mr. Norris explained that, because the acid phosphatase test was considered a presumptive test (since other substances could render a positive result), the standard protocol would have been to examine the stain under a microscope to look for the presence of sperm. He conceded that he did not look for sperm in this case. However, he noted that the absence of sperm would not mean the stain was not semen. If the semen came from someone who had undergone a vasectomy, there would be no sperm in the semen.

After concluding that the stain was semen, Mr. Norris conducted a blood typing on the stain. He explained to the jury that 80 percent of people are ABO "secretors," meaning they secrete their blood type in all of their bodily fluids. Accordingly, their blood type can be determined by testing other bodily fluids. The other 20 percent of the population do not secrete their blood type in their bodily fluids.

Mr. Norris took a sample of the sheet from the semen stain and he took two control samples, one near the stain and one at the edge of the sheet far from the stain. The two samples both tested positive for blood type A only. The stain itself tested positive for both type A and type O. Mr. Norris explained that this result indicated to him that the sheet had a background level of type A material, caused either by the sweat of a type A secretor or possibly by some less common cleaning products that give a false positive for type A blood. Accordingly, Mr. Norris subtracted the background type A result from the semen stain and concluded that a blood type O secretor most likely left the stain.

Mr. Norris conducted a "PGM" test on the stain. The PGM test uses electrophoresis to examine the presences of two genetic markers, which show up as bands in a gel. The PGM markers are classified as either "1" or "2," and every individual gets one marker from each parent, so the possible combinations are classified as "1,1," "2,2," or "2,1." Mr. Norris testified that the bands for a "2,1" individual would typically be of equal strength, whereas a sample with two or more commingled sources will not have equal bands. He noted that PGM is not appreciably present in sweat or saliva, so the presence of background sweat or saliva in the sample would not contribute to the PGM result. In this case, the test showed a PGM reading of 2,1 in equal bands, which Mr. Norris concluded as demonstrating that the contributor to the semen stain was a 2,1, and the result did not indicate contributions from more than one donor. Therefore, he concluded that the person that contributed the semen stain was most likely blood type O, with a PGM of 2,1.

Mr. Norris tested a sample of defendant's blood and determined that defendant was type O, with a PGM of 2,1. Mr. Norris tested a sample of blood obtained from Ms.Vickers's body. According to Dr. Mason, Ms. Vickers was also blood type O. Mr. Norris conducted a PGM test on Ms. Vickers's blood, but there was no PGM activity, which is common for samples taken from someone who was already deceased.

Mr. Norris acknowledged that while in his opinion the most likely interpretation of the results was that the person that contributed the semen stain was a blood type O secretor with a PGM of 2,1 that was not the only possible interpretation of the results. He noted that, although he had subtracted the type A result from the stain because it was also present in the two controls he tested, the presence of blood type A in the stain could be interpreted as coming from the person that had contributed the semen. He explained to the jury that the stain could have been a commingling of semen and vaginal fluid, the semen could have been contributed by a non-secretor of any blood type, and the type O result could have come from the victim. Mr. Norris observed that it was possible that the

2,1 PGM result could have been from the commingling of two different sources. He explained that the only blood types that could conclusively be excluded were type B and type AB secretors, which make up about 10 percent of the population. However, while he acknowledged there were several possible interpretations of the results, his opinion was that the most likely explanation of the results was that the contributor of the semen stain had blood type O, PGM 2,1, which included defendant as the possible source.

*Evidence Relating To Defendant*

Detective Healy questioned defendant a few days after the murder. Defendant told the police that he was at St. James Infirmary on October 22, 1976, and acknowledged he left the bar at the same time as Ms. Vickers and her friends, but he claimed that he drove straight home without making any stops. Defendant confirmed that his home was at 1546 Lochinvar Street, in Sunnyvale. On November 10, 1976, Detective Healy executed a search warrant at defendant's home. He took possession of a notebook type journal. In addition, he took a sample of blood from defendant. Defendant was arrested for Ms. Vickers's murder, but the district attorney's office did not file a complaint.

Defendant was married to Marilyn Garisto in October 1976, and they lived together at 1546 Lochinvar Street. At defendant's trial, Ms. Garisto testified that on October 22, 1976, defendant was out all night and did not come home until 4:00 a.m. In 1976, she believed defendant was seeing other women, and so she kept entries in her journal about defendant's actions. Her original journal entry made at the time showed that defendant was home at 2 a.m. At some point, the entry was changed to 4 a.m. Ms. Garisto could not remember why the entry was changed. When she questioned defendant about his absence, he told her he had been out "driving around," but he did not say where.

Christine Ebertowski had been married to defendant from 1971 to 1973, and the two were still friends in 1976. Ms. Ebertowski confirmed that defendant underwent a vasectomy in 1973. She testified that a few days after the murder, defendant contacted her and arranged to take her out to lunch so they could talk. At that meeting defendant

informed Ms. Ebertowski that the police might contact her about his whereabouts in the early morning hours of October 22. Defendant asked Ms. Ebertowski to provide him with an alibi. Defendant explained to her that he had been with Ms. Vickers at the St. James Infirmary and had left at the same time she had. He said that he drove around for a while and drove past Ms. Ebertowski's house. Defendant told Ms. Ebertowski that somebody might come to talk to her. At no point in the conversation did he deny killing Ms. Vickers. Ms. Ebertowski thought about defendant's request for a few days. Ultimately, she decided not to agree to give him an alibi.[7]

Back in 1976, Ms. Victory had not spoken with defendant since June of that year. She testified that when she heard about Ms. Vickers's murder she called defendant to discuss it. Defendant told her that he was at the same bar as Ms. Vickers on the night she was murdered and that he stayed at the bar until closing.

A couple of months later, investigators contacted Ms. Victory. Ms. Victory realized that defendant was a suspect in Ms. Vickers's murder. Sometime after that interview defendant called her. He said he was told that she had spoken to the police and had told them that he had admitted to her he had killed Ms. Vickers. Ms. Victory assured defendant that she made no such statement to the police. However, she commented to defendant that he had never denied killing Ms. Vickers. There was a silent pause. Then, defendant responded, "don't worry about it."

Patricia Diane Schneck was married to defendant in the early 1980s, after defendant left California for Arizona. On several occasions before and during their marriage, defendant made threats against Ms. Schneck. She recalled several occasions when he told her he would kill her; that he would get away with it "because he had before in the past." On one occasion, he remarked, "Why do you think I had to leave

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[7] Initially, when an investigator interviewed her in 1976 Ms. Ebertowski omitted telling him that the defendant had asked her for an alibi. In fact, she told the investigator that the defendant had not asked for an alibi.

California?" Ms. Schneck recounted defendant told her, "that there was a trial and there wasn't enough evidence" so she assumed that he was arrested. Defendant complained that he had a good life in California but had to leave.[8] Defendant did not mention Ms. Vickers's name. Nor did he indicate that the person he had killed was a woman.

After defendant's marriage to Ms. Schneck ended, defendant married Linda Jo Blainey in 1986 in Arizona. Ms. Blainey had two children from a previous marriage and her ex-husband would come over for visitation. Ms. Blainey recounted that on several occasions, defendant would complain to her about her ex-husband coming over. On those occasions, he threatened to kill her ex-husband and told Ms. Blainey that he had "killed before and gotten away with it."

*1108/1101 Evidence*

M.E. lived in San Jose, California in August 1973. She met defendant because she had been dating a mutual friend. On one occasion, when she and her friend went out to dinner together with defendant, defendant touched her foot under the table. This made Ms. E. very uncomfortable. Defendant asked Ms. E. out several times, and she finally agreed to go out with defendant for a Sunday afternoon drive. They may have kissed once during the drive. When defendant brought her home, he kissed her again. However, Ms. E. was not interested in defendant. After that date she avoided his calls and made excuses not to go out with him.

Ms. E. was dating someone else on February 13, 1974. She was in the process of moving out of her apartment. At around 8:00 p.m. that night, Ms. E. was carrying a heavy box to her car when she encountered defendant. Defendant reeked of alcohol.

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[8] Ms. Schneck testified "there was confrontation going on but he didn't say like I killed before and I'll kill you and I got away with it in California. That didn't happen like in all just one conversation. It just happened like at one conversation and a week or week and a half later, you know, something would be said, an argument or anything like that, and then he would make another statement. I mean it wasn't just like, you know, one after the other."

Defendant offered to carry the box. Out of politeness, Ms. E. allowed him so to do. Without being invited, defendant followed Ms. E. back into her apartment. They talked briefly about Ms. E.'s job. The entire time, Ms. E. stood at the door trying to figure out a way to get defendant to leave. Ms. E. got a phone call from her boyfriend. She told defendant that he needed to leave because her boyfriend was coming over. Defendant hesitated and looked a little unfocused, but then left.

