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SUPREME COURT COPY

S061026

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
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Frederick K. Ohlrich Clerk
DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GENE ESTEL McCURDY,

Defendant and Appellant.

Kings Co. Sup.
Ct. No. 95CM5316

APPELLANT'S REPLY BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Kings County

HONORABLE PETER M. SCHULTZ, JUDGE

MICHAEL J. HERSEK
State Public Defender

GARY D. GARCIA
Deputy State Public Defender
Cal. State Bar 157612

221 Main Street, Tenth Floor
San Francisco, CA 94105
Telephone: (415) 904-5600

Attorneys for Appellant

DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	No. S061026
v.	)	(Kings County Sup. Ct. No. 95CM5316)
GENE ESTEL McCURDY,	)	
Defendant and Appellant.	)	

APPELLANT'S REPLY BRIEF

- - -

INTRODUCTION

In this brief, appellant does not reply to respondent's arguments that are adequately addressed in appellant's opening brief. Unless expressly noted to the contrary, the failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13), but reflects appellant's view that the issue has been

adequately presented and the positions of the parties fully joined.[1] For the convenience of the Court, the arguments in this reply are numbered to correspond to the argument numbers in Appellant's Opening Brief.

Appellant also notes that he addresses respondent's responses to Arguments VIII and XVII (both of which were filed under separate cover from the opening brief) in the instant brief, not in a separate pleading.[2]

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[1] As in Appellant's Opening Brief, the Clerk's Transcript is hereinafter referred to as "CT," the Augmented Clerk's Transcript as "Aug. CT," the Second Augmented Clerk's Transcript as "2nd Aug. CT," the Second Supplemental Augmented Clerk's Transcript as "2nd Supp. Aug. CT," and the Reporter's Transcript as "RT." Except where otherwise indicated, appellant cites to the record on appeal in the following manner: "[volume] CT [or RT] [page number]." (Cal. Rules of Court, rule 14, subd. (a)(1)(C).) Moreover, the briefs previously filed by appellant and respondent are hereinafter referred to as follows: "AOB" (appellant's opening brief); "Supp. AOB" (appellant's supplemental opening brief); "RB" (respondent's brief); and, "Supp. RB" (respondent's supplemental brief). Finally, as in the opening brief, all statutory references are to the Penal Code unless otherwise noted.

[2] Appellant filed Argument VIII of the opening brief under separate cover, accompanied by a motion to file that argument under seal, or in the alternative, to unseal the related transcripts and exhibits and deem the argument filed as a regular unsealed part of the brief. This Court denied appellant's request to file Argument VIII under seal, and granted his request to unseal certain transcripts and exhibits and to deem Argument VIII filed as a regular, unsealed part of the opening brief. Accordingly, appellant re-filed Argument VIII, this time unsealed. Appellant subsequently filed a supplemental opening brief, containing Argument XVII (now renumbered as Argument XVI, as explained on page 93, footnote 50, *infra*.).

ARGUMENT

I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR A CHANGE OF VENUE BASED UPON THE PREJUDICIAL NATURE AND EXTENT OF PRETRIAL PUBLICITY

In his opening brief, appellant argued that the trial court erroneously denied his motion for a change of venue, requiring a reversal of the entire judgment. (AOB 45-59.) Respondent, however, contends that appellant has waived the issue for appeal by failing to renew the motion following voir dire and agreeing to the jury without exhausting his peremptory challenges. Respondent further contends that a change of venue was unwarranted because the gag order imposed in this case, and the subsequent voir dire conducted by the trial court, ensured that appellant received a fair and unbiased jury. (RB 33-49.) Respondent is incorrect on both grounds because the vast majority of prospective jurors had been, or likely had been, exposed to inaccurate and/or inflammatory information, so that appellant could not have had a fair trial in Kings County.

A. The Trial Court Erred In Denying Appellant's Motion For A Change Of Venue

As respondent agrees, the reviewing court must independently examine the record, considering the following five factors in determining de novo whether a fair trial was obtainable: (1) the nature and gravity of the case; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the prominence of the victim. (RB 33, citing *People v. Harris* (1981) 28 Cal.3d 935, 948.) Respondent's analysis of those factors, however, is flawed and will not assist this Court in reaching a proper determination.

1. The Nature And Gravity Of The Offense Called For A Change Of Venue

Asserting that "[u]doubtably [sic], the kidnapping and murder of an eight-year-old girl from a shopping center in Lemoore was a shocking crime" (RB 37), respondent tacitly concedes that the nature and gravity of the crime weigh in favor of a change of venue. It simply disputes that this factor, by itself, compelled a venue change. (*Ibid.*, citing *People v. Hamilton* (1989) 48 Cal.3d 1142, 1159.) But that, of course, is neither the legal test nor appellant's argument. The nature and gravity of the crime must be considered in conjunction with the other venue-change factors. Moreover, an assessment of the nature and gravity of the offense goes beyond the bare fact that a young girl was kidnaped and murdered. This case presents precisely the sensational and sexual overtones that this Court found missing in *Hamilton*, upon which respondent relies. (See RB 37-38, citing *People v. Hamilton, supra*, 48 Cal.3d at p. 1159 [defendant was charged with murdering his pregnant wife for profit]; see also *People v. Green* (1980) 27 Cal.3d 1, 46 [holding that, although the defendant was charged with murder, the offense lacked "the sensational overtones of other killings that have been held to require a change of venue, such as an ongoing crime spree, multiple victims often related or acquainted, or sexual motivation"], abrogated on another ground in *People v. Martinez* (1999) 20 Cal.4th 225, and overruled on another ground in *People v. Hall* (1986) 41 Cal.3d 826.)

Indeed, this case was painted over with "sexual overtones." (See Argument III.) News coverage of the case publicized, among other things, that: appellant had molested his sister over a period of about 13 years (1 CT 178, 180-181, 184, 195, 207); the police had recovered sexually explicit

materials belonging to appellant, including magazines and videotapes, some of which allegedly depicted females under the age of 18, books, photographs of children, a computer disc and a computer game (1 CT 177, 232, 234, 238, 242, 244-245, 252); and that appellant was accused of kidnaping, raping, and sodomizing Maria and committing lewd and lascivious acts before murdering her (1 CT 168-169, 184-185).[3] These are exactly the type of lurid and inflammatory facts that warrant a venue change.

At bottom, the nature of the capital murder charges here weighed heavily in favor of a change of venue. As appellant noted at trial, the apparently random abduction and murder of an eight year old girl, taken from a public place by an alleged stranger, is the kind of "crime that can present a fear of 'immediate danger to the public' which must judge the guilt and punishment of the accused. [Citation.]" (1 CT 162, original underscoring.) This is particularly so when coupled with the allegations of incest and possession of pornography. Consequently, the sensational nature of the offenses were seared into the community's consciousness. (See *Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582 [while committing a robbery of a bar, the defendant, mistakenly believing the victim was a police officer, shot him in the back].) Moreover, as this Court has recognized, "[b]ecause it carries such grave consequences, a death penalty case inherently attracts press coverage; in such a case the factor of gravity must weigh heavily in a determination regarding the change of venue." (*Id.* at p. 583.) Therefore, the gravity of the charges also weighed in favor of a

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[3] The instant case also involved racial overtones, in that it was obvious from the news reports that appellant is Caucasian and Maria Piceno was Hispanic.

venue change. (See *People v. Edwards* (1991) 54 Cal.3d 787, 807 [where the defendant shot two girls with whom he was unacquainted, killing one of them, this Court noted that "the gravity of the offense is most serious and, if considered alone, would support a change of venue"].)

Respondent asserts that the fact appellant was charged with capital murder does not compel a change of venue, but the cases it cites do not support its position. (RB 38, citing *People v. Fauber* (1992) 2 Cal.4th 792, 811-812, 817-818; *People v. Edwards*, *supra*, 54 Cal.3d at pp. 806-809; *People v. Hamilton*, *supra*, 48 Cal.3d at p. 1159.) *Fauber* involved the murder of a drug dealer during the course of a robbery. In *Edwards*, the defendant shot two girls with whom he was unacquainted, killing one of them. And in *Hamilton*, the defendant was charged with fatally shooting his pregnant wife for profit. Those cases, while undoubtedly serious, lacked "the sensational overtones" of killings which have been held to require a change of venue. (See *People v. Green*, *supra*, 27 Cal.3d at p. 46.) In contrast, the charged offenses in this case – with its allegations that appellant kidnaped Maria with the intent to molest her, and that, as a child and adolescent, he engaged in incest with his sister – carried the sort of sensational, inflammatory sexual overtones discussed in *Hamilton* and *Green*.[4]

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[4] Respondent appears to incorporate the "prominence of the victim" and "nature and extent of the media coverage" factors into the "nature and gravity of the crime" factor. (RB 38, citing *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 289, 293 [referring to the victims' prominence within the community and the fact that the defendant was depicted as a hippie, in a community where there was widespread dislike and distrust of hippies]; *People v. Tidwell* (1970) 3 Cal.3d 62, 65, 70, 72 [describing "pervasive news coverage" of the case and the prominence of two of the three victims];
(continued...)

Therefore, the nature and gravity of the offenses weighed in favor of a venue change.

2. The Size of the Community Called For A Change Of Venue

Although respondent apparently concedes that the size of Kings County weighed at least somewhat in favor of a venue change, it mistakenly relies on *People v. Proctor* (1992) 4 Cal.4th 499, 525-526, and *People v. Coleman* (1989) 48 Cal.3d 112, 134, in arguing that the size of the community did not weigh heavily in favor of a change of venue. (RB 39.) In *Proctor*, this Court held that Shasta County's population of approximately 122,000 "weigh[ed] somewhat in favor of a change of venue." (*People v. Proctor*, *supra*, 4 Cal.4th at pp. 525-526.) Because the population of Kings County – i.e., 116,312 at the time of appellant's trial (1 CT 159) – was smaller than that of Shasta County, it was even less likely to neutralize or dilute the impact of adverse publicity, and therefore weighed more heavily in favor of a venue change.

In *Coleman*, which involved a Sonoma County case, this Court held that the trial court properly denied the defendant's motion for a change of venue; at the time of Coleman's venue motion, the population of Sonoma County was approximately 299,681. (*People v. Coleman*, *supra*, 48 Cal.3d

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[4](...continued)
Fain v. Superior Court (1970) 2 Cal.3d 46, 49, 51 [describing "substantial" media coverage of the case, which involved the murder of a popular high school athlete and the kidnapping and rape of two school girl companions]; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 385, 388 [describing "extensive[]" media coverage of kidnapping and assault of a popular teenage couple from well-known family in the community].) Of course, these remain separate factors for the purpose of venue analysis. (*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1157.)

at p. 134.) In so holding, this Court pointed out that cases in which venue changes were granted or ordered on review have usually involved counties with populations smaller than that of Sonoma County. (*Ibid.*, citing *People v. Balderas* (1985) 41 Cal.3d 144, 178-179.) Although the size of the community by itself is not determinative as to whether a change of venue must be granted (*People v. Proctor*, *supra*, 4 Cal.4th at p. 525), it is significant that several of the cases cited in *Balderas* involved counties with populations larger than that of Kings County. (See *People v. Balderas*, *supra*, 41 Cal.3d at pp. 178-179, citing *Williams v. Superior Court* (1983) 34 Cal.3d 584, 592 [Placer County, population 117,000]; *Frazier v. Superior Court*, *supra*, 5 Cal.3d at p. 293, fn. 5 [Santa Cruz County, population 123,800]; *Fain v. Superior Court, supra*, 2 Cal.3d at p. 52, fn. 1 [Stanislaus County, population 184,600]; see also *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623, 626-627 [San Mateo County, population of almost 600,000].)

Because Kings County was too small to "neutralize or dilute the impact of adverse publicity" in appellant's case (*People v. Proctor*, *supra*, 4 Cal.4th at p. 525), that factor weighed significantly in favor of a venue change, particularly when considered in combination with the other factors.

3. Appellant's Status In The Community And The Prominence Of The Victim Called For A Change Of Venue

Respondent argues that neither appellant nor the victim had any particular status, popularity or prominence within the community comparable to other cases where a change of venue was granted. (RB 39.) However, respondent ignores appellant's argument that Maria Piceno became very prominent posthumously due to the outpouring of sympathy and grief within the community following her disappearance. (AOB 58.)

Accordingly, these factors also favored a change of venue.

4. The Nature and Extent Of The Media Coverage Called For A Change Of Venue

Respondent argues that the news coverage in this case was not pervasive and that it primarily tracked the procedural events in the case. (RB 41-44.) Here, too, respondent's contention is incorrect.

