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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. ANTOLIN GARCIA-TORRES, Defendant.	Criminal Case No. 213515 PEOPLE'S MEMORANDUM RE: CALCRIM 375

The defense is asking that this Court do what the California Supreme Court has never required.[1/] However, if this Court is prepared to do just that, the People request that the Court instruct on identity, common scheme or plan, motive and intent. This Court never limited the use of the Safeway evidence with respect to the other Safeway counts during motions in limine[2/] and the defense's proposed instruction would deprive the People of the evidence and inferences that may be reasonably drawn from the evidence.

1/ *See People v. Villatoro* (2012) 54 Cal.4th 1152, 1180-81, Justice Corrigan specifically notes that the California Supreme Court has never required 1101(b) instructional limitations on evidence presented in concurrently charged crimes.

2/ The motions exclusively dealt with severance and cross admissibility between the murder and the Safeway counts.

The California Supreme Court long ago recognized in *People v. Kelly* (1928) 203 Cal. 128 that where "[t]he indictment showed that the three murders were committed by the same person, on the same day, and in the same city and county[,]... *[t]he circumstances under which each crime was committed, and the proof required to establish it, necessarily threw light upon the other two.*" *Id.* at 135 (emphasis added).

In *People v. Hawkins* (1995) 10 Cal.4th 920, 939-943 (overruled on other grounds), the defendant was charged with two murders in separate incidents. The defendant was connected to the murder of John Hedlund because, one week later, eyewitnesses established that the defendant killed Herman Hicks inside Sonny's Market with a handgun. The handgun was tied by ballistics experts to the Hedlund murder. The Court held that the two separate murders were properly tried together, because evidence of the Sonny's Market murder "would have been not only admissible at, but critical to, a separate Hedlund murder trial... to prove the identity of the murderer." *Id.* at 940-942.

The Court in *Hawkins* rejected the contention that the trial court failed to provide sua sponte an instruction "limiting the jury's consideration of the Sonny's Market crimes in deciding the Hedlund murder." *Id.* at 942-943. The Court held, "[T]he trial court does not have the sua sponte duty to furnish a limiting instruction on cross-admissible evidence in a trial of multiple crimes." *Id.* The Court also rejected the claim that defense counsel was ineffective for failing to request a limiting instruction on cross-admissible evidence, because a reasonable attorney might have concluded it was not worth the risk of highlighting the relatively stronger evidence. *Id.*

Likewise, in *People v. Maury* (2003) 30 Cal.4th 342, 391-394, the Court came to the same conclusion. The defendant was convicted of the murders of three women and complained on appeal that the trial court should have severed the trial of one murder from the other two. The Court rejected his claim because evidence of the murders was cross-admissible. The "evidence relating to the Berryhill and Stark offenses would have been admissible at a separate Weeden murder trial on the issue of identity" because the similarities of the offenses were "sufficient to establish a common modus operandi, raising a strong inference that defendant killed Weeden."

The defendant further contended on appeal that the trial court erred in failing to provide sua sponte an instruction limiting the jury's consideration of the Stark and Berryhill crimes in deciding defendant's guilt of the Weeden murder. The Court rejected the argument and the related challenge on ineffective assistance of counsel grounds, citing the above rule from *Hawkins*, *supra*.

The California Supreme Court recently stated that it has "made clear that juries may consider evidence of other charged offenses for the purposes outlined in [section 1101(b)] as well as to establish the charged offenses, if the evidence would have been cross-admissible had the charges been tried separately." *People v. Villatoro* (2012) 54 Cal.4th 1152, 1166, citing *People v. Catlin* (2001) 26 Cal.4th 81, 153.

On appeal from his conviction for two separate murders in *People v. Catlin*, *supra*, 26 Cal.4th at 153, the defendant argued that the trial court erred in refusing to give his proposed special instruction that read, "Evidence applicable to each offense charged must be considered as if it were the only accusation before the jury." The Court held the instruction was correctly refused:

> Contrary to the import of the proposed special instruction, under Evidence Code section 1101 the jury could properly consider other-crimes evidence in connection with each count, and also could consider evidence relevant to one of the charged counts as it considered the other charged count.

Id. at 153.

Villatoro, *supra*, 54 Cal.4th 1152, 1167-1168, held that a *charged* sexual offense may be used as evidence under Evidence Code section 1108 to show the defendant's propensity to commit another sexual offense *charged* in the same case. The majority also upheld a modified jury instruction on the use of propensity evidence when it was based on charged offenses. In her dissent, Justice Corrigan (joined by Justice Werdegar) opined that a propensity instruction was unnecessary and potentially confusing because the evidence was not limited in purpose. *Id.* at 1178-1182. Justice Corrigan's discussion of instructional issues provides some helpful guidance here:

> Unless evidence is admitted for a limited purpose, or against a specific party, evidence admitted at trial may generally be considered for any purpose. A corollary of this rule is that the jury is free to apply its *factual findings* on one count in deciding any other count to which those facts are relevant. However, while the jury is free to apply relevant factual findings across counts, it is admitted

that it must return a separate verdict on each count (CALCRIM No. 3515; CALJIC No. 17.02) and must decide each charge "uninfluenced by its *verdict* as to any other count."

Id. at 1170.

Justice Corrigan raises the question—not decided in the *Villatoro* case—of whether a jury instruction is necessary when evidence is admitted on a *charged* offense, and the nature of that evidence may lead to 1101(b) inferences on other *charged* offenses. She wrote:

> When a defendant's similar uncharged conduct is offered under section 1101(b), the court will instruct the jury that evidence of the uncharged offense has been offered for a limited purpose and may only be considered in support of an inference related to that limited purpose. (CALCRIM No. 375.) If other similar offenses have been *charged*, does the court also have to instruct that evidence generally admitted to prove the charged offenses can be used to support an inference of intent with respect to the other charged offenses? If the charged offenses would not be similar enough to be admissible under *People v. Ewoldt*, [] would the defense be entitled to an instruction limiting how this otherwise admissible evidence should be used? We have never so held, in either case.

Id. at 1180-1181 (italics in original, internal citation omitted). The defense is asking that this Court do what the California Supreme Court has never done. This case should not be the first.

For all the foregoing reasons, the prosecution does not believe that a limiting instruction is necessary to instruct the jury on how evidence generally admitted to prove the charged offenses may be used to support inferences with respect to the other charged offenses. Such an instruction will potentially create confusion. The evidence here relates only to *charged* crimes, and the jury can properly consider evidence relevant to one of the charged counts as it considers the other charged counts. *Catlin*, *supra*, 26 Cal.4th at 153. The People have no objection to a narrow instruction with respect to propensity only.

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Respectfully submitted,

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