About five minutes later, defendant knocked at the door and asked to use Ms. E.'s phone. Ms. E. opened the door and gestured to her phone. As she was turning and pointing to the phone, defendant pulled out a gun and hit her on the right side of the head with it. Ms. E. was dazed and temporarily knocked unconscious. She recalled waking up being dragged across the floor by her arms into her bedroom. Her vision was blurred from the blow, but she felt defendant rip off her clothes and unzip his own pants. She blacked out again, and when she came to, she heard defendant rummaging in her kitchen, going through drawers. In order to save herself, Ms. E. got up, smashed the glass out of a window, and started screaming wildly. Defendant ran in, grabbed her throat and threw her on the bed. He got on top of Ms. E., held her by the throat and started banging her head violently against the headboard. Ms. E. tried to claw at his face to fight him off, but he used his weight and his legs to pin her down. Defendant squeezed her throat until she lost consciousness again. A stranger who had responded to her screams and was trying to revive her awakened her. Defendant had fled, and Ms. E. had skin and blood under her fingernails. At a court hearing later, Ms. E. testified that defendant was the person who assaulted her.

J.Hd was 19 years old in 1975. She lived in Cupertino, California. Ms. Hd. lived in a small farmhouse owned by her parents. She had a roommate who had two young children. In July 1975, Ms. Hd. and her roommate had a party. A friend of her roommate brought defendant to the party. At some point during the party, defendant came up to Ms. Hd. and asked her for a corkscrew to open a bottle of wine. Ms. Hd.

thought this was a little odd since she did not know defendant and she was not drinking. She did not have any further contact with defendant until early the next year.

Ms. Hd. began going to St. James Infirmary, where she met Ms. Vickers. One evening, in the late winter or early spring of 1976, while Ms. Hd. was at St. James Infirmary defendant came up to her and started chatting with her. He reminded her that he had met her once before at her house. Defendant told Ms. Hd. an elaborate story about how he had gone to prison for attempted murder. He said that he managed an apartment complex with his wife, and had to carry a gun because he often had large sums of cash on him. Defendant explained that at some point he got in an argument in a bar, retrieved his gun, and threatened a guy and was convicted of attempted murder. This story made Ms. Hd. very uncomfortable. She excused herself to go to the bathroom, but then took the opportunity to leave the bar and go home.

Later that evening, around 11:00 p.m., defendant knocked at her door. She opened it a crack to ask him what he wanted. Defendant wanted to know why she left without saying goodbye. Defendant opened the door and entered the house uninvited. He tried to kiss Ms. Hd., but she said no and asked him to stop. She told him to leave, but defendant continued his advances. Defendant started to undress her over her protestations. Ms. Hd. explained that she was afraid to make a scene because there were two young children sleeping in the house and she did not want to expose them to a traumatic event. Defendant undressed Ms. Hd. and had intercourse with her. She did not want to have sex with defendant and told him no, but she did not physically resist him. After he ejaculated, defendant pulled up his pants and left. Ms. Hd. described defendant's demeanor as robotic and cold.

A.H. lived in Phoenix, Arizona in 1980. She met defendant through a mutual friend. The two chatted, and they exchanged phone numbers. The following night, they were each invited to a different party. They decided to go out on a date together, first to defendant's office party and then to the party of Ms. H.'s friend. Defendant picked Ms. H.

up at her home and drove her to his office party. After a couple of hours, they went out to defendant's car to drive to the other party. When they got into the car, defendant tried to kiss Ms. H. She rebuffed him. In response, defendant grabbed her throat and started choking her. Then, abruptly, he stopped. Defendant drove Ms. H. to her friend's party, and the two parted company. Ms. H. made it clear that she wanted nothing to do with defendant after that incident.

Less than a month later, on May 29, 1980, Ms. H. was home alone in her studio apartment at around 11:00 p.m. Defendant walked in through the unlocked front door uninvited. Ms. H. told defendant to leave. Defendant responded by pulling out a gun and holding it to her head. Defendant motioned Ms. H. over to her bed. Ms. H. told him to stop, but defendant responded that it would not hurt. Defendant undressed Ms. H. Then, he undressed. Defendant raped Ms. H. When he finished, he said to her that it wasn't so bad. She said, "Yes it was." Defendant responded by getting on top of her, straddling her, grabbing her throat, and choking her. Ms. H. tried to scream, but she could not make any noise because she was being strangled. When defendant relaxed his grip, Ms. H. screamed, so he started choking her again. After about a minute, defendant released her, got up and started getting dressed. He then told Ms. H. to stay right there and not say anything. Defendant walked across the room, and Ms. H. took the opportunity to grab her dress and run into the bathroom. She climbed out the bathroom window and ran to get help.

P.N. lived in Phoenix, Arizona in 1986. She worked at the same company as defendant. The two were friends, and occasionally carpooled to work together. Defendant began flirting with Ms. N. even though she was married and defendant was in a relationship. At one point, defendant told Ms. N. that he loved her. He wanted her to leave her husband for him, and he kissed her. Ms. N. was not interested in a romantic relationship with defendant. She ended up leaving her job to avoid his advances.

Ms. N.'s husband had a job delivering newspapers in the early morning hours. Her husband would leave at 2:00 a.m. and return between 5:30 a.m. and 7:00 a.m. Ms. N. recounted that, on June 15, 1986, the phone rang in the early morning hours, after her husband had left for work. At first, she did not answer the phone. She thought it might be her husband's supervisor calling because he might have been late. The phone rang again 10 minutes later. Again, she did not answer it. It rang a third time. Finally on the fourth call, she answered the phone, but there was no one on the other end of the line. A short time later there was a knock on the door. She could not see anyone through the peephole, so she went to the carport door and looked out. She saw defendant at the front door. She had not invited him to come over.

Defendant was distraught, and wanted to talk to Ms. N. He said he was having problems with his girlfriend, was losing his house, and was contemplating suicide. Ms. N. said it was not a good time to talk, but defendant insisted. Ms. N. told defendant he could not come inside the house, but she would talk to him outside. She just needed to change out of her pajamas. Ms. N. went to her room to change. As she was changing clothes, defendant suddenly walked into the bedroom, holding a gun. Defendant told her to take off her clothes. Ms. N. asked defendant if they could just talk outside, but defendant refused. She asked if they could go into the living room because her son was asleep in the next room. Defendant led her to the living room, undressed her, and had intercourse with her. She did not want to have intercourse. Afterwards, she let defendant talk to her for a while, and then he left. After defendant left, Ms. N. called the police.

*Defense Case*

Celia Hartnett testified for the defense as an expert witness in serological examinations. She disagreed with several of the conclusions drawn by Mr. Norris about the biological evidence. With respect to PGM testing, she testified that you cannot tell anything from the relative band strengths in the electrophoresis bands for a 1 and 2. Thus, a result of 2,1 could come from a single person with a type 2,1, or from a mixture

of two people who are 1,1 and 2,2. Equal band strengths would not preclude the results having come from a mixture of two sources. She noted that, if you do not know the victim's PGM number, then you cannot exclude the possibility that the stain was contributed by either a 1,1 or a 2,2, and was commingled with the victim's biological fluid to create a 2,1 result.

Ms. Hartnett reiterated that the acid phosphatase test was just a presumptive test because other substances can give a positive result for that test. She said a positive acid phosphatase test should be followed up with a microscope examination of the sample to look for the presence of sperm, which would conclusively show the substance was semen. She added that, if there was no sperm present, a second follow up test was available in 1976, which involved testing for the presence of the P-30 enzyme. The standard procedure for testing a semen stain should have included a follow up test.

Ms. Hartnett disagreed with Mr. Norris's conclusion about the blood type of the semen donor. She would not have subtracted out the type A result from the stain due to the presence of the background reading of type A in the control areas. She opined that the presence of the type A result in the semen stain could still mean that the contributor was a blood type A or blood type O secretor, or possibly a non-secretor of any blood type. She concluded that, since the only groups that could conclusively be excluded as contributors were secretors with blood types B or AB, the possible contributors included roughly 88 percent of the population.

*Proceedings Below*

Before trial, among other things, defendant moved to dismiss the indictment on the ground that his due process right to a fair trial was violated because the physical evidence in Ms. Vickers's case, which had been gathered by the Mountain View police, had been lost.

Specifically, Mountain View police had collected a fitted bed sheet from Ms. Vickers's bed; a blood stained pillowcase; other bedding; underwear belonging to Ms.

Vickers; physical evidence from Ms. Vickers's body including vaginal smears that contained large amounts of vaginal fluid and epithelial cells, and rectal smears containing epithelial cells; fingerprints; numerous items taken from the living room including a glass table lighter and wine bottle; items taken from Ms. Vickers's bedroom, including an electric blanket and yellow bedspread; and hair samples. Defense counsel argued that all these things could have been tested and would exculpate defendant.

Moreover, defense counsel asserted that the District Attorney did not charge defendant in 1976. Rather, the District Attorney brought a probation violation charge against defendant. Numerous witnesses testified at the probation violation hearing. According to defense counsel, some of the same witnesses were on the prosecution's witness list. One of the witnesses was someone who was in a relationship with defendant. In 1976, this person told the police that although defendant was sexually aggressive, he was not physically aggressive. More recently, this person told the District Attorney that defendant had raped her and she testified to this at the probation violation hearing. Defense counsel argued that had this case been charged in 1976, defendant would have had the transcript of the hearing to impeach the prosecution's current witnesses.