A review of the record demonstrates that inaccurate and/or inflammatory media coverage of the case informed the perceptions of many of the prospective jurors. (Cf. *People v. Ramirez* (2006) 39 Cal.4th 398, 436 [change of venue not required where, among other things, most media accounts were accurate].) Among other things, prospective jurors recalled, or at least believed they recalled, information regarding: (1) evidence tying appellant to the crimes;[5] (2) the crimes themselves;[6] and (3) information

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[5] See, e.g., 1 2nd Supp. Aug. CT 682 ["The police arrested the defendant & searched his apt. & vehicle. They believe some hairs from Maria were found in his vehicle"]; 2 2nd Supp. Aug. CT 898 [prospective juror recalled that appellant's sister turned him in], 934 [prospective juror recalled that "evidence was found in McCurdy home that may be connected to the murder of Maria Piceno. That McCurdy has a sister that lives in the area [in] which Maria['s] little body was found."]; 4 2nd Supp. Aug. CT 1553 [prospective juror recalled that appellant's shower curtain was found near Maria's body, that appellant was arrested while at sea, that he was turned in by a female relative, and that authorities were investigating whether any other child was missing from or killed at places where appellant had been stationed], 1589 [prospective juror recalled, among other things, that Maria was wearing pink, polka-dotted pants when she disappeared, that her mother had erected a shrine for her, that tips regarding appellant came from "his sister & ladies in Washington State," and that he was arrested on his ship; prospective juror also commented that the "[c]itizens of Lemoore were shocked that this could happen in their small community"]; 5 2nd Supp. Aug. CT 2058 [prospective juror recalled that appellant mentioned Maria when he was questioned on the ship]; 6 2nd

(continued...)

[5](...continued)
Supp. Aug. CT 2202 [prospective juror recalled that "[appellant] was seen at market talking to child described as Maria. Evidence found at murder scene or creek where body was found was linked to defendant. Defendant was able to leave town soon after victim disappeared by being in the Navy"], 2328 [prospective juror recalled, among other things, that "[a]ppellant was questioned on board ship and arrested. Some of his possessions were confiscated. Tests were performed on some hair samples. Some other evidence was found much later (shower curtain, bowling ball)."]; 7 2nd Supp. Aug. CT 2697 [prospective juror had participated in "[d]iscussion of evidence found and said to belong to defendant."], 2841 ["Where she was found[,] that there was a witness that seen [sic] the defendant leading Maria somewhere[,] something about a bowling ball and shower curtain"]; 8 2nd Supp. Aug. CT 3002 [prospective juror recalled that material was found in his apartment], 3092 ["I seem to remember a wittness [sic] being found who placed the defendant at/in the area of the abduction. Also reports that a search of the defendant's property found material, magazines, etc[.] that the reporters wanted the reader to believe are consistent with sex crimes, perversion etc., also implied that articles of Maria's clothing might of been found. Also that defendant had knowledge of area in which body was found." Prospective juror also read that because suspect was not questioned properly, "these findings may not be admissible."]; 9 2nd Supp. Aug. CT 3145 ["Other than Maria being kidnapped and found murdered and that the defendant was arrested on board ship with incriminating evidence; also more evidence was found at his home is all that I recall."], 3163 ["1. That McCurdy[']s sister initiated the investigation. 2. That McCurdy once lived in the Poso Creek area. 3. A shower curtain and bowling ball found in the creek are alleged to be his."], 3236-3237 [prospective juror, who observed that "T.V. coverage was vast," believed that the "police wouldn't have gone to the Far East to recover McCurdy without some sort of evidence"].

[6] See, e.g., 1 2nd Supp. Aug. CT 736 [prospective juror read that the victim had been kidnaped, sexually abused, and murdered]; 2 2nd Supp. Aug. CT 1096 [prospective juror recalled that victim "may have been sexually molested – choked or drowned, located in canal near Bakersfield Ca. by teenagers"]; 5 2nd Supp. Aug. CT 2058 [prospective juror believed she had heard that the victim had been sexually assaulted]; 6 2nd Supp. Aug.
(continued...)

relating to appellant's incestuous relationship with his sister and/or his possession of adult material.[7] Other prospective jurors had read so many

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[6](...continued)
CT 2455 ["From what I read or heard, the child was kidnapped, raped and killed. There was a search conducted, a man was arrested. He was in the Navy and had to be brought back to Kings County."].

[7] See, e.g., 1 2nd Supp. Aug. CT 682 [prospective juror recalled that "pornographic materials (tapes, etc.) were found in his apts."]; 2 2nd Supp. Aug. CT 862 [prospective juror recalled "1. Newspaper (read of abduction; investigation, arrest of Mr. Mcurdy [sic], presence of pornography in Mcurdy's [sic] possession. 2. Radio, same as above."], 1024 [prospective juror recalled that videos of an explicit nature were found in appellant's possession]; 3 2nd Supp. Aug. CT 1150 [prospective juror wrote, among other things, that appellant's apartment "had films and picture [sic] in it"]; 4 2nd Supp. Aug. CT 1553 [prospective juror recalled that appellant was turned in by a female relative whom he allegedly had molested], 1589 [prospective juror recalled, among other things, that appellant possessed pornographic material depicting "young Spanish girls"], 1734 [prospective juror recalled, among other things, that videotapes were found at appellant's residence]; 5 2nd Supp. Aug. CT 2058 [prospective juror recalled that appellant had a storage place with "pornographic (child) stuff"]; 6 2nd Supp. Aug. CT 2292 [prospective juror recalled, among other things, that "police found photographs of the child in his house" and that she had been sexually abused], 2310 [prospective juror recalled, among other things, that "[t]hey searched his apartment & found sex videos w/minors, questioned him across seas & arrested him"], 2328 [prospective juror recalled that, "[a]pparenly [sic] Gene's sister accused him of incest."], 2400 [prospective juror recalled that "[appellant's] storage locker had been gone through & child pornography material had been found & that he frequented a nearby x-rated video store & allegedly requested child pornography videos. I have also heard that he might be involved in the case in Tulare Cty. There is some question as to whether he was still at NAS Whidbey Island at time of the [illegible] child murders."], 2455 [prospective juror recalled that "[p]ictures were found of the victim or other naked children."]; 8 2nd Supp. Aug. CT 3092 [prospective juror recalled "reports that a search of the defendant's property found material, magazines, etc that the reporters wanted the reader to believe are consistent with sex crimes, perversion etc.,
(continued...)

articles that one can reasonably infer that they too were exposed to inaccurate and/or inflammatory information.[8] Finally, a review of the record demonstrates that the case had been the subject of widespread

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[7](...continued)
also implied that articles of Maria's clothing might of been found."]; 9 2nd Supp. Aug. CT 3163 [prospective juror recalled that pornographic material was found in appellant's storage].

[8] See, e.g., 1 2nd Supp. Aug. CT 718-719 [prospective juror had watched television news broadcasts regarding the case and also read "[e]verything from the time she was kidnapped to the time she was found"]; 2 2nd Supp. Aug. CT 826-827 [television news coverage and approximately three or four newspaper articles], 917 [approximately four or five articles], 1042-1043 ["[a]ll that was in [the] paper" and saw television coverage]; 3 2nd Supp. Aug. CT 1132-1133 [approximately nine newspaper articles and television coverage of the case], 1204-1205 ["whatever's been put in the papers" and television news coverage]; 4 2nd Supp. Aug. CT 1680-1681 [learned about case from "all news media forms," including approximately two dozen articles], 1699 [approximately five articles], 1716-1717 [prospective juror read "almost all the local [articles]" and watched television news coverage]; 5 2nd Supp. Aug. CT 1806-1807 [watched television coverage and read about one or two articles], 2166-2167 [read approximately two or three articles]; 6 2nd Supp. Aug. CT 2184-2185 [television and "a few articles"], 2437-2438 ["Partial reading" of approximately eight to ten articles]; 7 2nd Supp. Aug. CT 2510-2511 [television, radio and approximately ten to twelve articles over past two years], 2528 [television news and read approximately three or four articles in local newspapers], 2679 ["All sources! I've heard about everything, start to finish"], 2787-2788 [television coverage and "many articles"], 2805-2806 [television news coverage and approximately two or three articles]; 8 2nd Supp. Aug. CT 2842 [approximately eight articles], 2895 ["everything printed in the Hanford Sentinel"], 2967-2968 [television news coverage and "mostly all of [the articles]"], 2984 [television; has heard "Everything?" about case], 3021 [approximately two newspaper articles]; 9 2nd Supp. Aug. CT 3183 [approximately twenty articles], 3272-3273 [television coverage and "everything that was written"].

discussion within the community.[9]

The pervasive media coverage led many of the prospective jurors to conclude that appellant was or probably was guilty (1 2nd Supp. Aug. CT 595-596, 701; 2 2nd Supp. Aug. CT 828, 882, 936, 1043-1044; 3 2nd Supp. Aug. CT 1134, 1170, 1206; 4 2nd Supp. Aug. CT 1590, 1681-1682, 1753; 5 2nd Supp. Aug. CT 2059-2060, 2077-2078; 6 2nd Supp. Aug. CT 2203-2204,

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[9] See CT 1222 [juror #4] [discussed the case with friends], 1914 [juror #3] [her husband told her about Maria's disappearance], 1932 [alternate juror #5] [friends engaged in "gossip" about the case], 1950 [alternate juror #3] [conversation with a friend and with her sister]; 1 2nd Supp. Aug. CT 594 [discussed case with friends], 612 [same], 790 [same]; 2 2nd Supp. Aug. CT 898 [same], 952 [same], 1042 [conversations with relatives], 1060 [conversations with friends], 1078 ["overhear[d]" discussions of the case], 1096 [discussions with friends and family]; 3 2nd Supp. Aug. CT 1114 [conversations with friends], 1204 [discussions with wife and neighbors], 1354 [conversations with coworkers], 1372 [discussed case with a friend, a resident of Lemoore], 1390 [discussed case with a former co-worker]; 4 2nd Supp. Aug. CT 1553 [discussed case with friends], 1625 ["office gossip"], 1644 [conversations with friends], 1752 [same]; 5 2nd Supp. Aug. CT 2058 [same], 2076 [discussions with neighbors], 2094 [discussions with friends], 2112 [read about case in a school newsletter], 2166 [conversations with friends and relatives]; 6 2nd Supp. Aug. CT 2256 ["conversations heard"], 2274 ["I heard through conversation about her murder."], 2328 [conversations with friends], 2382 [conversation with a co-worker, who reported that his ex-wife's husband was the officer who talked to appellant on the ship], 2400 ["working at NAS Lemoore, people talk"], 2437 [conversations with friends and spouse]; 7 2nd Supp. Aug. CT 2492 ["friends"], 2697-2698 [conversations], 2751 ["friends"], 2787 [conversations with friends]; 8 2nd Supp. Aug. CT 2913 [conversation with family and friends who live in Lemoore and on NAS Lemoore], 3109 ["conversation"]; 9 2nd Supp. Aug. CT 3163 ["rumors"]; see also 3 RT 184-186, 270-273, 293-295, 312-314, 321-322, 379-384, 400-401, 432-435, 442-445, 453-454, 462-464; 4 RT 528-530, 537-538, 541-543, 550-552, 561-563, 590-597, 653-656, 672-675, 716-720, 741-742; 7 RT 898-902, 930-931, 1059-1061, 1068-1069, 1089-1091, 1283-1286; 9 RT 1271-1273, 1326-1331, 131-1353, 1402-1404.

2220-2221, 2293-2294, 2384; 7 2nd Supp. Aug. CT 2698; 8 2nd Supp. Aug. CT 2843, 2896-2897, 2915, 2968, 3004; 9 2nd Supp. Aug. CT 3146-3147, 3164, 3237-3238, 3291), or that he deserved the death penalty (1 2nd Supp. Aug. CT 791; 2 2nd Supp. Aug. CT 899, 917; 4 2nd Supp. Aug. CT 1590-1591; 8 2nd Supp. Aug. CT 2843).

Respondent's reliance upon *Powell v. Superior Court* (1991) 232 Cal.App.3d 785, a case arising from the arrest and beating of Rodney King, is misplaced. (RB 41-44). While there can be no doubt that media coverage of the legal proceedings relating to the Rodney King case had saturated Los Angeles County, the matter also garnered national and international notoriety. Publicity of that singular magnitude cannot be the standard by which venue-related arguments are judged.[10]

Accordingly, the nature and extent of the media coverage also favored a change of venue.

5. The Voir Dire Process Did Not Eliminate The Impact Of Pre-Trial Media Coverage

Contrary to respondent's position (RB 45-47), the steps taken by the trial court to eliminate the impact of pre-trial media coverage – specifically, imposition of a gag order and the use of juror questionnaires and individualized voir dire – failed to ensure that appellant received a fair trial. Each of those measures was ineffective because the pre-trial media coverage of the case had been so extensive. Of the 101 prospective jurors who were independently questioned regarding exposure to pre-trial

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[10] Although changes of venue were not required in either *People v. Bonin* (1988) 46 Cal.3d 659, 677, or *People v. Cummings* (1993) 4 Cal.4th 1233, 1275, fn. 6, which were also cited by respondent (RB 44-45), it is worth noting that those cases took place in two of the state's largest counties, i.e., Orange County and Los Angeles County, respectively.

publicity about the case, seven were excused for cause based on the trial court's determination that they had been overly exposed to pre-trial publicity. (3 RT 482; 4 RT 670; 7 RT 948, 1030; 9 RT 1221, 1265-1266, 1383.)[11] 25 of the 101 prospective jurors were excused for cause on grounds largely unrelated to exposure to pre-trial publicity. (3 RT 236, 242, 250, 273, 310, 320, 430, 451, 461-462; 4 RT 566-567, 576, 580, 589, 688, 738, 782; 7 RT 940, 961, 1066, 1112; 9 RT 1235-1236, 1245, 1289-1290, 1350, 1407.)[12] Significantly, each of the 25 prospective jurors had been exposed to at least some pre-trial publicity about the case, and some were exposed to inaccurate and/or inflammatory information.[13]

Of the 69 remaining prospective jurors, only four had not been exposed to any publicity about the case (3 RT 220-221, 388-389; 4 RT 537-538; 9 RT 1224)[14] and perhaps five did not remember the specific nature of

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[11] Respondent mistakenly states that only five prospective jurors were excused on this basis. (RB 47.)