Defense counsel indicated that a number of witnesses in Ms. Vickers's case were unavailable to testify. Of specific importance, Bruce Gundlach, Carl Stanley and Terry Braswell had all died in the intervening years. As to their importance to defendant's case, defense counsel noted that Mr. Gundlach was one of Ms. Vickers's neighbors. He arrived home about 10:15 p.m. on the night of the murder and heard nothing out of the ordinary. Defense counsel contended that this helped to defeat the prosecution's theory that a violent rape had occurred in Ms. Vickers's apartment that night.

As to Mr. Stanley, defense counsel pointed out that he was the on-again, off-again boyfriend of the victim. According to another witness, Lynn Berkstrom, Mr. Stanley and Ms. Vickers had numerous arguments. Further, according to Ms. Lujan, Ms. Vickers's

downstairs neighbor, there were often noises coming from the victim's apartment that sounded as if someone was being pushed around. Defense counsel argued that these facts merited the consideration of Mr. Stanley as a suspect in Ms. Vickers's murder. However, the defense had no evidence that the police ever interviewed Mr. Stanley and he believed that this alternative theory had been ignored. Defense counsel argued that Mr. Stanley's death made it impossible to interview him in an attempt to discover if he was responsible for Ms. Vickers's death or at least build evidence to make a third-party culpability defense.

As to Ms. Braswell she knew defendant around the time of Ms. Vickers's death. Although she had said some things harmful to defendant's defense, she would have served to impeach another prosecution witness. That witness, Ms. Hd., claimed to be Ms. Braswell's roommate when she met defendant. Ms. Hd. now denied being her roommate. Accordingly, defense counsel argued that if Ms. Braswell was available she could have impeached Ms. Hd.; an important witness who claimed that defendant raped her.

Finally, defense counsel asserted that several of the prosecution witnesses had no independent recollection of things that they said back in 1976. For instance Ms. Victory allegedly told the police in 1976 that defendant had made derogatory comments about Ms. Vickers and he did not like her. However, during her grand jury testimony Ms. Victory could not recall saying this and attempts to refresh her recollection failed. Nevertheless, she testified that she trusted the statement she made to the detective back in 1976. Accordingly, defense counsel argued that Ms. Victory's memory had "clearly diminished over the time to the point that she has no independent recollection of important facts." Defense counsel contended that without her memory, he could not effectively cross-examine or challenge the basis of Ms. Victory's statement.

Furthermore, Ms. Ebertowski, defendant's ex-wife, testified before the grand jury about defendant asking her for an alibi. However, when she was asked whether he had made a statement about why he needed the alibi or what was causing the police

investigation she indicated that she could not remember. Accordingly, defense counsel argued that this damaging piece of testimony was beyond cross-examination because Ms. Ebertowski could not independently remember the circumstances under which the request was made.

As to the incident involving Ms. H., no physical evidence existed in that case. Accordingly, defense counsel argued that it would have been helpful in defending against the use of this incident as Evidence Code 1108/1101 evidence because defendant was acquitted of the offense involving Ms. H. in a jury trial at a time when the evidence existed.

Furthermore, defense counsel contended that numerous witnesses were missing who could have been helpful to the defense. Specifically, two officers who testified at defendant's trial concerning the H. incident and the assisting nurse who would have been able to provide information relating to Ms. H.'s mental state at the time of the incident and who could testify to the absence of marks on Ms. H.'s neck.

As to the incident involving Ms. N., the evidence that was collected included a rape kit; a Pepsi bottle that Ms. N. indicated was handled by the suspect; and photographs taken by police at the scene. Defense counsel argued that the rape kit could have been used to demonstrate a lack of trauma or have pointed to a different suspect. Counsel pointed out that the sexual assault report prepared for the case showed no indication of trauma; a wet mount collected showed the presence of sperm and serological samples had been obtained. Counsel noted that none of the evidence presently existed. Counsel contended that although defendant had pleaded guilty at the time, nonetheless, he was entitled to challenge the facts of this case at the upcoming trial because at the time he was facing a "stiff sentence" and pleaded guilty in exchange for a sentence of one year in county jail and probation.

Defense counsel argued that the unavailability of the investigating officers prevented him from eliciting testimony about Ms. N.'s attitude in reporting the crime.

One of the officers noted in his report that Ms. N. reluctantly called the police and that it was her husband's idea to call. In addition, defendant's ex-wife had provided him with an alibi at the time. Defendant's ex-wife indicated that she had been arguing with defendant and called the "Crime Stoppers" telephone number during this argument. A defense investigation revealed that "Crime Stoppers" did not keep records of these calls. If the call was made, there was no way to prove it.

Finally, the defense was unable to locate Mark Hall, a criminalist with the Phoenix Police Department. Mr. Hall had compared the print found on the Pepsi bottle to that of defendant and found it did not match. Defense counsel argued that Mr. Hall was a key witness whose testimony would have suggested that defendant was not Ms. N.'s assailant.

As to the incident involving Ms. Everette defense counsel pointed out that the evidence that was collected had been destroyed. Thus, there were no medical records or sexual assault kit to assist the defense in determining the identity of the perpetrator or assuming it was defendant the "intent he possessed, i.e. was it a sexual crime?"

While the jury was deliberating in defendant's murder case the court considered the motion to dismiss the indictment on the ground that defendant's due process right to a fair trial had been violated. After hearing from counsel, the court found that the prejudice to defendant was minimal and there was a reasonable justification for the delay. The court ruled there was no violation of due process and denied defendant's motion to dismiss.

In addition to defendant's motion to dismiss the indictment, defendant strenuously objected to the introduction of evidence of four separate incidents of sexual misconduct, which the prosecution intended to offer pursuant to Evidence Code sections 1108 and 1101, subdivision (b). As to the Evidence Code section 1108 evidence, defense counsel argued that the evidence should be excluded because Evidence Code section 1108 could

not be used in a case where no sex crime was charged;[9] Evidence Code section 1108 violates due process;[10] Evidence Code section 1108 violates equal protection; the evidence was substantially more prejudicial than probative; admission of the four incidents in this case violated due process because the evidence is a generation old and the physical evidence has been lost or destroyed; and the introduction of the evidence in this case violated ex-post facto provisions of the state and federal Constitutions because Evidence Code section 1108 was being applied retroactively. Further, defense counsel argued that if the court allowed the introduction of the evidence, the court should limit the evidence to that which was relevant to defendant's propensity to commit sex offenses.

Finally, defense counsel argued the defendant's bad acts were insufficiently similar to qualify for admission under Evidence Code 1101 to prove defendant's identity or common scheme. Following argument by counsel, the court denied defendant's motion.

As a result, the four victims of the defendant's alleged sexual misconduct testified at defendant's murder trial.

*Discussion*

*Due Process Right to a Fair Trial*

In denying defendant's motion to dismiss the indictment, Judge Condron explained her understanding of defendant's motion as follows: "Defendant seeks dismissal of the indictment in this case based on a denial of due process, that is, his ability to receive a fair trial due to the loss of physical and other evidence following a significant preaccusation delay."

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[9] Defense counsel alleged that the incident involving Ms. E. did not qualify as a sexual offense because defendant had pleaded guilty to assault with a deadly weapon.

[10] Defense counsel recognized that the California Supreme Court in *People v. Falsetta* (1999) 21 Cal.4th 903 held that Evidence Code section 1108 does not violate due process on its face. However, counsel pointed out that the United States Supreme Court had not yet ruled on the constitutionality of Evidence Code section 1108.

Judge Condron went on to address the loss of each piece of evidence. "First, defendant alleges that the loss of certain physical evidence obtained by the Mountain View Police Department during the investigation of this case in 1976 creates prejudice, specifically, a fitted bed sheet, pillowcase, other bedding, underwear, vaginal smear, fingerprint cards and hair samples. Defendant argues there is a prejudice that warrants dismissal.

"I note at the outset that the loss of that evidence in this case appears to have occurred based on all the evidence presented at the time the Mountain View Police Department was relocated and immediately prior to the implementation of a bar code system of cataloging evidence . . . in late 1980. It was not degraded by the passage of time nor was it destroyed as some part of scheduled disposition in inactive cases.

"In fact, the nearly 30 year delay in this case is in no way causally related to the evidence's mysterious disappearance but on the prosecution's failure to provide evidence in its possession as addressed in the Trombetta and Youngblood cases and in the prior ruling of this Court.[11]

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11 *California v. Trombetta* (1984) 467 U.S. 479 (104 S.Ct. 2528), *Arizona v. Youngblood* (1988) 488 U.S. 51 (109 S.Ct. 333). Before trial, defendant brought a *Trombetta* motion to dismiss the indictment on the ground that the prosecution had failed to preserve exculpatory evidence. Following an evidentiary hearing, in denying the motion, Judge Condron found that there was no evidence of bad faith. Rather, she found the evidence was "clearly lost due to some degree of negligence in maintaining physical property for a period of nearly 20 years on an inactive case file. [¶] However, there is no question that even that negligent loss of evidence has to be evaluated in the context of the possible prejudice to the defendant particularly with respect to exculpatory [*sic*] evidence that the People might seek to introduce against him at the trial. Specifically, the issue had been raised with regard to the bed sheet and the pillowcase. [¶] No other arguments have been made regarding any of the other evidence. No evidence was presented to the court from which this court could find that the other evidence was even potentially exculpatory . . . . [¶] With respect to the bed sheet, the alleged exculpatory value of that sheet is that the presence of the physical sheet, and the ability to test it again and presumably come out with the same result because a different result . . . would be inculpatory to the defendant . . . the benefit of that is not lost because the test results are what they are."

"And although the case of People versus Hartman[12] cited by the defendant does appear to be on point in many cases, actual prejudice due to the lapse of time and loss of evidence was merely presumed and never addressed."

As to the serological evidence, Judge Condron was skeptical that the evidence could still be tested to exculpate defendant. Further, she determined that there was no "actual prejudice to the defendant in the inability to conduct further serological or DNA testing." Judge Condron concluded that in the context of the entire body of evidence presented, "the completely speculative nature of the serological evidence was relatively insignificant. The prejudice, if any, is minimal."

As to the prints and hair samples that were lost, Judge Condron found that at most they could "indicate that persons other than defendant were in the apartment at some time or that the defendant was in the apartment at some time." Accordingly, Judge Condron concluded that there was no prejudice shown in the loss of this evidence.

Judge Condron found that there was no dimming of memories of the witnesses that saw defendant at the apartment complex on the day before Ms. Vickers's murder. Nor was there any prejudice from the fact that the original photographic line-up, from which they had identified defendant, had been lost.

As to the Evidence Code section 1108/1101, subdivision (b) evidence, Judge Condron accepted that several people had died since the incidents. However, she found that there was "no indication other than that based on pure speculation that any of the proffered or suggested now lost evidence could in any way have assisted the defendant in the presence [*sic*] of a defense in this case."

In conclusion, Judge Condron found that "with the exception of the evidence of the fitted bed sheet found beneath the victim in this case, no prejudice has been shown as to the loss of any of the claimed evidence, no determination of failure of witnesses'

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12 *People v. Hartman* (1985) 170 Cal.App.3d 572.

memory or loss of witnesses who are in any way material to the prosecution or defense of this case."

Turning to the justification for the delay, Judge Condron found that although in 1976 there was "a strong suspicion of the guilt of the defendant in this case, [it] was not sufficient . . . to proceed to a trial and to be convinced that [the prosecution] would succeed in convincing a jury beyond a reasonable doubt of the guilt of the defendant." Judge Condron found that the serological evidence was the same at trial as it was back in 1976. However, in the intervening years there were "at least two additional incidents which were similar enough in nature that they might be admissible in a trial of this matter. [Investigators] discovered that the defendant had made admissions of having killed a woman in California and gotten away with it, having been arrested for it and released based on insufficiency of the evidence, and there was no other such situation in the defendant's criminal history, and that in combination with the preexisting evidence, resulted in the district attorney's [*sic*] making a determination to proceed with the prosecution in this case." Judge Condron continued, "The bottom line is that the People made a determination, one with which this Court will not interfere unless it was patently unreasonable at the time not to proceed with the prosecution. That after the development of significant other evidence and the defendant's conduct in the intervening years and its determination in conjunction with the prior offenses, and I mean prior to the Vickers' murder, turned a case that was otherwise relatively marginal into one that was virtually overwhelming. . . . [¶] So there is a reasonable justification for the delay in this case."

In balancing the prejudice to defendant against the justification for the delay, Judge Condron noted that it was "with great reluctance" that she followed the "case of People versus Hartman." Judge Condron found the case not to be dispositive "on the issue of the causal relationship . . . ." Ultimately, Judge Condron found that "All of the cases that address the loss of physical evidence with respect to the question of prejudice are clear in that the purely speculative nature of that loss is not sufficient to demonstrate

actual prejudice such as is required here, but most certainly in this case where there is no indication or evidence . . . that the absence of the presence of sperm would preclude the defendant from being the contributor of that stain [on the bed sheet]." Judge Condron continued, "There is no evidence that presence of sperm would eliminate the defendant as either, A, a possible contributor of that stain, or B, even if not a contributor of that stain, that it would eliminate him as the perpetrator of this crime, or that it would in any way rebut the otherwise reasonable inferences that there was a burglary and attempted or completed sexual assault and a murder and that defendant was the perpetrator thereof. [¶] The prejudice in conjunction with all the other known evidence, that is, the similarity of other sexual assault strangulation cases in which the defendant is known to be the perpetrator, the timing of this with respect to the defendant's contact, his demonstrated interest in the victim, her rejection of him and his own admissions of culpability in this offense demonstrate the minimal prejudice, and when weighed against the justification for the delay in the prosecution until such evidence was sufficient to create a reasonable anticipation that a jury could find beyond a reasonable doubt that the defendant was guilty thereof, I find that there is no denial of due process and the motion to dismiss is denied."

Defendant contends that because the quarter-century delay in prosecuting this case resulted in the loss of all physical evidence in the case, he was denied his due process right to a fair trial and the trial court erred in refusing to dismiss the information.

Defendant argues that the loss of the evidence is "monumental." He asserts that "absolutely everything" that was seized from Ms. Vickers's apartment was lost or destroyed because of the passage of time. This loss was critical to his defense because there was no physical evidence and no eyewitnesses to connect him to the homicide or to his presence in Ms. Vickers's apartment.

In *People v. Archerd* (1970) 3 Cal.3d 615 (*Archerd*), our Supreme Court considered what rules should apply when an accused claims there has been an

unreasonable delay in arresting and charging him. In *Archerd*, the Supreme Court held that the speedy trial right had no application to such a claim. As the Supreme Court explained, "One does not become an accused until the filing of a complaint. The provisions of the Sixth Amendment contemplate a pending charge, not the mere possibility of a criminal charge." (*Id.* at p. 639.) Nevertheless, the *Archerd* court did find that due process could be violated by a pre-accusation delay. Specifically, if the delay were purposeful, oppressive, and prejudicial to the accused's ability to defend him or her self, it could violate due process. (*Id.* at p. 640.) As a consequence, the *Archerd* court established prejudice as an essential element of a due process claim. Furthermore, the *Archerd* court established that "Prejudice . . . may be shown by the loss of a material witness or other missing evidence or fading memory caused by lapse of time."[13] (*Ibid.*)

Subsequently, in *Scherling v. Superior Court* (1978) 22 Cal.3d 493 (*Scherling*), the California Supreme Court affirmed that due process is the appropriate test to be applied to a delay occurring after a crime is committed but before a formal complaint is filed or the defendant is arrested. (*Id.* at p. 505.) The *Scherling* court stated, "regardless of whether defendant's claim is based on a due process analysis or a right to a speedy trial

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[13] In *Archerd*, there was an 11-year delay between the first of a series of murders committed by the defendant and the time an indictment was filed against him. The delay was caused by the absence of a scientific test to confirm the suspicion of the police that the defendant had murdered his victims by the injection of insulin. (*Archerd*, *supra*, 3 Cal.3d at pp. 620-621.) The Supreme Court addressed the question of whether the defendant was denied a speedy trial and due process of law by the pre-indictment delay. (*Id*. at pp. 639-640.) In *Archerd*, the defendant made no showing at the trial that any crucial defense was lost by reason of the delay. The prosecution located any material witnesses requested by defendant or stipulated as to what the testimony would be. The prosecution produced evidence to show that there was a reasonable investigation, which commenced with the murder of Zella Archerd, and continued until the scientific breakthrough occurred that could form the foundation for a successful investigation and prosecution to alter all of the medical opinions, which, previously, had thwarted prosecution. (*Id*. at p. 641.)

not defined by statute, the test is the same, i.e., any prejudice to the defendant resulting from the delay must be weighed against justification for the delay." (*Ibid*.)[14]

The *Scherling* court went on to explain what it meant by this balancing test as follows. "We do not intend to imply that only a deliberate delay by the prosecution for the purpose of prejudicing the defense may justify a conclusion that a defendant has been deprived of due process. The ultimate inquiry in determining a claim based upon due process is whether the defendant will be denied a fair trial. If such deprivation results from unjustified delay by the prosecution coupled with prejudice, it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligence of law enforcement agencies or the prosecution. In both situations, the defendant will be denied his right to a fair trial as a result of government conduct. [Citation.] Thus, although delay may have been caused only by the negligence of the government, the prejudice suffered by a defendant may be sufficient when balanced against the reasons for the delay to constitute a denial of due process." (*Scherling*, *supra*, 22 Cal.3d at p. 507.)[15]

More recently, in *People v. Catlin* (2001) 26 Cal.4th 81 (*Catlin*), our Supreme Court reaffirmed that a "Delay in prosecution that occurs before the accused is arrested or

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[14] In *Scherling*, in 1976 the defendant was charged with four counts of burglary committed in 1966 and 1967. (*Scherling supra*, 22 Cal.3d at p. 496.) The defendant contended that he was prejudiced by the delay in charging him with the burglaries because his memory of the crimes has faded and because a number of witnesses who were available to verify his defense had died or were unavailable. (*Id.* at pp. 505-506.)