[12] Respondent mistakenly states that 37 prospective jurors were excused on this ground. (RB 47.)

[13] See 3 RT 231-232, 236-237, 242-244, 272-273, 304-305, 312-314, 420-423, 440, 442-445; 4 RT 555-556, 573-574, 577-578, 580-586, 681-682, 731-733, 748-752; 7 RT 940, 949-950, 1059-1061, 1105; 9 RT 1230-1231, 1240, 1283-1286, 1347-1348, 1402-1404.

[14] Respondent mistakenly states that 99 prospective jurors were questioned regarding their exposure to publicity, and that 10 of those jurors had not been exposed to any publicity about the case. (RB 47.) In fact, 6 of those 10 prospective jurors – including one who was ultimately seated as an alternate juror – had been exposed to at least some pretrial publicity. (3 RT 405, 442-444; 4 RT 537; 7 RT 873; 9 RT 1224, 1230-1231; CT 1276 [alternate juror #4]; 2 2nd Aug. CT 1060; 3 2nd Aug. CT 1390; 5 2nd Aug. CT 2040; 8 2nd Aug. CT 2859, 3056.) Another, who was later seated as juror

(continued...)

the publicity they had read (3 RT 226-227, 266, 321-322, 327-328; 7 RT 1048).[15]

Finally, respondent mistakenly contends that every single juror who had been exposed to any publicity about the case represented that he or she could keep what had been seen or read separate from the trial and be impartial. (RB 48.) However, a review of the record demonstrates that: (1) 13 prospective jurors, including three who were ultimately seated as jurors and two who were seated as alternate jurors, made no such representations (3 RT 328, 388-389, 405-407, 415-416; 4 RT 541-543, 709; 7 RT 872-873, 894-896, 930-931, 934-935, 1048; 9 RT 1230-1231, 1402-1404);[16] (2)

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[14](...continued)
#3, had seen a billboard regarding Maria Piceno's disappearance and heard about the case from her husband. (4 RT 543, CT 1914.)

[15] Respondent argues that the *majority* of the remaining jurors did not remember the specific nature of the publicity they had read because it had occurred a year previously (RB 48, emphasis added), yet respondent identifies only 11 (out of 69) prospective jurors who gave such responses. One of the 11 was in fact excused for cause, and therefore could not have been selected to serve as a juror. (4 RT 555-567.) Several others recalled, or likely recalled, more than respondent indicates. (See, e.g., 3 RT 327-328 [alternate juror #4] [prospective juror had seen a news broadcast about the case the previous Monday], 415-416 [prospective juror recalled that a little girl was missing and that the defendant was in the military], 453-454 [prospective juror, who had obtained information about the case from television, newspaper articles and overheard conversations, recalled that similarities between Maria Piceno, Angelica Ramirez and Traci Conrad had been discussed]; 4 RT 550-552 [alternate juror #5] [prospective juror, who had obtained information about the case from television, newspaper articles and "gossip," recalled that a girl was missing, that her body was found in the Bakersfield/Wasco area, and that the defendant was arrested aboard a ship].

[16] Another prospective juror, who was later seated as a juror, did not (continued...)

another prospective juror represented merely that she "probably" could set aside what she had read and heard (3 RT 238); (3) another agreed that he could set aside what he had seen or read about the case, but added that he would be bothered by the fact appellant's sister had made statements concerning appellant (3 RT 314), presumably referring to her incriminating statements and/or preliminary hearing testimony; and (4) one of the prospective jurors in this group was excused due to his extensive exposure to pre-trial publicity (3 RT 476, 482). In addition, at least four of the prospective jurors in this group recalled inflammatory and/or inaccurate information. (3 RT 255; 4 RT 692; 7 RT 1017, 1077; 1 2nd Aug. CT 736; 4 2nd Aug. CT 1734; 6 2nd Aug. CT 2310, 2455.)

Although a gag order had been imposed, there was extensive coverage which undoubtedly made an impression on the great majority of prospective jurors, many of whom had detailed recollections of the case. The fact that the gag order might have reduced the amount of media coverage (ignoring the fact that at least one enforcement official discussed the case in violation of the order (AOB 50)) does not undue the harm from the barrage of coverage before the order was imposed. (See *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1210-1212 [in holding that trial court erred in denying the defendant's venue motion, Ninth Circuit focused almost exclusively on the nature and extent of the pre-trial publicity, rejecting the trial court's position that whether an impartial jury could be

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[16](...continued)
represent directly that could disregard what she had read or heard; she did, however, state that she was not of the opinion that appellant was probably guilty. (3 RT 322.) Another prospective juror made no such representation, but agreed that she would follow the presumption of innocence. (3 RT 401.)

impaneled would be determined through the voir dire process].)

Appellant was "entitled to a trial free of the 'unacceptable risk . . . of impermissible factors coming into play.'" (*Powell v. Superior Court* (1991) 232 Cal.App.3d 785, 202, quoting *Estelle v. Williams* (1976) 425 U.S. 501, 505.) Because almost all of the prospective jurors had been exposed to pre-trial publicity, much of which was inflammatory and/or inaccurate, appellant was denied such a trial.

B. Because It Would Have Been Futile to Renew the Venue Motion, This Argument Is Cognizable On Appeal

Although respondent asserts that appellant has waived this argument, respondent has failed to address appellant's explanation that it would have been futile to renew the venue motion, given the trial court's clear intention to keep the trial in King's County. (AOB 45, fn. 23, citing *People v. Hill* (1998) 17 Cal.4th 800, 820.) As appellant explained, during a hearing on the gag order, the trial court expressed its skepticism that a change of venue would constitute a less burdensome alternative to a gag order. Moreover, the trial court expressed concern that a change of venue would place an undue burden upon the supposed right of victims to have access to the area in which the matter is being tried. (A RT (June 23, 1995, proceedings) 21.) As appellant stated in his opening brief (AOB 45, fn. 23), he is unaware of any such right (compare Cal. Const., art. I, § 28 [creating a "bill of rights for victims of crime"]), and, at any rate, consideration of such "right" has no place in the context of venue analysis, where the factors to be used in guiding the trial court's rulings are well established. (See, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 45.)

It is immaterial that defense counsel failed to exhaust all of the peremptory challenges available to him, or to express his dissatisfaction

with the jury. (Cf. *People v. Hart* (1992) 20 Cal.4th 546, 600.) As appellant explained in the preceding section, even if defense counsel had exercised all of his peremptory challenges, there would have been too few untainted prospective jurors to assemble an impartial jury. Consequently, it would have been futile to exhaust his peremptory challenges. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 820 [appellate issue not waived for failure to object if objection would be futile]; cf. *People v. Hart*, *supra*, 20 Cal.4th at p. 600.)

For these reasons and those stated in the opening brief, the trial court's failure to change venue denied appellant his constitutional rights to due process, equal protection, a fair trial and impartial jury, and reliable determination of penalty. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16.) Thus, reversal of the guilt verdicts, special circumstance finding, and penalty verdict is mandated in this case.

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II

THE TRIAL COURT ERRED IN PARTIALLY DENYING APPELLANT'S MOTION TO SUPPRESS HIS STATEMENTS, WHICH WERE OBTAINED IN VIOLATION OF *MIRANDA* AND WERE INVOLUNTARY

A. Introduction

In his opening brief, appellant argued that the trial court erred in partially denying his motion to suppress statements he made to law enforcement officials during the coercive four-part custodial interrogation because all of his statements were both involuntary and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436. (AOB 60-104.)

Respondent fails to address appellant's arguments as to why the first two sections of the interrogation were involuntary (AOB 81-84, 89-92), but otherwise argues that substantial evidence supports the trial court's factual findings and ruling that appellant's initial statements were voluntarily obtained. (RB 73-74.) Respondent's position is incorrect.

B. The Trial Court Erred In Ruling That Any Of Appellant's Statements Were Admissible; All Of The Statements Were Obtained In Violation Of *Miranda* And Also Were Involuntary

1. First Section Of The Interrogation

As the trial court recognized, the interrogation "got off to an improper start" because the officers failed to advise appellant of his *Miranda* rights before beginning to question him. (E RT (Mar. 13, 1996, proceedings) 3.) Nevertheless, the trial court ruled, the initial section of the interrogation was admissible because of the non-incriminating nature of appellant's statements and the fact that he was subsequently given a

Miranda warning. (E RT (Mar. 13, 1996, proceedings) 3.)[17] However, as appellant has argued, the trial court erred in concluding that his initial, un-Mirandized statements were voluntary. (AOB 81-84.)

In answering appellant's claim that his un-Mirandized statements in the first section of the interrogation were involuntary, respondent simply asserts that there was no need for a *Miranda* warning. Respondent mistakenly argues that there was no interrogation because appellant was asked no questions likely to elicit an incriminating response and he made no incriminating statements. (RB 74, citing *People v. Cunningham* (2001) 25 Cal.4th 926, 993 (which in turn quotes from *Rhode Island v. Innis* (1980) 446 U.S. 291, 301).) But this is not the test for when a *Miranda* warning is required. As the United States Supreme Court made clear in *Innis*, the *Miranda* safeguards come into play whenever the police engage in any express questioning, words or actions that "are reasonably likely to elicit an incriminating response from the suspect," and that an "incriminating response" is any response - whether inculpatory or exculpatory - that the prosecution may seek to introduce at trial. (*Rhode Island v. Innis*, *supra*, 446 U.S. at p. 301.)[18] Significantly, the prosecution did introduce

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[17] This section of the interrogation is summarized at pages 66-67 of Appellant's Opening Brief.

[18] Specifically, the United States Supreme Court explained that

> [b]y "incriminating response" we refer to any response - whether inculpatory or exculpatory - that the *prosecution* may seek to introduce at trial. As the Court observed in *Miranda*: 'No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any

(continued...)

appellant's pre-advisement statements insofar as it cross-examined him about the initial section of the interrogation. (15 RT 2595-2596.)

Moreover, respondent fails to address appellant's contention that a proper review of the totality of the circumstances surrounding these statements demonstrates that they were involuntary. (AOB 81-84.) First, the interrogating officers failed to give a *Miranda* warning, and their failure to do so was likely purposeful. (D RT (Jan, 19, 1996, proceedings) 54-56.) Second, the circumstances under which the interrogation took place contributed to its coercive nature. Among other things, appellant was placed in restraints prior to the interrogation (C RT 308-310, 319, 321, 323, 327, 330-334; D RT (Jan. 19, 1996, proceedings) 20, 22-23, 56, 59, 95); the investigators interrogated appellant in a cramped room of a ship at sea (C RT 308-309, 320, 322; D RT (Jan. 19, 1996, proceedings) 21, 155); and, the interrogation did not begin until about 10:00 p.m., after appellant had worked a full shift and was already tired (C RT 308-309, 319, 321, 323, 327; D RT (Jan. 19, 1996, proceedings) 20, 23, 56, 59, 95, 111; D RT (Jan.

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[18](...continued)

> manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory". If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.' [Citation.]

(*Rhode Island* v. *Innis*, *supra*, 446 U.S. at p. 301, fn. 5; italics original.)

22, 1996, proceedings) 214, 239). Third, appellant was in evident distress from the very start of the interrogation; for instance, at the outset of the interrogation he explained that he was under stress, and shortly thereafter made the first of several requests for water. (Exh. 1A, pp. 1, 12; 3 Aug. CT 633, 644.) These factors, viewed together, were the "proximate cause" of appellant's statements during this section of the interrogation. (See *People v. Benson* (1990) 52 Cal.3d 754, 778-779.)

Under these circumstances, the trial court's findings as to the initial section of the interrogation were not supported by substantial evidence, and therefore this Court must find that the trial court erred in ruling that appellant's statements were voluntary. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 813-816 [noting that reviewing court will "'accept the trial court's factual findings, based on its resolution of factual disputes, its choices among conflicting inferences, and its evaluations of witness credibility, provided that these findings are supported by substantial evidence.' [Citations.]".)

2. Second Section Of The Interrogation

After Lieutenant Bingaman finally issued a *Miranda* admonition (Exh. 1A, p. 13; 3 Aug. CT 645), appellant responded, "They always tell you to get a lawyer. I don't know why" (Exh. 1A, p. 14; 3 Aug. CT 646). Special Agent Ackerman responded, "We can't advise you[,] okay," adding, "But uh, what we're concerned with is getting your help because we genuinely think you can help us." (*Ibid.*) Appellant then explained that he felt like a suspect. Ackerman assured him, "You know what we're trying to do is we're trying to help you," and then continued with the interrogation.

(*Ibid.*)[19] The trial court ruled that this section of the interrogation was admissible because appellant's response to the *Miranda* warning did not invoke his right to counsel and he implicitly waived his *Miranda* rights by engaging in further conversation. (E RT (Mar. 13, 1996, proceedings) 2-3.)

Citing *Davis v. United States* (1994) 512 U.S. 452, respondent argues that the trial court correctly found that appellant's comment did not unambiguously invoke the right to counsel and properly observed that Ackerman's response conveyed a willingness to respect appellant's wishes if he chose to ask for an attorney. (RB 74-75.) Respondent's analysis is flawed.