[15] The *Scherling* court found no prejudice and thus no need to consider justification for the delay. (*Scherling, supra*, 22 Cal.3d at p. 506.) Accordingly, the court's statement that negligent delay may be enough was dictum. However, where the Supreme Court unequivocally states a principle of law in a unanimous opinion, then the statement, albeit dictum, is entitled to respect from the Courts of Appeal and should be followed absent sound reasons otherwise. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 947, pp. 989-991.) For its part, the Supreme Court treats the absence of deliberate or intentional delay as a relevant factor, but not in itself determinative. (*Catlin*, *supra*, 26 Cal.4th at pp. 109-110.)

the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.] A claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant. [Citations.]" (*Id*. at p. 107.) The *Catlin* court observed that " '[p]rejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.' [Citation.]" (*Ibid.*)[16]

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[16] In *Catlin*, the defendant was charged in 1985 with the 1976 murder of his fourth wife Joyce. (*Catlin*, *supra*, 26 Cal.4th at p. 98.) On appeal, the defendant contended that the delay in charging him with the murder of Joyce caused him prejudice, in that two persons who had attended the autopsy performed on Joyce's body namely Dr. Ambrosecchia and Primus Jones had died before the 1990 trial. In addition, the defendant complained of the loss of the letter from the Bethesda Naval Hospital stating that the slides of Joyce's tissue had some characteristics of paraquat poisoning but that no paraquat could be found because of the preservative used. Further, he complained that the jar of tissue samples had been destroyed before he was arrested, that the Bakersfield Police Department records relating to Joyce's murder had been destroyed, and that some of the labels on the tissue blocks that were prepared after Joyce's autopsy had been lost. Finally, defendant contended he was prejudiced by his own loss of memory of the events of 1976 and by his inability to produce alibi witnesses to testify concerning his whereabouts when Joyce ingested paraquat or to testify regarding his lack of access to paraquat at the time. (*Id.* at p. 108.)

In *Catlin*, the Supreme Court found that the defendant's claims of prejudice were weak. The evidence indicated that Dr. Ambrosecchia did not perform the autopsy, and there is no evidence suggesting that Ambrosecchia or Primus Jones would have testified favorably to the defense. Various witnesses testified that Joyce's tissue could not be subjected to a chemical analysis for paraquat because it was preserved in formalin rather than frozen. Further, it appeared that the missing letter from the Bethesda Naval Hospital was consistent with this view. The loss of the jar containing tissue samples was insignificant, because preservation in formalin made it impossible to test for paraquat. Moreover, the Defendant had not suggested how records of the police investigation of the crime would have been relevant to his defense. As for defendant's loss of memory and

"Due process guarantees that a criminal defendant will be treated with 'that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.' [Citation.]" (*U.S. v. Valenzuela-Bernal* (1982**)** 458 U.S. 858, 872 [102 S.Ct. 3440].)

Essentially, the trial court's task "is to determine whether precharging 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. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 914.)

The question of whether preaccusation delay is unreasonable and prejudicial is a question of fact. The trial court's ruling is upheld on appeal if supported by substantial evidence. (*People v. Mitchell* (1972) 8 Cal.3d 164, 167; *People v. Dunn-Gonzalez*, *supra*, 47 Cal.App.4th at pp. 911-912.) 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. If the government deliberately uses delay to strengthen its position by weakening that of the defense or otherwise impairs a defendant's right to a fair trial, an inordinate preindictment delay may be shown to be prejudicial. (*People v. Archerd*, *supra*, 3 Cal.3d at p. 640.)

As noted, in balancing the prejudice to defendant against the justification for the delay, Judge Condron added to the balance "all the other known evidence" including the "similarity of other sexual assault strangulation cases in which the defendant is known to be the perpetrator." For reasons that we will explain later, this evidence should not have been added to the balancing process. However, because we find the admission of the

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alibi witnesses, the details of defendant's whereabouts at the time Joyce ingested paraquat were not highly significant, given the defendant's unlimited access to the victim and the circumstance that the paraquat could have been administered at any point over a lengthy period. (*Catlin*, *supra*, at p. 109.)

Evidence Code section 1108/1101 evidence prejudicial, we must reverse defendant's conviction. Our ruling on this evidentiary issue renders moot defendant's contention that he was denied due process and a fair trial.

That being said, we make the following observation. This court is extremely disturbed about the loss of all the physical evidence in this case. After more than a quarter of a century, defendant's burden to show that he was prejudiced by the loss is unattainable. When evidence is lost, it is not possible to show that it would have been favorable to the defense particularly in a case such as this where the defense was denied any opportunity to test it. In other words, a defendant can do nothing other than speculate that the evidence would have exculpated him. As our Supreme Court has stated in another context, "Due process requires that criminal defendants have an opportunity to examine, and in appropriate cases have chemical tests performed on, evidence to be offered against them. [Citation.]" (*People v. Backus* (1979) 23 Cal.3d 360, 384.)[17] That could not happen in this case because none of the evidence existed, not even that used in the testing of the bed sheet.

*Evidence Code Sections 1108 and 1101 Evidence*[18]

As noted, before trial defendant moved the court to exclude evidence of four separate incidents of sexual misconduct, which the prosecution intended to offer pursuant to sections 1108 and 1101, subdivision (b). Initially, Judge Condron ruled that the evidence was inadmissible under section 1101, subdivision (b) to prove identity. Defense counsel asked that the court exclude some of the incidents pursuant to section 352, noting that defendant was acquitted following trial in the H. incident. Defense counsel

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[17] The only restriction on this is if the defendant's testing would consume the entire sample. (*People v. Cooper* (1991) 53 Cal.3d 771, 815 ["the defendant has no right to obtain the evidence collected by the prosecution, to destroy that evidence in independent testing, and then to withhold from the prosecution the results of the testing"].)

[18] Unless noted, all subsequent statutory references are to the Evidence Code.

suggested that the court limit the evidence to one or two of the incidents that had resulted in defendant's guilty plea. The following day, the court changed its ruling and allowed the admission of the incidents for the purpose of establishing identity and denied defendant's request that any of the incidents be excluded pursuant to section 352. As to the admission of the prior sexual offenses under section 1108, the court ruled that the evidence of the other sexual assaults was admissible because the court concluded that section 1108 does not require "that a specific sex offense be charged, only that the offense charged involved conduct prescribed by . . . specific statutes."

Consequently, the court instructed the jury as follows: "Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in this case." The court went on to define the term sexual offense to include rape or attempted rape. The court continued, "If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. [¶] If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed rape or attempted rape in this case."

*Section 1108*

In full, section 1108 provides, "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal

Code. [¶] (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code. [¶] (d) As used in this section, the following definitions shall apply: [¶] (1) 'Sexual offense' means a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code. [¶] (B) Any conduct proscribed by Section 220 of the Penal Code, except assault with intent to commit mayhem. [¶] (C) Contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person. [¶] (D) Contact, without consent, between the genitals or anus of the defendant and any part of another person's body. [¶] (E) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. [¶] (F) An attempt or conspiracy to engage in conduct described in this paragraph. [¶] (2) 'Consent' shall have the same meaning as provided in Section 261.6 of the Penal Code, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim."

Defendant contends that section 1108 applies only to accusations of a " 'sexual offense' " and as he was not charged with a " 'sexual offense' " the trial court erred in applying the statute and instructing the jury pursuant to it.

Generally, we review the admissibility of evidence of prior sex offenses under an abuse of discretion standard. (*People v. Cudjo* (1993) 6 Cal.4th 585, 609.) However, to the extent that the trial court's ruling depends on the proper interpretation of a statute, it presents a question of law, to which we apply de novo review. (*People v. Taylor* (1992) 6 Cal.App.4th 1084, 1090-1091.)

When construing a statute, first we "examine the words at issue to determine whether their meaning is ambiguous." (*Sand v. Superior Court* (1983) 34 Cal.3d 567,

570.) If the statutory law is " ' "clear and unambiguous there is no need for construction, and courts should not indulge in it." ' " (*In re Lance W.* (1985) 37 Cal.3d 873, 886; see also *People v. Baker* (1968) 69 Cal.2d 44, 50, [emphasizing that the plain meaning of words used is not to be disregarded].) Nevertheless, "the 'plain meaning' rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

By its own terms, section 1108 applies only to situations where the defendant is "accused of a sexual offense." As the California Supreme Court explained in *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), "on its face, section 1108 is limited to the defendant's *sex offenses*, and it applies only when he is charged with committing *another sex offense*."[19] (*Id*. at p. 916, underlining added.)

Section 1108 permits the trier of fact to consider a defendant's prior sex offenses as propensity evidence. (*Falsetta, supra*, 21 Cal.4th at pp. 911-912.) In enacting section 1108, the Legislature determined that "evidence of prior sex offenses is so uniquely probative in sex crime prosecutions" that "it is presumed admissible without regard to the limitations of Evidence Code section 1101." (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 405.)

In this case, as respondent concedes, defendant was charged with an "open" count of murder. However, respondent argues that the only theory of first degree murder in this case was first degree felony murder with the underlying felony of rape or attempted rape.[20] Accordingly, respondent argues without citation to authority that in a case where

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[19] Although the statute uses the word "accused" one does not become accused, unless one is charged. That is, when there is a formal charge of criminal wrongdoing.

[20] The court gave the jury the felony murder instruction with the underlying felony of rape or burglary or an attempt to commit burglary or rape. In addition, the court gave the jury the definition of burglary, the underlying felony being the intent to commit rape.

the prosecution charges an open count, but argues that the murder is felony murder, with the underlying felony being rape, that is a sexual offense.

Section 1108 defines "sexual offense" as a crime under the law of a state or of the United States involving either conduct proscribed by a series of enumerated Penal Code sections or nonconsensual sexual contact. Murder (Pen. Code, § 187) is not found in any of the enumerated Penal Code sections nor does it include as a necessary element nonconsensual *sexual* contact.

Section 1108 does include within its definition any crime that involves "[d]eriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person." (§ 1108, subd. (d)(1)(E).) The Legislature did not include in this definition murder or even felony murder where the underlying felony is rape. We recite a familiar maxim of statutory construction: *expressio unius est exclusio alterius.* That is, to specify one thing in a statute is to impliedly exclude other things not specified. To put it another way, when the Legislature expressly includes certain offenses in a statute, it intends to exclude those not mentioned. (*People v. Sanchez* (1997) 52 Cal.App.4th 997, 1001.)

Just last year, Division 7 of the Second District Court of Appeal considered whether section 1108, subdivision (d)(1)(E) permits the trier of fact to consider a defendant's prior sexual offenses in a case where the circumstances under which a violent crime has been committed suggest that the defendant derived sexual pleasure or gratification from the victim's pain, even though sexual pleasure or gratification is neither a necessary element of the charged offense nor alleged in the information as an enhancement or aggravating factor. (*People v. Walker* (2006) 139 Cal.App.4th 782, 799 (*Walker*), review denied Aug. 30, 2006.)

In *Walker*, the defendant was on trial for the asphyxiation murder of Kathryn Walters, a prostitute. (*Walker, supra,* 139 Cal.App.4th at p. 788.) He was charged with a single count of first degree murder—Penal Code section 187, subdivision (a). (*Id.* at p.

789.) During the trial, pursuant to section 1108, subdivision (a), the People were allowed to introduce evidence of the defendant's three prior sexual assaults on two women, only one of whom was a prostitute, to establish the defendant's predisposition to commit the offenses for which he was charged. (*Id*. at p. 788.)

In holding that the trial court had erred in admitting the evidence, the *Walker* court noted that murder "is not one of the sexual offenses enumerated in section 1108, subdivision (d)(1)(A) or (B) and the crime with which Walker was charged did not involve as one of its necessary adjudicated elements deriving sexual pleasure or gratification from inflicting death, bodily injury or physical pain on his victim." (*Walker, supra,* 139 Cal.App.4th at p. 802.) The *Walker* court reasoned, "[s]ection 1108, subdivision (a), limits the statute's scope to criminal actions in which the defendant is 'accused of a sexual offense'; and subdivision (d)(1) defines 'sexual offense' to mean a 'crime . . . that involve[s]' certain categories and enumerated types of sexual misconduct. In ordinary usage these terms connote that the requisite sexual transgression must be an element or component of the crime itself without regard to the evidence establishing a specific violation." (*Id.* at p. 800.)

Both *Walker, supra,* 139 Cal.App.4th 782 and *Falsetta, supra*, 21 Cal.4th 903, stand for the proposition that section 1108 must be narrowly limited to apply only when the defendant is charged with committing a sexual offense. The Legislature enacted section 1108 because it believed that sex crimes were hard to prove and that offenders often recidivated thereby displaying propensity to commit these specific types of crimes. (*Falsetta, supra,* 21 Cal.4th at pp. 911-912: " 'Our elected Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial.' ") One of the reasons that the California

Supreme Court upheld the constitutionality of section 1108 in *Falsetta* was because "No far ranging attacks on the defendant's character can occur under section 1108." (*Id*. at p. 916.)

If a defendant is not charged with a sexual crime, section 1108 does not apply. Murder is not a sexual crime. This rule follows both from the rules of statutory construction and the intent of the Legislature. The Legislature could have included murder, but did not. Section 1108 was not designed, as it was used in this case, to allow damaging propensity evidence to bolster a prosecution for murder.

Respondent argues that section 1108 evidence is admissible for any crime, provided the crime involves conduct that is set out in subsections (A) through (F). In other words, section 1108 does not place any categorical restriction on what statutory offenses may be eligible for having prior offenses introduced under section 1108. Respondent's construction of the statute would allow prior sexual offenses to be admitted in any case where the defendant committed a crime during which he engaged in conduct of a sexual nature. We decline to extend the statute that far in light of the Legislature's declared intent in enacting section 1108. Specifically, "the Legislature 'declared that the willingness to commit a sexual offense is not common to most individuals; thus, evidence of any prior sexual offenses is particularly probative and necessary *for determining the credibility of the witness*.' [Citation.]" (*People v. Soto* (1998) 64 Cal.App.4th 966, 983.) Here, there was no witness whose credibility needed to be determined.

Accordingly, we conclude that the trial court erred in admitting the prior sexual offenses under section 1108.

However, because the trial court admitted the evidence of defendant's prior sexual offenses under section 1108 and 1101, subdivision (b), we can find error in its admission only if the testimony was inadmissible under both sections. (*People v. Branch* (2001) 91 Cal.App.4th 274, 280-281.)

*Section 1101*

In ruling that the evidence of prior sexual offenses was admissible under section 1101, subdivision (b) to prove identity, Judge Condron found "distinct characteristics." Specifically, she found that the "ages of the victims, and the age differential between the defendant and the victims, the fact that the victims were all [C]aucasian, the fact they were all casual acquaintances of the defendant, that the defendant had demonstrated in each and every one of them an interest or attraction prior to the commission of the offense that in each case the victim refused or rebuked the defendant's advances in one case because the victim was married, in the other cases they simply declined or refused, that in every case the defendant committed these crimes after dark and always in the victim's home, that the defendant appeared without invitation and unexpectedly at the victim's home, that in every case the defendant engaged in a ruse or a surprise entry that is by taking advantage and simply walking in unannounced when there was no secure door or using a ruse such as wanting to use the phone, losing his job and needing to talk . . . in other cases. . . . [¶] In every case the conduct was described as cold, emotionless, merely robotic. In every case the defendant undressed the victim. In every case there was either the use of or threat of a gun, and in every case where the victim physically resisted there was manual strangulation."

As a result of this ruling, the court instructed the jury pursuant to CALJIC No. 2.50 that they could consider the evidence that defendant had committed crimes or acts similar to those for which he was on trial, for the limited purpose of determining if it tended to show "The identity of the person who committed the crime, if any, of which the defendant is accused."[21]

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[21] In full, as given by the court in this case, CALJIC No. 2.50 provides, "Evidence has been introduced for the purpose of showing that the defendant committed crimes or acts similar to those for which he is on trial. [¶] Except as you will otherwise be instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of bad character or that he has a disposition to commit crimes. It may be considered by you only for the limited purpose of determining if it tends to show:

Under section 1101, subdivision (b), " '[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent.' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1147 (*Carter*); *Walker*, *supra*, 139 Cal.App.4th at pp. 795-796.)

A defendant's similar crime can be circumstantial evidence tending to prove identity, intent, and motive in the present crime. "Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence *vel non* of some other rule requiring exclusion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705.) On appeal, we review the trial court's ruling on the issue, essentially a determination of relevance, for abuse of discretion. (*Carter*, *supra*, 36 Cal.4th at p. 1147.)

" 'To be relevant on the issue of identity, the uncharged crimes must be highly similar to the charged offenses. [Citation.] Evidence of an uncharged crime is relevant to prove identity only if the charged and uncharged offenses display a " 'pattern and characteristics . . . so unusual and distinctive as to be like a signature.' " [Citation.] "The

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[¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged, or the identity of the person who committed the crime, if any, of which the defendant is accused; [¶] The existence of the intent which is a necessary element of the crime charged; [¶] The identity of the person who committed the crime, if any, of which the defendant is accused; [¶] A motive for the commission of the crime charge[d]; [¶] That the defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged; [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case."

strength of the inference in any case depends upon two factors: (1) the *degree of distinctiveness* of individual shared marks, and (2) the *number* of minimally distinctive shared marks." ' " (*Carter, supra,* 36 Cal.4th at p. 1148.)