This Court has explained that "the words used by [appellant] 'must be construed in context.'" (*People v. Hayes* (1985) 38 Cal.3d 780, 784-785, quoting *In re Joe R.* (1980) 27 Cal.3d 496, 515.) As appellant argued in his opening brief (AOB 86), his statement constituted an inartful but unequivocal request for counsel. His comment conveyed a recognition that he needed counsel, even if he did not know precisely why.[20] Certainly, his comment was no more equivocal or ambiguous than those found in other cases to have effectively invoked the right to counsel. (See, e.g., *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 571-573 [defendant

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[19] This section of the interrogation is summarized at pages 67-72 of Appellant's Opening Brief.

[20] It is hardly surprising that appellant might not know exactly why he was requesting counsel. Aside from the paucity of the evidence against him, appellant had no prior criminal history and was therefore unfamiliar with the rights and procedures to which he was constitutionally entitled. (Cf. *People v. Coffman* (2004) 34 Cal.4th 1, 58 [Court considered defendant's criminal history in concluding that his statements were voluntary].)

invoked right to counsel by saying, "You know, I'm scared now. I think I should call an attorney."]; *State v. Bohn* (Mo. App. 1997) 950 S.W.2d 277, 281 [defendant invoked right to counsel by saying, "I feel like I ought to have a good counselor"].) Moreover, his statements must be viewed in light of the coercive circumstances surrounding this section of the interrogation. (AOB 89-92.) Under the circumstances, it would have been better police practice to clarify whether appellant was asking for counsel. (*Davis v. United States*, *supra*, 512 U.S. at pp. 459, 461.)

Contrary to respondent's suggestion (RB 75), the trial court erroneously concluded that Ackerman conveyed a willingness to respect appellant's wishes if he chose to ask for an attorney. Rather, Ackerman side-stepped appellant's statement, asserting that he could not advise appellant. (Exh. 1A, p. 14; 3 Aug. CT 646.) A plain reading of Ackerman's comments – that is, his suggestion that he believed appellant could help the investigators, and that they in turn were trying to help him – demonstrates that he intended to continue the conversation, not to abide by appellant's wishes.

Accordingly, the trial court's finding that appellant did not invoke his right to counsel, and its finding that his subsequent conversation constituted an implicit waiver of his *Miranda* rights, were not supported by substantial evidence. (See *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 813-816.) Therefore, appellant's statements should have been suppressed for all purposes. (See *People v. Neal* (2003) 31 Cal.4th 63, 79.) At the very least, the prosecution should have been barred from introducing the statements in its case in chief. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 479; *Oregon v. Elstad* (1985) 470 U.S. 298, 307.)

3. Third Section Of The Interrogation

a. Appellant Did Not Waive His Right To Counsel

The trial court properly found that appellant asserted his right to counsel when an interrogator asked whether something had happened earlier in his life that might have influenced his desire to possess adult magazines, and appellant responded by saying, "I can't say. I want a lawyer" (Exh. 1A, second pp. 18-19; 3 Aug. CT 706-707). (E RT (Mar. 13, 1996 proceedings) 3.)[21] The trial court, however, erroneously concluded that appellant reinitiated the conversation by commenting, "I don't know if you guys got any other suspects or what," implicitly waiving his right to counsel (*id.* at p. 4). (AOB 92-96.)

Respondent argues that the trial court correctly found that after invoking his right to counsel, appellant voluntarily decided to waive that right and continue the conversation. (RB 75-77.) Respondent's contention is incorrect.

As respondent notes, the trial court found several factors to be significant in ruling that appellant implicitly waived his right to counsel. (RB 77.) In particular, the court found as follows: the improper preliminary questioning had yielded no inculpatory information; appellant had been advised of his *Miranda* rights an hour and 45 minutes earlier, and he had waived his rights; up to that point, no one had badgered or verbally intimidated appellant, nor had anyone made any improper inducements; appellant knew he was a suspect in Maria's death; appellant was aware of his ability to end the interview; and, appellant reinitiated the conversation.

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[21] This section of the interrogation is summarized at pages 72-74 of Appellant's Opening Brief.

(E RT (Mar. 13, 1996, proceedings) 7-8.)

However, respondent ignores appellant's argument that the trial court's findings were erroneous because they ignored that: (1) whether appellant's statements were inculpatory or exculpatory was not only irrelevant (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 477), but the interrogation had elicited prejudicial, if not inculpatory, information, in that appellant had begun to discuss his adult magazines and videotapes and his early sexual experiences, and had said he felt like a suspect (Exh. 1A, pp. 4-12 and second pp. 1-19; 3 Aug. CT 636-644, 689-707); (2) Ackerman had made implicit promises of leniency, claiming that they only wanted to help appellant (Exh. 1A, p. 14; 3 Aug. CT 646) and did not want to give "grief or punishment problem [sic]" (Exh. 1A, second pp. 12-13; 3 Aug. CT 700-701); (3) Ackerman had already twice ignored appellant's invocations of his *Miranda* rights (Exh. 1A, p. 14 and second pp. 18-19; 3 Aug. CT 646, 706-707); and (4) appellant continued to be intimidated by the situation, as he was shaking, had difficulty breathing, said he needed a cigarette, expressed concern about his career, and asked for water. (AOB 93-94.)

Contrary to respondent's position (RB 76-78), it cannot be said that appellant re-initiated the interrogation within the meaning of *Edwards v. Arizona* (1981) 451 U.S. 477. In that case, the United States Supreme Court pointed out that "[i]t is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' [Citations.]" (*Id.* at p. 482.) Applying this principle to the facts set forth in the preceding paragraph, it

cannot be said that appellant's rhetorical musing, made in the midst of a stressful interrogation, represented a knowing and intelligent relinquishment of his right to counsel. Therefore, as in *Edwards*, the police officers should not have continued to interrogate him. (*Id.* at p. 485.)

Oregon v. Bradshaw (1983) 462 U.S. 1039, also cited by respondent (RB 76, 78), is distinguishable. In *Bradshaw*, the defendant asserted his right to counsel, then later re-initiated conversation with the police by asking, "Well, what is going to happen to me now?" The officer answered by saying, "You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say – because – since you have requested an attorney, you know, it has to be at your own free will." The defendant said he understood and further discussion ensued. (*Id.* at p. 1042 (plur. opn. of Rehnquist, J.).) Under those circumstances, the defendant's response demonstrated that he had not only waived the right to counsel, but that the waiver was knowing and voluntary. (*Id.* at p. 1046 (plur. opn. of Rehnquist, J.).) In the instant case, by contrast, there was no similarly explicit abandonment of appellant's right to counsel.

Because there is not substantial evidence to support the trial court's finding that appellant voluntarily waived his right to counsel, this Court must conclude that the trial court erred in so finding. (See *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 813-816.)

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b. Even If Appellant Waived His Right To Counsel, His Statements During The Third Section Of The Interrogation Were Involuntary

Respondent observes that the trial court found that appellant voluntarily reinitiated the interview. (RB 77-78.) However, for the reasons set forth in section B.3.a, *supra*, many of the factors which show appellant did not waive his right to counsel during the third section of the interrogation also establish that his statements were involuntary. (See also AOB 93-96.)

Respondent fails to address the investigators' coercive interrogation techniques. (AOB 95-96.) For instance, the investigators repeatedly disregarded appellant's requests for counsel and to remain silent. (Exh. 1A, p. 14 and second pp. 18-19, 29-31; 3 Aug. CT 646, 706-707, 717-719.) Accordingly, appellant could only have concluded that the interrogators would not recognize his right to silence or right to counsel until he confessed. (*People v. Neal*, *supra*, 31 Cal.4th at pp. 81-82.) Moreover, appellant could only have understood Ackerman's false claims that he was a profiler and his suggestions that he was like an "old time tracker[]" (Exh. 1A, second pp. 32-37; 3 Aug. CT 720-725) to mean Ackerman could detect that appellant was suppressing information, even if appellant himself was unaware he was doing so. (See, e.g., *People v. Hogan* (1982) 31 Cal.3d 815, 840-841; *People v. Engert* (1987) 193 Cal.App.3d 1518, 1524.)

Additional factors suggesting that appellant's statements were involuntary include the following: (1) it was very late at night at this point of the interrogation (cf. *People v. Jablonski*, *supra*, 37 Cal.4th at p. 815 [the interrogation was spread over a four-hour period from midmorning to midafternoon with a refreshment break and a lunch break]); and, (2)

appellant's lack of criminal history (cf. *People v. Coffman*, *supra*, 34 Cal.4th at p. 58 [Court considered defendant's criminal history in concluding that his statements were voluntary]). (AOB 95-96.)

These factors were the "proximate cause" of appellant's statements during this section of the interrogation. (See *People v. Benson*, *supra*, 52 Cal.3d at pp. 778-779.) Accordingly, the trial court's finding that appellant voluntarily reinitiated the conversation is not supported by substantial evidence (see *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 813-816), and therefore this Court must conclude that appellant's statements were involuntary and should have been suppressed for all purposes.

4. Fourth Section Of The Interrogation

With respect to the fourth section of the interrogation, the trial court properly found that appellant's statements were obtained in violation of *Miranda*, but erred in finding that they were voluntary and admissible for the purpose of impeachment. (E RT (Mar. 13, 1996, proceedings) 9-18.) As appellant has argued (AOB 96-100), his statements were involuntary and should have been excluded for all purposes.

Respondent correctly notes that the trial court ruled that appellant's "statements after line 2 of the second Page 44 of Exhibit 1(a) through page 46 line 4 were obtained in violation of his *Miranda* rights and are ordered suppressed from the case-in-chief" (E RT (Mar. 13, 1996, proceedings) 10.) (RB 78.) Contrary to respondent's reading of the record (RB 78), however, the trial court did not suppress appellant's subsequent statements for all purposes. Rather, the trial court ruled that appellant's subsequent statements were violative of appellant's *Miranda* rights, and therefore inadmissible in the prosecution's case-in-chief, until the point that his statements were rendered involuntary, i.e., page 44 of Exhibit 1(b). (E RT

(Mar. 13, 1996, proceedings) 9-18.)

For the reasons set forth in the opening brief, the trial court's finding that appellant's statements were voluntary is not supported by substantial evidence (see *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 813-816), and therefore this Court must conclude that appellant's statements were involuntary and should have been suppressed for all purposes.[22]

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[22] In his opening brief, appellant argued that the trial court's error in finding the statements voluntary was prejudicial because, among other things, that ruling constituted the basis for its admission of the testimony of prosecution witness Mychael Jackson. (AOB 104.) Respondent argues the trial court correctly ruled that the involuntary portion of appellant's interrogation did not require suppression of Jackson's testimony. (RB 78-79.) Appellant addresses respondent's argument in Argument XVI. (Supp. AOB 1-23; *infra*, at pp. 95-104.)

III

ARGUMENTS RELATING TO ADMISSION OF EVIDENCE UNDER EVIDENCE CODE SECTIONS 1101 AND 1108

A. Introduction

In his opening brief, appellant argued that the trial court erred in admitting the following evidence: (1) the testimony of appellant's sister, Donna Holmes, that appellant had engaged in incestuous conduct with her on a continuing basis from the time he was five years old until he was a teenager; (2) Donna's testimony that, during a 1991 confrontation about their incestuous conduct, appellant apologized and stated that he had never married because he feared he would molest his own children; (3) a list of 29 adult-oriented magazines recovered from a storage unit rented by appellant; (4) the testimony of a prosecution expert, Bruce Ackerman, regarding the nature of the magazines; and, (5) evidence that appellant rented nine adult videotapes on March 27, 1995. (AOB 105-178.)

Respondent fails to address several critical aspects of appellant's argument, which are adequately raised in the opening brief and therefore not addressed further in the instant pleading. In particular, respondent ignores the following: (1) appellant's contention that he was presumptively incapable of committing criminal conduct before the age of 14 (Pen. Code, § 26), and therefore any incestuous conduct committed through the age of 13 did not constitute a "prior sexual offense" within the meaning of Evidence Code section 1108 (AOB 120-121); (2) that the trial court's admission of the incest-related evidence constituted an abuse of discretion in part because its analysis of the first two factors set forth in *People v.*

Falsetta (1999) 21 Cal.4th 903 was flawed (AOB 124-125);[23] and, (3) that the trial court's admission of the incest-related evidence should be analyzed under Evidence Code section 1101 (rather than Evidence Code section 1108) and, viewed in that light, constituted an abuse of discretion (AOB 130-136). Moreover, contrary to respondent's position, none of the evidence described above was "relevant to show appellant's motive, intent and propensity to commit sex crimes." (RB 79.) Because of the trial court's error, Evidence Code sections 1101 and 1108 functioned in the manner of a "Trojan Horse," a means by which the prosecutor was able to introduce into evidence a wide array of irrelevant, inflammatory, and inherently prejudicial evidence.