Viewing the evidence in the light most favorable to the trial court's ruling (*Carter, supra,* 36 Cal.4th at p. 1148), we disagree that the circumstances of defendant's prior sexual offenses reveal a substantially distinctive pattern.

Respondent argues that there were numerous similarities that elevated the defendant's previous sexual offenses into a signature "whereby [defendant] targeted female acquaintances, for whom he had expressed an interest but who had rejected his overture, by making an unforced entry into their homes at night, raping them, and manually strangling them if they resisted." Accordingly, respondent argues that the "pattern of the prior offenses fit perfectly with the rape and murder of Betty Vickers."

In *People v. Rivera* (1985) 41 Cal.3d 388 (*Rivera*), the defendant was charged with murder and burglary, and the trial court admitted evidence of a prior robbery to prove identity based on the following similarities: (1) both crimes occurred on a Friday night; (2) both occurred at approximately 11:30 p.m.; (3) both involved convenience markets; (4) both markets were in the same neighborhood; (5) both markets were located on street corners; (6) both crimes involved three perpetrators; (7) both involved getaway vehicles; (8) prior to both crimes, two or three people were observed standing outside the store; and (9) the defendant used similar alibis. (*Id*. at pp. 390-393.)

Nevertheless, the Supreme Court concluded that the evidence was inadmissible. "Taken alone or together . . . these characteristics are not sufficiently unique or distinctive so as to demonstrate a 'signature' or other indication that defendant perpetrated both crimes. Convenience stores are often on street corners and are prime targets for crimes; undoubtedly many of these offenses occur late on Friday evenings and involve a getaway car and more than one perpetrator; finally, alibi is a common defense. Moreover, the dissimilarities between the two crimes are significant: (1) the prior offense was armed

robbery, a crime against the person, whereas the charged offense was planned as a burglary, a crime against property; (2) the prior involved the taking of money, while the charged crime involved the taking of beer; (3) the coperpetrators in each case were different." (*Rivera, supra,* 41 Cal.3d at p. 393.)

Similarly, in this case all that can be said of the evidence of the charged crime is that defendant knew Ms. Vickers and they were casual acquaintances; Ms. Vickers was found dead in her bed from manual strangulation; and according to the coroner, she had been raped. Moreover, defendant's pattern of sexual conduct in the other cases was not consistent or distinctive. In each case, the defendant forced or attempted to force an acquaintance to have sex with him. In only two cases was there any suggestion that defendant attempted to strangle the victim, one before an attempted rape and one after a rape. Furthermore, the manner in which defendant attempted to strangle these victims, bears very little similarity to the strangulation of Ms. Vickers as described by Dr. Mason. Any "pattern" that can be found in these incidents is entirely unremarkable.

The similarities noted by respondent must be common to a substantial portion of acquaintance rapists. By definition, their victims are acquaintances, who were forced to have intercourse. Respondent has not convinced us that a peculiar pattern in defendant's prior sex offenses establishes his identity as Ms. Vickers's killer by setting him apart from the general class of acquaintance rapists.

Consequently, the court erred in admitting the evidence of defendant's prior sexual offenses to prove he murdered Ms. Vickers.

Nevertheless, although we have concluded that the trial court erred in admitting the evidence of defendant's prior sexual offenses under both sections 1108 and 1101, subdivision (b), the erroneous admission of prior misconduct evidence does not compel reversal unless a result more favorable to the defendant would have been reasonably probable if such evidence were excluded. (*Carter, supra,* 36 Cal.4th at p. 1152.)

Respondent argues that any error in this case was harmless because the "physical

evidence, the medical evidence, and the circumstantial evidence, including [defendant's] extended absence from home during the precise time of the murder, and his efforts to lie to the police about his whereabouts and to persuade his former wife to make up a false alibi for him, when viewed in conjunction with [defendant]'s repeated admissions to his ex-wife Linda Blainey that he killed a woman before and got away with it, and to his ex-wife Patricia Diane Schneck that he had committed a murder in California, was arrested for it, but was ultimately released because of insufficient evidence to go forward, pointed unerringly to [defendant]'s guilt."

First, we point out that the record does not support respondent's assertion that defendant admitted to his ex-wife Linda Blainey that he killed a woman. Second, the physical evidence only pointed to defendant as a possible source of the presumptive semen stain found on the bed sheet. As Mr. Norris testified, the semen stain could have come from any male human being who had a blood type of O and a PGM of 2,1. Furthermore, there was absolutely no evidence presented as to when the semen stain was deposited on the bed sheet. The remaining physical evidence—the position and state of the body—indicates a sex act, but not necessarily rape or attempted rape. The medical evidence adds nothing to the equation because all it indicates is that Ms. Vickers was strangled.[22] As to the other evidence, what is left is the lack of an alibi, defendant's attempts to procure an alibi as testified to by Ms. Ebertowski and the admissions to one of his ex-wives that he had killed before and got away with it and to another ex-wife that he committed a murder, was arrested for it, put on trial, but was released.[23]

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[22] We find the coroner's conclusion that there was evidence of rape in this case to be dubious. No reasonable juror could conclude that the presence of a bloody tampon on the bed alone was sufficient to indicate that Ms. Vickers had been raped.

[23] It appears that defendant was arrested on November 22, 1976 for Ms. Vickers's murder, but was released from custody. On November 26, defendant was taken into custody on a probation violation. He was arraigned on the probation violation in docket number 58272. A probation violation hearing was held during which then Judge Panelli ruled that there was not violation of probation. Specifically, Judge Panelli noted that the

The jury began to deliberate in this case on September 30, around mid-morning. They deliberated again on October 3, during which time they requested read back of the testimony of Mr. Norris, Dr. Mason and Ms. Everette. The jury continued to deliberate on October 4th, returning a verdict around mid-afternoon.

The length of jury deliberations and requests from the jury to rehear evidence during deliberations suggest that defendant's case was close. (See e.g., *People v. Cribas* (1991) 231 Cal.App.3d 596, 607-608.)[24] The only issues the jury had to decide were the identity of Ms. Vickers's murderer and did that person enter the apartment with the intent to commit rape or did he commit rape or attempt to commit a rape and then murder Ms. Vickers. Although the circumstantial evidence points to defendant as a possible suspect, we find the circumstantial evidence very thin. This is particularly so in light of CALJIC 2.71 (oral admissions), which contains three pieces of information for a jury presented with evidence of a defendant's out-of-court oral statements. CALJIC 2.71 identifies such statements as "admissions" where the statements "tend to prove" the defendant's guilt. In addition, it tells the jury that it has the power to decide whether such statements were made. Further, CALJIC 2.71 informs the jury that it also is the judge of whether these

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People "presented numerous witnesses concerning the sexual behavior of the defendant with a variety of females. There also has been some innuendo as to the defendant's involvement with the homicide of Betty Vickers. However, in weighing and evaluating the testimony of numerous witnesses presented, the defendant's involvement with the death of Betty Vickers remains shadowy and inconclusive." Finally, Judge Panelli found that the "evidence presented by the People relative to defendant's involvement with the Vickers' homicide was not very persuasive." Nevertheless, Judge Panelli noted, "apparently there was some evidence obtained by the Mountain View Police Department which may have had some bearing on the issue, but was not presented because of certain exclusionary rules."

[24] In the past our Supreme Court has indicated jury deliberations that last almost six hours are an indication that the issue of guilt is not "open and shut." (*People v. Woodard* (1979) 23 Cal.3d 329, 341; *People v. Cardenas* (1982) 31 Cal.3d 897, 907, plurality opn., Bird, C .J.)

statements were "true." Finally, the instruction admonishes the jury to view evidence of such oral statements "with caution."

Accordingly, we cannot say with any certainty that the jury would still have found defendant guilty of first degree murder without the erroneous admission of the section 1108 and 1101, subdivision (b) evidence. As a result, we think that a result more favorable to the defendant would have been reasonably probable if such evidence had been excluded. Consequently, we must reverse defendant's conviction.

Given that the judgment must be reversed, it is not necessary to address defendant's remaining contentions other than defendant's contention relating to claims of insufficient evidence to support the verdict of first degree felony murder. (*People v. Pierce* (1979) 24 Cal.3d 199, 209-210.)

*Sufficiency of the Evidence of First Degree Felony Murder*

Defendant contends that his judgment of conviction for first degree murder must be reversed because the evidence was insufficient to sustain a conviction. Defendant argues that the problem with the theory of felony murder is that the evidence was not sufficient to establish rape or burglary, or attempts to commit those crimes.

Under the substantial evidence standard of review, we determine not whether a criminal defendant is guilty beyond a reasonable doubt, but whether substantial evidence supports the jury's findings, or in other words, whether a reasonable jury could have found the elements of the crime to have been proven beyond a reasonable doubt. (*People v. Cuevas* (1995) 12 Cal.4th 252, 274; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) We "view the record in the light most favorable to the verdict and uphold the verdict" if it is supported by evidence that is "reasonable, credible, and of solid value." (*People v. Marshall* (1997) 15 Cal.4th 1, 31.) In addition, we presume in support of the judgment all facts that the trier of fact reasonably could have deduced from the evidence. (*People v. Campbell* (1976) 63 Cal.App.3d 599, 608.)

"The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[, ] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reconciled with a contrary finding does not warrant reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

Thus, "In a case, such as the present one, [where the finding is] based upon circumstantial evidence, we must decide whether the circumstances reasonably justify the findings of the trier of fact, but our opinion that the circumstances also might reasonably be reconciled with a contrary finding would not warrant reversal of the judgment. [Citation.]" (*People v. Proctor* (1992) 4 Cal.4th 499, 528-529.)

As noted earlier, in this case the jury was presented with two theories of first degree felony murder. The jury had to decide if defendant entered the apartment with the intent to commit rape and then murdered Ms. Vickers. Or did the defendant murder Ms. Vickers in the course of raping or attempting to rape her.

"Intent to commit rape is the intent to commit the act against the will of the complainant. [Citations.] A defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence. [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130.)

Respondent relies heavily on the testimony of Ms. Knight,[25] the location of Ms. Vickers's body, the fact that Ms. Vickers was partially clothed, the blood-stained tampon

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[25] Respondent presumes that after defendant asked Ms. Knight to have breakfast with him at Denny's, and she refused, that defendant asked Ms. Vickers the same or a similar question and Ms. Vickers was declining a sexual encounter. This is a highly speculative

on Ms. Vickers's bed, the presence of the semen stain on the sheet, and the fact that Ms. Vickers was "brutally murdered in the very spot where the sex act occurred" to argue that the sex was not consensual.

First degree felony murder is the unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs as a result of the commission or attempt to commit arson, rape, robbery, burglary, mayhem, or any act punishable under Penal Code section 288, and where there is in the mind of the perpetrator the specific intent to commit one or more of these crimes. (Pen. Code, § 189; *People v. Dillon* (1983) 34 Cal.3d 441, 475.) The intentional commission of the underlying felony is not only an essential element of the crime of first degree felony murder. It is the sole basis for holding the killing is murder in the first degree. (*People v. Anderson* (1968) 70 Cal.2d 15, 34-36.)

In short, " '[I]n order to establish a defendant's guilt of first degree murder on the theory that he committed the killing during the perpetration [or attempted perpetration] of one of the enumerated felonies [in section 189 of the Penal Code], the prosecution must prove that he harbored the specific intent to commit one of such enumerated felonies.' [Citation.] Additionally, the evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts[,] which resulted in the victim's death . . . ." (*People v. Anderson, supra,* 70 Cal.2d at p. 34.)

In older cases involving a charge of sexual assault, in the absence of physical evidence that a sexual assault had occurred (e.g., the presence of semen or vaginal trauma), the California Supreme Court declined to infer an intent to commit a sexual assault on the victim, even if the victim was unclothed. (See, e.g., *People v. Granados* (1957) 49 Cal.2d 490, 497; *People v. Craig* (1957) 49 Cal.2d 313, 318-319; *People v.*

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inference. An inference is not reasonable if it is based only on speculation. (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

*Anderson*, *supra*, 70 Cal.2d at p. 35.)[26] More recently, however, the California Supreme Court distinguished these decisions by noting the lack of semen or absence of sexual trauma on the victim did not rebut an inference, based on the other physical evidence surrounding the attack, that the defendant entered the victim's house with the intent to rape. (*People v. Holloway* (2004) 33 Cal.4th 96, 138-139 (*Holloway*).)

In *Holloway*, the defendant was convicted of the first degree murder of two women, Debra Cimmino and Diane Pencin, the attempted rape of one victim, and burglary of the victims' joint residence. The jury found true the special circumstances of multiple murder, murder of one victim in the commission of attempted rape, and murder of the other victim in the commission of burglary. (*Holloway*, *supra*, 33 Cal.4th. at p. 103.)

On appeal, Holloway challenged the sufficiency of the evidence that he entered the victims' residence with the intent to commit rape. (*Holloway*, *supra*, 33 Cal.4th at p. 138.) The evidence showed that "Diane's body was found lying on her back on her bed, nude, but her mother testified that Diane did not sleep in the nude, and defendant told the police both victims, presumably clothed, answered the door when he went to the townhouse. The bedroom was in disarray and a pair of panties was found tucked between the mattress and the bed frame. Diane's wrists and ankles bore ligature marks, and her stab wounds were to the front of her body." (*Ibid*.)

Taking the foregoing evidence together with the physical evidence "indicating an incomplete sexual attack on Debbie Cimmino in the backseat of her car (her partially unclothed body, a vaginal tear, foreign pubic hairs found on her body and on the robe

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[26] In *People v. Craig*, *supra*, 49 Cal.2d at page 318, the California Supreme Court regarded the condition of the defendant's clothing as inconsistent with the prosecution's rape murder theory. In all three decisions, the Supreme Court noted the lack of semen, wounds to the victims' genital area, or both. (*Id.* at pp. 317, 319; *People v. Granados, supra*, 49 Cal.2d at p. 497; *People v. Anderson, supra*, 70 Cal.2d at p. 22.)

covering it, the location of defendant's palm print above the backseat, and a lack of semen on the body or surrounding items)" (*Holloway*, *supra*, 33 Cal.4th at p. 138), the Attorney General argued the jury could have rationally inferred defendant tried to rape Debbie in the car but failed and, frustrated, turned his sexually assaultive intent on Diane, entering or reentering the townhouse, removing Diane's nightclothes, tying her up by the wrists and ankles on the bed, and eventually stabbing and strangling her in that position. The Attorney General conceded that the defendant also entered with the intent of killing Diane to eliminate a witness who could tie him to Debbie's death, but had that been his only intent he would have had no reason to remove Diane's clothing or bind her hands and feet. (*Ibid*.) The California Supreme Court agreed that from "this evidence a rational trier of fact could have found beyond a reasonable doubt that defendant entered the townhouse with the intent to sexually assault Diane." (*Ibid*.) The court noted, "evidence of another sexual assault linked to the charged attack, together with the physical evidence surrounding the attack itself, sufficiently supported the finding of sexually assaultive intent." (*Ibid*.)

There would be no better proof that the murderer entered Ms. Vickers's apartment with intent to commit rape than a showing he did in fact commit rape after his entry. However, although we do have evidence of a sex act, the semen stain and the presence of the white discharge in Ms. Vickers's vagina, there is no definitive evidence that Ms. Vickers was raped. That is, there is no solid or credible evidence of rape. There was no sexual trauma to the vagina, no evidence of restraints used during the sex act and no other injuries to the body from which the jury could infer that Ms. Vickers physically resisted her attacker during the sex act, or her attacker inflicted physical violence on her during the sex act.[27]

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[27] Dr. Mason indicated that Ms. Vickers's internal injuries to the larynx and strap muscles, other neck injuries and internal hemorrhaging in the tissue on her front chest and collarbone area reflected that the killer placed his elbows or knees on Ms. Vickers's

Although intent may be shown by circumstantial evidence, the circumstantial evidence must be substantial. Specifically, it must be such that a reasonable jury could find it allows only one reasonable inference, that of criminal intent. The evidence bearing on the murderer's actual intent when he attacked Ms. Vickers is simply too ambiguous and uninformative to be of "solid value." (*People v. Marshall*, *supra*, 15 Cal.4th at p. 31.) The lack of evidence of any injury to Ms. Vickers, other than those inflicted when she was strangled, does not allow a reasonable jury to simply know beyond a reasonable doubt that Ms. Vickers's murderer intended to force her to have sex with him before killing her.

Accordingly, we conclude that there was insufficient evidence from which the jury could conclude that defendant, assuming that he was the murderer, entered Ms. Vickers's apartment with the intent to commit rape.

As to the evidence of rape, again, it is too ambiguous to conclude that defendant committed murder in the course of raping Ms. Vickers. Respondent asserts that because Ms. Vickers was menstruating a reasonable inference to be drawn from the evidence is that sexual intercourse was not consensual. Further, the condition of the body and the scene demonstrate the intercourse was not consensual. Moreover, the blood stained tampon on the bed indicates that Ms. Vickers was not in control of the situation.

As respondent concedes, a conviction for rape in 1976 required evidence of actual resistance by the victim. The jury was so instructed. In this case, however, there was no evidence of resistance. The bed was undisturbed on one side indicating that there was not a struggle; the downstairs neighbor did not hear any disturbance; there was no evidence of restraints used during the sex act; there was no bruising to the body other than that caused by the actual strangulation; and there was no vaginal trauma. Furthermore, there

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upper chest as she was lying face up, and applied pressure to pin her down while manually strangling her as she resisted.

was no evidence that the murderer brandished a gun or any other weapon with which he threatened Ms. Vickers so that she did not resist.

Accordingly, we conclude that there was insufficient evidence that Ms. Vickers was murdered in the course of rape or attempted rape.

*Disposition*

The judgment is reversed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.