B. The Trial Court's Admission of Evidence Regarding Appellant's Incestuous Conduct With His Sister Was Error

1. The Evidence Was Inadmissible Under Evidence Code Section 1108

The trial court initially admitted the evidence of appellant's incest with his sister under Evidence Code section 1108. (10 RT 1439-1441.) However, the trial court instructed the jury that the evidence could be considered only for the limited purpose of proving intent or motive (12 CT 3447-3448; 15 RT 2672-2675; 16 RT 2706-2707), an instruction which is consistent with Evidence Code section 1101, not section 1108. The discrepancy between the trial court's stated ruling and its instructions

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[23] Specifically, the *Falsetta* factors are: (1) the burden on the defense in having to defend against the uncharged offenses, (2) judicial efficiency, and (3) whether admission of the defendant's uncharged offenses results in undue prejudice under Evidence Code section 352. (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915-916.)

suggests that at some point the trial court recognized that the evidence was inadmissible under Evidence Code section 1108. In any event, the trial court's initial ruling was erroneous because (1) neither the incest evidence nor the kidnaping charge was a "sexual offense" within the meaning of Evidence Code section 1108, and (2) the incest evidence should have been excluded under the factors set forth in *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915-916. (See AOB 116-130.)

a. Evidence Code Section 1108 Was Inapplicable In This Case

In his opening brief, appellant argued that the trial court erred in admitting evidence of appellant's incestuous conduct with his sister because neither the incest evidence nor the charged offense (i.e., Pen. Code, § 207, subd. (b)) was a "sexual offense" within the meaning of Evidence Code section 1108. (AOB 120-123.)

Contrary to respondent's position (RB 86), appellant has not waived this argument. During the hearing on the motions in limine, defense counsel argued that at least some of appellant's conduct with his sister did not did not constitute a "prior sexual offense" because he was incapable of committing criminal conduct due to his young age. (RT of Dec. 23, 1996, proceedings, p. 25.) Moreover, the record demonstrates that the trial court recognized that the applicability of Evidence Code section 1108 generally was at issue. (F RT (Jan. 16, 1997, proceedings) 5; 10 RT 1438-1439.) Consequently, this argument is cognizable even if defense counsel's objection was somehow inadequate. (See *People v. Scott* (1978) 21 Cal.3d 284, 290 [even if it is inadequately phrased, an objection will be deemed preserved if the record shows that the court understood the issue presented]; *People v. Bob* (1946) 29 Cal.2d 321, 326-327 [same].)

To the extent appellant failed to raise this argument below, it is nevertheless cognizable on appeal. A defendant's failure to object does not preclude assertion of error with respect to the admission of inadmissible matter in violation of his right to due process. (See *People v. Matteson* (1964) 61 Cal.2d 466, 469; *People v. Underwood* (1964) 61 Cal.2d 113, 120; 3 Witkin, Cal. Evid. (4th ed. 2000) Presentation at Trial, § 397, pp. 487-488.) As appellant has demonstrated (AOB 160-165), admission of the incest evidence violated numerous state and federal constitutional rights, including his right to due process.

Moreover, an appellate court has the discretion to consider an issue that has not been preserved for review by a party. (*People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6; see also 6 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) Reversible Error, § 36, p. 497.) That discretion should be exercised here. This Court has pointed out that the Legislature's principal justification for adopting Evidence Code section 1108 was that sex crimes are usually committed without third party witnesses or substantial corroborating evidence, and the ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. (*People v. Falsetta, supra*, 21 Cal.4th at p. 915.) In the instant case, however, there was no evidence that a sexual offense was committed against Maria, in secret or otherwise, and there was no "he said/she said" credibility determination for the jury to make with respect to the charged offenses. Accordingly, it was unfair to apply Evidence Code section 1108.

Respondent is also mistaken on the merits. First, as noted above, respondent fails to address the merits of appellant's contention that he was presumptively incapable of committing criminal conduct before the age of

14 (Pen. Code, § 26), and therefore any incestuous conduct committed through the age of 13 did not constitute a "prior sexual offense" within the meaning of Evidence Code section 1108. (AOB 120-121.) Although the presumption may be rebutted by "clear proof that at the time of committing the act charged against [the child], [he or she] knew its wrongfulness" (§ 26), the prosecution failed to rebut that presumption. The prosecutor argued that "[t]here's indication that there was [sic] threats made about reporting the incidents which would indicate knowing that his conduct was wrong" (RT of Dec. 23, 1996, proceedings, p. 27), but there was no such evidence before the trial court at the time it ruled that the incest evidence was admissible. During the preliminary hearing, Donna had testified that appellant had molested her, but did not testify to any fact showing that, at the time of the incestuous conduct, he understood it to be "wrongful." In particular, she did not testify at the preliminary hearing that he had ever threatened her. (B RT 47-49, 58-61.)[24]

Second, appellant asserts that, as a matter of law, kidnaping for the purpose of committing a violation of section 288 (§ 207, subd. (b)) is not a

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[24] At trial, the prosecution presented little, if any, evidence showing that appellant knew the wrongfulness of his conduct. Donna testified that when appellant was about five years old, he fondled her and said they were not supposed to tell their parents or they would get into trouble. (11 RT 1805-1805.) She also testified that, years later, she threatened to tell their parents about the incestuous conduct, and appellant said he would kill her if she did (11 RT 1824-1825); based on her testimony, appellant could have been anywhere from about 13 years old to about 17 years old when he reportedly made that statement (11 RT 1803, 1812, 1820). Even assuming that the incident occurred before appellant was 14 years old, his statement did not demonstrate that he knew his conduct was wrongful. For instance, he may have been mimicking sexual abuse he himself had experienced. (See 14 RT 2500-2501 [appellant revealed to Donna that he had been molested by their uncle for a period of ten years].)

"sexual offense" within the meaning of Evidence Code section 1108. Evidence Code section 1108, subdivision (d)(1), defines "sexual offense" in pertinent part "as a crime under the law of a state or the United States involving either conduct proscribed by a series of enumerated Penal Code sections or nonconsensual sexual conduct," or an attempt or conspiracy to engage in such conduct. (*People v. Walker* (2006) 139 Cal.App.4th 782, 797.)[25] The statute defines "sexual offense" by the defendant's conduct, which must be sexual in nature, not his purpose or intent. The action proscribed by section 207(b) – kidnaping – does not involve sexual conduct.

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[25] Specifically, Evidence Code section 1108(d)(1) provides that: "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.

The elements of section 207(b) include a *purpose* to commit sexual misconduct, but not sexual *misconduct* itself. As such, section 207(b) does not fall within the purview of Evidence Code section 1108.

As appellant previously argued (AOB 122), this Court should reject the reasoning of *People v. Pierce* (2002) 104 Cal.App.4th 893, 898-899, which held that kidnaping to commit rape was a form of attempted rape for purposes of Evidence Code section 1108 and upon which respondent relies to assert that kidnaping for the purpose of committing an act defined in section 288 is necessarily an attempt to commit an act defined in section 288, and is therefore a "sexual offense." (RB 87.) *Pierce* ignores that the Legislature defined "sexual offense" by the defendant's conduct rather than by his purpose. Moreover, this Court already has recognized that kidnaping as proscribed in section 207, subdivision (b) is a separate and distinct offense from an attempted lewd and lascivious act with a child under the age of 14 as proscribed by sections 644 and 288. (*People v. Martinez* (1995) 11 Cal.4th 434, 451, fn. 17 [§ 207, subd. (b), § 288, and §§ 664/288 define three different offenses].) Thus, contrary to respondent's position, such a kidnaping is not the equivalent of an attempted lewd and lascivious act.

Extension of Evidence Code section 1108 to non-enumerated offenses and offenses not involving sexual conduct would disregard the Legislature's intent as expressed in the plain language of that provision. (See *People v. Walker*, *supra*, 139 Cal.App.4th at pp. 801-802 [holding that the trial court erred in allowing evidence of prior sexual offenses because murder was not one of the sexual offenses enumerated in Evidence Code section 1108].) Indeed, in rejecting a challenge to the constitutionality of Evidence Code section 1108, this Court

> emphasized the limited scope of section 1108's authorization for the use of propensity evidence in sexual offense cases: 'Had section 1108 allowed unrestricted admission of defendant's other "bad acts," character, or reputation, his due process argument would be stronger. But 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*. No far-ranging attacks on the defendant's character can occur under section 1108.

(*Id.* at p. 801, quoting *People v. Falsetta, supra*, 21 Cal.4th at p. 916.)

Because Evidence Code section 1108's provision for use of propensity evidence departs from a general rule of "long-standing application" (*People v. Falsetta, supra*, 21 Cal.4th at p. 913), it must be strictly construed. (*Id.* at pp. 916-917 [describing the limits of the trial court's discretion, including the requirement that it engage in a "careful weighing process under [Evidence Code] section 352," in determining whether evidence is admissible pursuant to Evidence Code section 1108].) Had the Legislature considered Section 207, subdivision (b), to be a "sexual offense" within the meaning of Evidence Code section 1108, it could have included it in that provision. It did not. And had the prosecution believed there was sufficient evidence to warrant prosecution for the commission or attempted commission of a violation of section 288, and had it believed that one of those charges was appropriate, it could have prosecuted appellant for one of those crimes. It did not.

In essence, the trial court's ruling allowed the prosecution to introduce evidence regarding appellant's incestuous conduct (including testimony relating to appellant's 1991 apology to his sister) even though neither the prior conduct nor the charged offense qualified as a sexual offense. Moreover, there was no evidence to establish appellant's intent other than the evidence that was introduced under Evidence Code sections

1101 and 1108 and challenged by the defense. That is, the trial court essentially ruled that the charged offense was a "sexual offense" based on the incest and other sex-related evidence, and admitted that evidence on the ground that the charged offense was a "sexual offense." This circular reasoning improperly permitted the prosecution to circumvent the plain requirements of Evidence Code section 1108. Therefore, this Court should conclude that the trial court erred in concluding that, because appellant was being tried for kidnaping a child for the purpose of committing a violation of section 288, the charge constituted a crime that "involv[ed]" conduct prohibited by section 288 and therefore qualified as a sexual offense under Evidence Code section 1108 (10 RT 1439). (See, e.g., *Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [as a matter of statutory construction, courts must "look first to the language of the statute, giving effect to its plain meaning."].)

Even assuming, arguendo, that evidence concerning the circumstances surrounding an offense may be relevant to determining whether it qualifies as a "sexual offense" (see *People v. Pierce*, *supra*, 104 Cal.App.4th at p. 898), such evidence was absent in this case. In *Pierce*, the Court of Appeal held that evidence that a crime had been committed to derive sexual pleasure or gratification from the infliction of death, bodily injury or physical pain on another person was relevant to the determination whether the defendant was accused of a sexual offense within the meaning of Evidence Code section 1108, subdivision (d)(1)(E). (*Ibid.*) In so holding, the Court noted that the defendant grabbed the victim, twisted her hand behind her back and held his hand over her mouth. He then pulled her into some bushes located in a dark area. At that point, a witness intervened and Pierce fled. (*Id.* at p. 896.) He later admitted that the assault was

motivated by a sexual impulse. (*Ibid.*) As such, the assault involved conduct that was clearly sexual in nature – i.e., a direct but interrupted (and therefore ineffectual) act done towards the commission of a rape – coupled with a specific intent to commit that crime. Moreover, there was evidence (namely, Pierce's admission) other than the prior sexual offense to establish his intent. (*Ibid.*)[26]

In the instant case, however, there was virtually no physical evidence that appellant engaged in, attempted to engage in, or even intended to engage in, any lewd or lascivious act with Maria. Her body was found fully clothed except for a sock and shoe missing from one foot. (10 RT 1587-1588; 13 RT 2130, 2152-2153.) Dr. Bolduc, the forensic pathologist who conducted the post-mortem examination, found no evidence that she was molested. (13 RT 2140-2144, 2153.) In this respect, this case is similar to *People v. Walker*, *supra*, 139 Cal.App.4th at pp. 799-802, in which the Court of Appeal distinguished *Pierce* by noting that, other than the challenged propensity evidence itself, there was no evidence that the murder was motivated by Walker's desire for sexual gratification.

People v. Rupp (1953) 41 Cal.2d 371 and *People v. Holt* (1997) 15 Cal.4th 619, upon which respondent also relies to argue that kidnaping for the purpose of committing an act defined in section 288 is necessarily an attempt to commit an act defined in section 288 (RB 86-87), are similarly inapposite. Neither *Rupp* nor *Holt* involved the application of Evidence Code section 1108. Moreover, *Rupp* and *Holt* are distinguishable in that the

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[26] However, as the Court of Appeal noted in *Walker*, "Yet the [*Pierce*] court did not conclude Pierce's admission the crime was 'motivated by a sexual impulse,' by itself, was sufficient to convert an otherwise nonsexual crime (for example, attempted kidnapping) into a 'sexual offense.'" (*People v. Walker*, *supra*, 139 Cal.App.4th at p. 800.)

elements of the crimes at issue in those cases included sexual misconduct and the evidence established that the defendant committed sexual assaults. (*People v. Rupp*, *supra*, 41 Cal.2d at p. 382 [holding that the defendant was properly convicted of murder arising out of an assault with the intent to commit rape where the evidence in the record reasonably showed the commission of no crime other than a killing in an attempt to perpetrate rape]; *People v. Holt*, *supra*, 15 Cal.4th at pp. 641, 674 [the trial court did not err in failing to instruct the jury sua sponte on attempted rape or assault with intent to commit rape, as lesser included offenses of rape by means of force or fear, where the defendant admitted to a completed sexual assault on the victim, not to an unsuccessful attempt to rape and sodomize her].) To the extent that an assault to commit rape (defined in Penal Code section 220) is a form of attempted rape (defined by sections 664 and 261), it is because the assault element of section 220 is so uniquely tantamount to an attempt to commit the crime of rape. (See *People v. Holt*, *supra*, 15 Cal.4th at p. 674; see also *People v. Griffin* (2004) 33 Cal.4th 1015, 1027-1028 [holding that in a forcible rape prosecution, the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, not whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker].) By contrast, kidnaping in and of itself does not constitute an attempt to violate section 288.

For the reasons set forth above, this Court must conclude that neither appellant's incestuous conduct nor the charged offense constituted a "sexual offense" within the meaning of Evidence Code section 1108, and that that provision was therefore inapplicable in this case.

b. The Trial Court Abused Its Discretion In Admitting The Evidence Under Evidence Code Section 1108

In his opening brief, appellant argued that the trial court's admission of the incest evidence under Evidence Code section 1108 constituted an abuse of discretion under the factors enumerated in *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915-916. (AOB 123-130.)[27] With respect to the trial court's application of Evidence Code section 352, appellant argued that it erred in finding that the probative value of that evidence outweighed its prejudicial effect because: (1) Evidence Code section 1108 was inapplicable because none of the charged offenses involved "conduct" proscribed by Penal Code section 288 (see Section 3.B.a, *supra*); (2) the nature of the evidence was extremely inflammatory; (3) evidence of appellant's incestuous relationship with his sister had absolutely no probative value in the instant case; (4) appellant's conduct with his sister was extremely remote in time; (5) absent the evidence of that conduct, the jury would have been far less likely to find appellant guilty of the charged offenses; and, (6) there were less prejudicial alternatives available to the trial court. (AOB 125-130.)

According to respondent, however, the record demonstrates that the trial court carefully balanced the probative value of the propensity evidence against its prejudicial effect, and therefore properly admitted that evidence. (RB 87-91.) Respondent's analysis, which addresses only some of the points raised by appellant with respect to the trial court's application of Evidence Code section 352, is flawed.

First, contrary to respondent's contention (RB 89-91), Donna's

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[27] Those factors are set forth on page 33, footnote 23, *supra*.

testimony was both inflammatory and prejudicial. Donna testified at length that, over a period of about fourteen years, appellant engaged in a number of sexual acts with her, including: fondling (11 RT 1804-1806, 1808-1809, 1812, 1817-1819); exposing himself (11 RT 1808); urging her to engage in vaginal intercourse, anal sex, and oral sex (11 RT 1809-1813, 1817-1819, 1827); and trying unsuccessfully to penetrate her (11 RT 1811-1812, 1822-1823). Such incest evidence is inherently inflammatory. (See, e.g., *Benton v. State* (Ga. 1995) 461 S.E.2d 202, 205 (conc. opn. of Sears, J.).)

Respondent's suggestion that Donna's testimony was "straightforward and to the point" (RB 90) does not minimize its damaging impact. If anything, the bluntness and clarity of her testimony exacerbated its prejudicial effect. As a result, her testimony was unduly prejudicial, in that it "uniquely tend[ed] to evoke an emotional bias against defendant as an individual and [would have] very little effect on the issues." (*People* v. *Yu* (1983) 143 Cal.App.3d 358, 377; see also *People* v. *Garceau* (1993) 6 Cal.4th 140, 178.) Moreover, respondent's pure, unsupported speculation that "Donna's testimony did not provoke a strong emotional response" (RB 90) ignores the inherently inflammatory nature of that testimony.

Respondent's distinction of *People v. Harris* (1998) 60 Cal.App.4th 727, cited by appellant (AOB 126-127), is flawed. Respondent mistakenly suggests that Donna's testimony was not unduly prejudicial given the charges that appellant kidnaped a young girl for the purpose of molesting her and then murdered her. (RB 90.) By this logic, in any case involving a murder charge, no prior offense short of murder would ever be deemed inflammatory enough to warrant exclusion. At the same time, respondent implicitly relies on the prejudicial nature of sex-related evidence, referring to appellant's sexual interests as "unusual" and his behavior as "abnormal"

and "uncommon." (RB 90-91.)[28]

Second, contrary to respondent's assertion (RB 88-89), the incest evidence was not relevant to show appellant's supposed motive for kidnaping Maria, that is, a sexual preoccupation with young girls. In particular, respondent's reliance upon *People v. Soto* (1998) 64 Cal.App.4th 966 is misplaced, and its analysis of that case flawed. (RB 88-89.) Soto was convicted of molesting a 12-year-old niece, Angelique. The Court of Appeal upheld the admission of evidence, pursuant to Evidence Code section 1108, that Soto had molested his sister and another niece a number of years earlier. (*Id.* at p. 991.) Although respondent suggests otherwise (RB 88-89), the appellate court did not conclude that the prior molestations involved conduct dissimilar to the charged offense. In fact, the Court expressly noted the similarity between the prior sexual molestations of Soto's sister and niece and that of Angelique. (*People v. Soto*, *supra*, 64 Cal.App.4th at p. 991.) In addition, the victims were within the same age range as Angelique when the prior acts occurred. (*Ibid.*) Under those circumstances, the Court determined that "the propensity evidence was extremely probative of appellant's sexual misconduct when left alone with young female relatives, and is exactly the type of evidence contemplated by the enactment of section 1108 and the parallel federal rules." (*Id.* at pp. 991-992.)

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[28] To illustrate appellant's "abnormal" behavior, respondent maintains that appellant collected magazines that depicted nude females who had been made up to look like young girls. (RB 90-91.) However, none of appellant's magazines was devoted to such depictions. (12 RT 2096-2097.) More important, none of his magazines depicted, or even purported to depict, prepubescent children; rather, the essential subject matter of the magazines was sexuality among *teenagers*. (12 RT 2074-2075, 2090-2091.)

In contrast, the nature of appellant's incestuous conduct was vastly different from the conduct underlying the charged offenses. Appellant was charged with kidnaping and murder, not with any substantive sexual crime. He was 35 years old at the time of the charged offenses, and the victim was an 8-year-old girl. (1 CT 168, 175; 10 RT 1506; 25 RT 3135-3136.) On the other hand, appellant was a very young child when the incest began; he was close in age to Donna, and almost all of the incestuous contact occurred when appellant was a minor. (11 RT 1804-1820.) Therefore, evidence of appellant's incestuous relationship with his sister had absolutely no probative value in the instant case. There was no evidence to show that appellant's childhood and adolescent conduct demonstrated that as an adult he possessed any sexual interest in young girls, let alone that he would kidnap a stranger to act upon such interest.

Moreover, appellant remained sexually interested in Donna even as she grew older and matured physically (11 RT 1809-1823), suggesting that he was drawn to Donna in particular, whatever her age. Meanwhile, the record is devoid of evidence of any sexual conduct with children other than Donna. There was no evidence that appellant had molested any other children with whom he had lived or had close ties, including his youngest sister (11 RT 1807, 1810; 25 RT 3135-3136), three children with whom he had shared a house (13 RT 2226-2227), and his nieces, one of whom was nine years old (25 RT 3146, 3152).

Third, contrary to respondent's suggestion (RB 88-89), the trial court did not properly conclude that the probative value of Donna's testimony outweighed the remoteness of the conduct. A substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. (*People v.*

Branch (2001) 91 Cal.App.4th 274, 285.) As appellant has noted (AOB 127), the dissimilar conduct at issue here had occurred roughly 16 to 30 years prior to the charged offenses. (1 CT 175; 25 RT 3145.)

Although courts have admitted acts that occurred as much as 30 years prior to the charged offenses (*People v. Branch*, *supra*, 91 Cal.App.4th at pp. 284-285; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395; *People v. Soto*, *supra*, 64 Cal.App.4th at p. 979), in such cases, the probative value of the evidence outweighed the remoteness because of the close similarity of the charged and uncharged offenses.[29] But that similarity is missing here. Because appellant's conduct with Donna was in no way akin to the charged offenses, it should have been excluded. (See *People v. Harris*, *supra*, 60 Cal.App.4th at pp. 730-733, 740-741.)[30] As such, the prior conduct was of no probative value in this case.

Finally, as appellant pointed out, the trial court initially admitted the evidence of appellant's incest with his sister under Evidence Code section 1108, yet instructed the jury that the evidence could be considered only for the limited purpose of proving intent or motive (16 RT 2672 [CALJIC No.

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[29] As noted above, the Court of Appeal in *Soto* concluded that the charged offense and the prior offenses were similar. (*People v. Soto*, *supra*, 64 Cal.App.4th at p. 991.)

[30] Significantly, appellant was never incarcerated during the interim between the incestuous conduct with Donna and the charged offense. (Cf. *People v. Pierce*, *supra*, 104 Cal.App.4th at p. 900 [Court of Appeal discounted significance of the remoteness of a 23-year-old prior offense where the defendant had been incarcerated for at least 12 years during the interim]; *People v. Soto*, *supra*, 64 Cal.App.4th at p. 973 [defendant had been in prison several years prior to the instant offense].) That is, it cannot be argued that appellant did not re-offend only because, due to incarceration, he lacked an opportunity to do so.

2.50]). (AOB 120.) Respondent sidesteps appellant's contention that the trial court must have recognized that the evidence was inadmissible under Evidence Code section 1108, and therefore gave an instruction intended for evidence introduced under Evidence Code section 1101. (AOB 120.) Instead, respondent merely argues that the trial court properly instructed the jury that evidence of other crimes may not be considered "to prove that defendant is [a] person of bad character or that he has a disposition to commit crimes." (RB 91, citing 16 RT 2672 [CALJIC No. 2.50].) However, the evidence was both inherently inflammatory and had been admitted under the relaxed evidentiary standards set forth in Evidence Code section 1108, which is explicitly intended to permit a jury to consider evidence of a prior sexual offense as disposition or propensity evidence. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 911; see also *People v. Mullens* (2004) 119 Cal.App.4th 648, 666 [acknowledging that evidence admitted under Evidence Code section 1108 carries an even greater risk of serious prejudice than evidence admitted under Evidence Code section 1101 because such evidence may be admitted "to prove 'predisposition' to commit sex crimes. [Citation.]"].) Had the trial court realized from the start that the evidence was inadmissible under Evidence Code section 1108, it likely would not have admitted it at all, because the evidence was also inadmissible under the stricter standard set forth in Evidence Code section 1101. Therefore, the jury should not have heard it at all. (See AOB 130-136.)

Under these circumstances, admission of the incest evidence necessitated undue consumption of time and created a substantial danger of undue prejudice, confusing the issues, and misleading the jury. (Evid. Code, § 352.)

C. The Trial Court Erred In Admitting Evidence That Appellant Told His Sister That He Had Never Married Because He Feared He Might Molest His Children

Appellant has argued that the trial court abused its discretion in admitting evidence, pursuant to Evidence Code section 1101, that he told Donna that the reason he had never married was out of fear he would molest his own children. (AOB 137-145.)[31] Therefore, appellant's statement was not relevant or admissible under Evidence Code section 1101, subdivision (b), as proof of his motive to kidnap Maria for the purpose of molesting her.

Simply asserting that appellant's statement was relevant (RB 91), respondent fails to address his arguments that: (1) his statement was not sufficiently similar to the charged offenses to justify its admission (see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 [admission of evidence of uncharged misconduct pursuant to Evid. Code, § 1101 requires that there be sufficient similarity between the uncharged misconduct and the charged offense]); and, (2) the statement was inadmissible to prove motive because there was no nexus between the statement and the charged offenses (cf. *People v. Demetrulias* (2006) 39 Cal.4th 1, 14-15 [evidence that the defendant had assaulted and robbed an elderly victim in his home was admissible to establish that his motive in killing another elderly man was to rob him, not to defend himself]). (AOB 138-141.)

Further, respondent is incorrect in suggesting that appellant's statement was properly admitted as an admission by a party opponent pursuant to Evidence Code 1220. (RB 91.) Appellant's statement did not constitute evidence of any prior conduct. Even if the statement was

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[31] Donna testified before the jury that appellant told her that one of the reasons he never got married was that he was afraid he *might* molest his own children. (12 RT 1827, 1830.)

suggestive of his sexual fears or desires, it manifested a fixation on incest, not sexual interest in minors. Therefore, while his statement was virtually certain to "render[] him an object of hatred, ridicule or social disapproval" (*Schoeps v. Carmichael* (9th Cir. 1949) 177 F.2d 391, 398), it in no way tended to establish that appellant was guilty of the charged offense.

D. The Trial Court Erroneously Admitted Evidence That Appellant Possessed Adult-Oriented Material To Prove His Motive And Intent To Commit A Lewd Or Lascivious Act Against A Child (§ 288, Subd. (a))

In his opening brief, appellant argued that the admission of evidence relating to the magazines and videotapes constituted reversible error because: (1) appellant's possession of the materials failed to meet the standard of admissibility established by *People v. Clark* (1992) 3 Cal.4th 41, and also lacked sufficient similarity to the charged offense to establish motive or intent under Evidence Code section 1101; (2) the prosecution improperly used the evidence to prove appellant committed the crimes against Maria Piceno based on propensity; and (3) the inflammatory effect of the evidence relating to the magazines and videotapes could only have biased the jurors against appellant. In addition, appellant argued, his First Amendment rights were violated when materials he was constitutionally entitled to possess were used against him (U.S. Const., Amend. I; *Dawson v. Delaware* (1992) 503 U.S. 159, 167). (AOB 145-161.)

As appellant has pointed out, the trial court cited *People v. Clark, supra*, 3 Cal.4th 41 in finding that evidence relating to the magazines was relevant to the issue of motive (12 RT 1874-1875), but failed to explain how that opinion applied to the facts of this case. (AOB 152.) Moreover, the trial court relied on *Clark* while ignoring the fact that this Court's conclusion that the challenged evidence was admissible was based on the

direct connection between that evidence (i.e., a picture of a "decapitated head orally copulating a severed penis") and the facts of the case (e.g., the defendant was charged with decapitating one of his victims and soliciting an act of oral copulation, among other things). (AOB 152.)

Appellant also pointed out that, in *Clark*, the defense objected to this evidence solely on grounds of relevance and Evidence Code section 352, but not Evidence Code section 1101 (*People v. Clark*, *supra*, 3 Cal.4th at pp. 127-129). (AOB 152, fn. 62.) Therefore, appellant argued, a lower threshold of similarity arguably was acceptable in that case. (*Ibid.*)

Respondent merely observes that the trial court found that the magazine photographs described by Ackerman and his testimony were relevant to the charged offenses and provided evidence of appellant's motive and intent, and that it weighed the probative value of this evidence against the potential for prejudice to appellant. (RB 92.) Respondent, however, makes no effort to address appellant's distinction of *Clark*, thus tacitly agreeing that it did not support the trial court's decision here.

Respondent's reliance upon *People v. Memro* (1995) 11 Cal.4th 786 is misplaced. (RB 92-93.) In *Memro*, this Court held that the trial court properly admitted photographs and magazines "contain[ing] sexually explicit stories, photographs and drawings of males ranging in age from prepubescent to young adult" as proof of the defendant's "intent to do a lewd and lascivious act with" the seven-year-old male victim. (*Id.* at p. 864.) Unlike *Memro*, however, the materials in appellant's possession did not include any depictions of children in Maria's age range, but rather were photographs of young women and thus offered no inference of motive or intent to molest an eight-year-old girl.

E. Conclusion

For the reasons stated in the opening brief and in the argument above, admission of evidence regarding appellant's incestuous conduct and his apology for that conduct, his statement as to why he had never married, and his possession and rental of adult materials, constituted prejudicial error under both state law and the federal Constitution. Accordingly, reversal of the guilt verdicts, the special circumstance finding and the death sentence is required.

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IV

CALJIC NOS. 2.50 AND 2.50.1 TOGETHER PERMITTED THE JURY TO FIND APPELLANT GUILTY OF FIRST DEGREE MURDER, KIDNAPING, AND KIDNAPING FOR THE PURPOSE OF VIOLATING PENAL CODE SECTION 288, AND TO FIND TRUE THE KIDNAP-MURDER SPECIAL CIRCUMSTANCE ALLEGATION, BY A MERE PREPONDERANCE OF THE EVIDENCE

In his opening brief, appellant argued that the trial court committed structural error by giving CALJIC Nos. 2.50 and 2.50.1 (12 CT 3447-3448, 3449; 16 RT 2706-2708), which lessened the burden of proof required to convict him. (AOB 179-189.)

Contrary to respondent's assertion (RB 93), appellant did not fail to preserve this argument for appeal by failing to object at trial. (See AOB 179-180, fn. 72.) Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Certainly, an error affecting the standard of proof affects the defendant's substantial rights. (See *In re Winship* (1970) 397 U.S. 358; *Sullivan v. Louisiana* (1993) 508 U.S. 275.)

Moreover, merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose

which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met.

Both of the cases cited by respondent support *appellant's* position. (RB 94, citing *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140 [defendant did not, by failing to object, waive his right to argue on appeal that CALJIC Nos. 2.50.1 and 2.50.01 violated his substantial right to have all elements of the offense proved beyond a reasonable doubt]; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978 [noting that a reviewing court may review a jury instruction which affects a defendant's substantial rights even if no objection was made in the lower court].)

Respondent is also incorrect in asserting that the trial court's instructions were proper. (RB 93-98.) First, respondent's attempt to distinguish the instant case from *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812 and *People v. Orellano* (2000) 79 Cal.App.4th 179, both of which found structural error in giving CALJIC Nos. 2.50.01 and 2.50.1 (see AOB 182-188), is deeply flawed. Respondent observes that the jury in this case was not given the pre-1999 version of CALJIC No. 2.50.01 found to be constitutionally defective in *People v. Falsetta* (1999) 21 Cal.4th 903, 924. (RB 97-98.) However, CALJIC No. 2.50 and CALJIC No. 2.50.01 are conceptually similar.[32] Each of these instructions advises the jury that: (1)

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[32] In appellant's case, CALJIC No. 2.50 read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] Such evidence, if believed, was not received

(continued...)

evidence has been introduced to show that the defendant committed crimes other than that for which he is on trial; (2) if the jury finds that the defendant committed a prior offense, it may infer a fact or facts establishing his guilt; and, (3) such evidence may be considered solely for a limited purpose. In addition, each of those instructions was given in conjunction with other instructions advising the jury that such evidence must be proved by a preponderance of the evidence. (12 CT 3449, 16 RT 2707 [CALJIC

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[32](...continued)

> and may not be considered by you to prove that the defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crime charged; [¶] A motive 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. [¶] You are not permitted to consider this evidence for any other purpose.

(12 CT 3447-3448, 16 RT 2706-2707 [CALJIC No. 2.50 (1994 rev.)].) The pre-1999 version of CALJIC No. 2.50.01 read in pertinent part:

> 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 the case. . . . 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 the same or similar type 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 or crimes of which he is accused. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 817.)

No. 2.50.1]; 12 CT 3450, 16 RT 2707-2708 [CALJIC No. 2.50.2].) Moreover, the instructions here, like the pre-1999 version of CALJIC No. 2.50.01, lacked one of the "'useful nuggets' of information" (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 923) incorporated into the 1999 version of CALJIC No. 2.50.01. (*Ibid.* [proposed instruction admonished jury not to convict defendant solely in reliance on the evidence that he committed prior sex offenses]; see also *People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1013; CALCRIM Nos. 375 and 1191.)[33] The instructions given in this case did not advise appellant's jury that if it found by a preponderance of the evidence that appellant had committed uncharged misconduct, that was not sufficient to prove beyond a reasonable doubt that he had committed the charged crime. (Cf. CALJIC No. 2.50.01 (2002 rev.).)[34] Therefore, the instructions given here resulted in structural error for essentially the same reasons as those discussed in *People v. Falsetta*, *supra*, 21 Cal.4th at p. 923, *Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 823-824, and *People v. Orellano*, *supra*, 79 Cal.App.4th at p. 184.

Contrary to respondent's suggestion (RB 98), it is insignificant that the jury in *Gibson* was not instructed with CALJIC No. 2.50, which informed the jury that evidence of other crimes could only be considered for the limited purposes of showing an intent or motive for the charged crimes (see 16 RT 2706-2707). As noted above, the version of CALJIC No.

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[33] As this Court has recognized, even the 1999 version of CALJIC No. 2.50.01 required improvement, and therefore it was revised again in 2002. (*People v. Reliford*, *supra*, 29 Cal.4th at p. 1016.)

[34] Respondent fails to address appellant's argument concerning the ways in which the jury likely applied the "preponderance of the evidence" standard rather than the constitutionally-required "beyond a reasonable doubt" standard. (See AOB 186.)

2.50.01 discussed in *Gibson* was found to be defective even though it made clear that the evidence at issue could only be considered for a limited purpose. (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 817 [jury was instructed that they could use evidence of prior sexual offense to infer that defendant had a disposition to commit, and thus that he did commit, charged crimes, but not "for any other purpose"].) Moreover, language regarding the limited purpose of other crimes evidence does not directly relate to the defects addressed in *Falsetta*, *Gibson* and *Orellano*, particularly the failure to advise the jury that if it found by a preponderance of the evidence that appellant had committed uncharged misconduct, that was not sufficient to prove beyond a reasonable doubt that he had committed the charged crime.[35] For the same reasons, it is immaterial that the jury in this case, unlike that in *Orellano*, was given CALJIC No. 2.01, contrary to respondent's suggestion (RB 98). (See AOB 183.)

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[35] Respondent's reliance upon *People v. Medina* (1995) 11 Cal.4th 694 and *People v. Carpenter* (1997) 15 Cal.4th 312 is misplaced because both of those cases involved an issue not raised in this case (i.e., a challenge to the standard of proof required for evidence of other crimes). (RB 94-96.) In *Medina*, the defendant argued that the trial court erred in instructing the jury that evidence of other crimes could be proven by a preponderance of the evidence, rather than beyond a reasonable doubt. (*People v. Medina*, *supra*, 11 Cal.4th at pp. 763-764.) Similarly, in *Carpenter*, the defendant argued that the trial court erred in instructing the jury that evidence of other crimes could be proven by a preponderance of the evidence, rather than by clear and convincing proof. (*People v. Carpenter*, *supra*, 15 Cal.4th at pp. 380-383.) Here, however, appellant argues that CALJIC Nos. 2.50 and 2.50.1 impermissibly lower the prosecution's burden of proof as to the *charged* offenses.

Accordingly, for the reasons set forth in the opening brief and in the preceding paragraphs, this Court must reverse appellant's convictions, the special circumstance finding, and the penalty verdict.

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V

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION OF KIDNAPING FOR THE PURPOSE OF COMMITTING AN ACT DEFINED IN PENAL CODE SECTION 288 (§ 207, Subd. (b)), AND USE OF THAT INVALID CONVICTION AS AN AGGRAVATING FACTOR TAINTED THE PENALTY VERDICT

Respondent claims that substantial evidence supports appellant's conviction of kidnaping for the purpose of committing a violation of section 288 was supported by substantial evidence. (RB 98-104.) However, appellant has adequately raised this argument in his opening brief, and, for the reasons set forth therein, asks this Court to reverse his conviction on count 2 and his death sentence. (AOB 190-196.)

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VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE MURDER

Appellant has argued that, by instructing the jury that they could convict him of felony murder in violation of Penal Code section 189 when he was charged only with malice murder in violation of Penal Code section 187, the trial court exceeded its jurisdiction and violated appellant's rights to due process, a jury determination on every element of the charged crime, adequate notice of the charges against him, and a fair and reliable capital guilt trial. (AOB 197-204.)

Respondent asserts that the contention is waived because appellant failed to object at trial, citing *People v. Valdez* (2004) 32 Cal.4th 73, 113. (RB 104.) Respondent is incorrect. Further, although respondent points out that this challenge has been rejected on appeal (RB 105), appellant argues that this Court's decisions on the issue were wrongly decided.

First, appellant's failure to object to the trial court's felony-murder instruction is of no moment. Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel (*People v. Williams* (1999) 21 Cal.4th 335, 340), and since no accusatory pleading charging appellant with felony murder had been filed, the court lacked subject matter jurisdiction to proceed with that charge (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368).[36]

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[36] In *People* v. *Toro* (1989) 47 Cal.3d 966, overruled on other grounds in *People* v. *Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3, this Court recognized a limited exception to this rule. *Toro* held that defense counsel could waive the jurisdictional bar in order to allow the defendant to be convicted of a lesser but not included offense. The exception was designed

(continued...)

Moreover, respondent's reliance upon *People v. Valdez*, *supra*, is misplaced because the defendant in that case argued that the trial court erroneously gave the jury a truncated version of CALJIC No. 8.81.17 (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 112-113), a very different claim from that raised by appellant. The argument raised in *Valdez* did not involve either (1) an allegation that the defendant was improperly prosecuted for an offense with which he had not been charged or (2) a challenge to the trial court's subject matter jurisdiction to try the defendant for such offense. (*Ibid.*) In fact, the defendant in that case also argued that the trial court erred in *failing* to instruct the jury on first-degree felony murder and second-degree murder. (*Id.* at pp. 114-119.)

According to respondent, and the cases on which respondent relies, malice murder and felony murder are not two different crimes but rather merely two theories of the same crime with different elements. (RB 104-106.) However, this position embodies a fundamental misunderstanding of how, for the purpose of constitutional adjudication, the courts determine if they are dealing with one crime or two. Comparison of the act committed by the defendant with the elements of a crime defined by statute is the way to determine if a crime has been committed and, if so, what crime that is. "A person commits a crime when his or her conduct violates the essential parts of the defined offense, which we refer to as its elements." (*Jones v.*

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[36](...continued)
for the defendant's benefit, to provide the jury the broadest range of options supported by the evidence and allow the defendant to be convicted of a less serious offense if that is what the evidence showed. The exception has no application here where the uncharged offenses were not lesser offenses but ones which, unlike the charged offense, could subject the defendant to a sentence of death.

United States (1999) 526 U.S. 227, 255 (dis. opn. of Kennedy, J.).)

Moreover, comparison of the elements of two statutory provisions is the traditional method used by the United States Supreme Court to determine if the crimes at issue are "different" or "the same." The question first arose as an issue of statutory construction in *Blockberger v. United States* (1932) 284 U.S. 299, when the appellant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections did describe different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockberger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment. (*United States v. Dixon* (1993) 509 U.S. 688, 696-697, and cases cited therein.) Justice Scalia, writing for the *Dixon* majority, rejected the dissent's argument that the "same offense" in a successive prosecution case had a different definition than the "same offense" in a successive punishment case, and stated that, "[I]t is embarrassing to assert that the single term 'same offence' (the words of the Fifth Amendment at issue here) has two different meanings – that what *is* the same offense is yet *not* the same offense." (*Id.* at p. 704, emphasis original.)

United States v. Dixon, *supra*, 509 U.S. 688, provides the controlling

definition of "same offense" for resolution of a double jeopardy claim. It should likewise provide the definition of "same offense" for resolution of the instant argument. Just as the meaning of "same offense" should not vary depending on which portion of the Double Jeopardy Clause is at issue, it should not vary depending on which provision of the Bill of Rights is at issue.

People v. Dillon (1983) 34 Cal.3d 441, the controlling interpretation of the felony murder rule at the time of appellant's trial, properly applied the *Blockberger-Dixon* test for "same offense" when it declared that "in this state the two kinds of murder are not the 'same' crimes." (*Id.* at p. 476, fn. 23.) Malice murder and felony murder are two crimes defined by separate statutes, for "each provision requires proof of an additional fact which the other does not." (See *Blockberger v. United States*, *supra*, 284 U.S. at p. 304.) Malice murder requires proof of malice (Pen. Code, § 187), and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony murder does not. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not.

Therefore, it is incongruous to say, as this Court did in *People v. Silva* (2001) 25 Cal.4th 345, that the language in *People v. Dillon*, *supra*, 34 Cal.3d 441, upon which appellant relies meant "only that the *elements* of the two kinds of murder differ; there is but a single statutory offense of murder." (*People v. Silva*, *supra*, 25 Cal.4th at p. 367, emphasis added.) If the *elements* of malice murder and felony murder are different, as *Silva* acknowledges they are, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

"Calling a particular kind of fact an 'element' carries certain legal consequences. [Citation.]" (*Richardson v. United States* (1999) 526 U.S. 813, 817.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The same consequence follows in a California criminal case; the right to a unanimous verdict arises from the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164) and is protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480, 488).

In addition, "elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. [Citations.]" (*Jones* v. *United States*, *supra*, 526 U.S. at p. 232.) In this case, where appellant was charged with one crime, but the jury was instructed that it could convict him of another, that rule was breached as well, violating appellant's rights to due process, a jury determination of each element of the charged crime, adequate notice of the charges, and a fair and reliable capital guilt trial.

People v. Seel (2004) 34 Cal.4th 535 and *Burris v. Superior Court* (2005) 34 Cal.4th 1012 offer further support for appellant's argument. In *Seel*, the defendant was convicted of attempted premeditated murder (Pen. Code, § 664, subd. (a) and § 187, subd. (a)). The Court of Appeal reversed the finding of premeditation and deliberation due to insufficient evidence and remanded for retrial on that allegation. In holding that double jeopardy barred retrial on the premeditation allegation under *Apprendi v. New Jersey* (2000) 530 U.S. 466, this Court endorsed the view that "'[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come

to a core criminal offense "element."''" (*People v. Seel*, *supra*, 34 Cal.4th at p. 549, citing *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 493.) Intent, of course, is an element which makes malice murder a different crime from felony murder.

In *Burris v. Superior Court*, *supra*, 34 Cal.4th 1012, this Court held that under Penal Code section 1387, the dismissal of a misdemeanor prosecution does not does not bar a subsequent felony prosecution based on the same criminal act when new evidence comes to light that suggests a crime originally charged as a misdemeanor is, in fact, graver and should be charged as a felony. (*Id.* at p. 1020.) In reaching this conclusion, the Court compared the elements of the offenses at issue. "When two crimes have the same elements, they are the same offense for purposes of Penal Code section 1387." (*Id.* at p. 1016, fn. 3, citing *Dunn v. Superior Court* (1984) 159 Cal.App.3d 1110, 1118 [applying "same elements" test to determine whether new charge is same offense as previously dismissed one for purposes of section 1387].) The negative implication is obvious: when two crimes have different elements, they are not the same offense.

Seel and *Burris* thus reaffirm the principle that because premeditated (malice) murder and felony murder have different elements in California, they are different crimes, not merely two theories of the same crime. The jury should not have been permitted to convict appellant of murder without being required to determine unanimously that the crime was either a premeditated (malice) murder under section 187 or felony murder under section 189. The conviction and judgment therefore must be reversed.

Accordingly, appellant's conviction for first degree murder must be reversed.

VII

THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

Appellant has argued that several guilt phase instructions diluted the meaning of the reasonable doubt standard and impermissibly lightened the prosecution's burden of proof. (AOB 205-220.) Appellant has adequately raised this argument in the opening brief, but responds here to two particular points raised by respondent. First, contrary to respondent's assertion (RB 106), this argument is cognizable on appeal even though he did not object at trial. For the reasons set forth previously, challenged jury instructions affected appellant's substantial rights. (See Argument IV, pp. 53-54, *supra*, incorporated by reference as if fully set forth herein; AOB p. 205, fn. 86.) Respondent further suggests that to the extent that appellant argues that the instructions were too general or incomplete, the argument is not cognizable because appellant was obligated to request clarification of these instructions but failed to do so. (RB 106, citing *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) However, that is not appellant's argument. Rather, appellant argues that the instructions in this case were not only incorrect, but lowered the prosecutor's burden of proof as to the *elements* of the charged offenses, an error which necessarily affected appellant's substantial rights. (See *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140.)

Second, although appellant is aware that similar challenges to these jury instructions have been rejected by the Court (see, e.g., *People v. Carey* (2007) 41 Cal.4th 109, 129-131), he requests that this Court reconsider those rulings, particularly because, when viewed in the context of the *whole charge*, there is a reasonable likelihood that the jury applied the challenged

instructions in a way that violated the Constitution. That is, it was reasonably likely the combination of all these jury instructions led the jury to convict appellant on proof that failed to meet the required "beyond a reasonable doubt" standard. For this reason, and for the reasons stated in his opening brief, the judgment must be reversed.

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VIII

THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY DENYING A NEW TRIAL ON GUILT WHEN PRESENTED WITH NEWLY-DISCOVERED EVIDENCE THAT A THIRD PARTY CONFESSED TO ABDUCTING AND KILLING MARIA PICENO AND BY EXCLUDING THE CONFESSION AS MITIGATING EVIDENCE AT THE PENALTY PHASE

In his opening brief, appellant argued that the trial court violated his state law and federal constitutional rights by denying his motion for a new trial and excluding from the penalty phase evidence that Donald Bales had confessed to abducting and killing Maria Piceno and Angelica Ramirez. (AOB 221-253.)[37] Respondent argues that the trial court properly denied the motion and excluded the evidence because Bales's confessions were involuntary and therefore inadmissible. (RB 108-118.) Respondent's position is incorrect.

A. Bales's Confessions Were Admissible As Declarations Against Interest (Evid. Code, § 1230)

On February 10, 1997, the trial court held a hearing, pursuant to Evidence Code section 402, on appellant's motion for a new trial or, in the alternative, admission of Bales's confessions at the penalty phase. (24 RT

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[37] As he pointed out in the introduction to this brief (p. 2, fn. 2, *supra*), appellant filed Argument VIII of the opening brief under separate cover, accompanied by a motion to file that argument under seal, or in the alternative, to unseal the related transcripts and exhibits and deem the argument filed as a regular unsealed part of the brief. After this Court granted his request to unseal certain transcripts and exhibits and to deem Argument VIII filed as a regular, unsealed part of the opening brief, appellant re-filed Argument VIII, this time unsealed.

3051-3118.)[38] At the hearing, Detective Jess Gutierrez of the Tulare County Sheriff's Office testified that he had conducted four interviews of Bales between January 28, 1997, and February 1, 1997. (24 RT 3064-3078.) During the first three interviews, Bales implicated another individual, Eddie Urias, in the abductions and murders of Angelica and Maria, providing a number of details which matched the actual facts as developed by the police investigation, some of which were confidential. (24 RT 3064-3077.) During the fourth interview, which took place on February 1, 1997, Bales told the police officers that he alone had raped and killed Angelica, and that he had taken jewelry from her. (24 RT 3077.) During that interview, Bales also stated that he himself had killed the Lemoore girl (i.e., Maria). (24 RT 3078.)[39] At trial, appellant argued that the interview of February 1, 1997, constituted a declaration against interest (Evid. Code, § 1230), and that the prior interview should come in to provide context for the later statement. (24 RT 3087.)[40]

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[38] With respect to the instant argument, appellant cites the corrected reporters's transcript and respondent apparently cites the uncorrected reporter's transcript. As a result, there is a discrepancy between the pages cited by the respective parties.

[39] The interviews of Bales are more thoroughly summarized at pages 223-225 of Appellant's Opening Brief.

[40] Evidence Code section 1230 provides:

> Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against

(continued...)

Respondent incorrectly asserts that the trial court properly ruled that Bales's confession to Maria's abduction and killing was not admissible as a declaration against interest because it had been coerced and thus was unreliable. (RB 118-119.)[41] Even if the interviewing officers engaged in intimidating conduct (24 RT 3111-3114), the remarkably specific details provided by Bales in discussing the crimes, some of which were confidential or not commonly known to the public, established the reliability of his statements. That is, the specificity of the details provided by Bales regarding the abduction and murder of Angelica Ramirez demonstrates the reliability of those statements, notwithstanding the officers' "good cop/bad cop routine." (24 RT 3113.) In turn, the reliability of those statements bolsters the reliability of Bales's confession to the abduction and murder of Maria Piceno.

First, Bales provided accurate information about Angelica's clothing and jewelry. Bales told Detective Gutierrez that Angelica had been wearing high-heeled shoes, earrings, and two necklaces. (24 RT 3066-3068.) Prior to that point, Gutierrez had not told Bales that she had been wearing earrings and a necklace, and the fact that she had been wearing high heels had been kept confidential. (24 RT 3066-3067.) Moreover, during the February 1, 1997, interview, Bales stated that he had given one of

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[40](...continued)
another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

[41] Respondent concedes that the trial court properly determined that Bales was unavailable as a witness because he had asserted his Fifth Amendment privilege against self-incrimination. (RB 118.)

Angelica's necklaces to one Marie Cosper. (24 RT 3077.) After recovering the necklace from Cosper, Gutierrez showed it to Angelica's mother, who told him that it looked exactly like the one her daughter always wore. (24 RT 3077-3078, 3084-3086.)

Second, the area where Bales indicated the rape and murder of Angelica had occurred was in fact the location where those crimes had occurred. (24 RT 3068-3070.) Bales even directed police officers to the crime scene. (24 RT 3072-3073.) Although the location had been publicized, Gutierrez had not told Bales where Angelica's body was found. (24 RT 3069-3070.)

Third, Bales accurately described the state of Angelica's clothing. Specifically, Bales claimed that, when Urias engaged in a sex act with Angelica, she was nude from the waist down and her blouse was pulled up to her chest area. Her clothes were found in that very condition. (24 RT 3066-3068.) Prior to Bales's statement, Gutierrez had not told him that her clothes had been found in that condition. (24 RT 3067-3068.)

Fourth, Bales accurately described the position and location of Angelica's body. Specifically, Bales stated that Angelica was placed on her back in a watery part of a canal or reservoir, and indicated which side of the reservoir she was placed. (24 RT 3073-3074.)

Fifth, Bales provided unusually distinctive details about the crime. He said that an orange or orange peels had been left at the scene. (24 RT 3074-3075.) The fact that an orange had been left at the scene was not commonly broadcast. (24 RT 3075.)[42] His description of where Urias's

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[42] Detective Gutierrez testified that he could not remember whether, prior to that point, he had told Bales that an orange had been left at the (continued...)

truck was parked generally matched the location where police found tire tracks. (24 RT 3076.) He also stated that Urias drove a white 1988 Chevy S-10 pickup truck. (24 RT 3072.) Significantly, Mychael Jackson testified that Maria's abductor drove a Chevy S-10 pickup. (12 RT 1920-1921, 1974-1975, 1979.)

Finally, contrary to respondent's assertion (RB 118), Bales provided at least some detail regarding Maria's abduction. Specifically, Bales said that the body of the girl from Lemoore (i.e., Maria) had been left in a Bakersfield creek. (24 RT 3070-3071.)

It defies belief that Bales simply guessed that Ramirez, a ten-year-old girl (14 RT 2449), was wearing high-heeled shoes. Similarly, it defies logic that he could have guessed so many unique details about her clothing and jewelry, the crime scene, and the manner of her death. Significantly, the trial court did not adopt or endorse the prosecutor's suggestion that Bales was simply following leading questions posed by the officers. (24 RT 3093.) Under these circumstances, it is immaterial that Bales recanted his confession to the abduction and murder of Maria. (24 RT 3078.)

For these reasons, and the reasons set forth in Appellant's Opening Brief, Bales's confessions constituted declarations against interest and were admissible pursuant to Evidence Code section 1230.

B. Bales's Confessions Were Not Involuntary And Therefore Were Admissible; Even If The Confessions Were Involuntary, They Were Admissible Under The Unique Circumstances Present In This Case

Respondent argues that the trial court's determination that Bales's confession was involuntary provided a separate constitutional basis for its

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[42](...continued)
scene. (24 RT 3074-3075.)

exclusion. (RB 119.) Respondent is incorrect.[43]

As defense counsel noted, any implied promises involved in the confession as to Angelica Ramirez were specific to that case, and nothing the investigators said suggested that he would receive more lenient treatment if he also confessed to the crimes against Maria. (24 RT 3097-3100.) Therefore, it cannot be inferred that the investigators' conduct induced the confession as to Maria. (See *People v. Hill* (1967) 66 Cal.2d 536, 549 [a suspect's statement will not be deemed involuntary unless it was induced by police conduct].) At the very least, then, his confession to the abduction and murder of Maria should have been admitted.

Even if Bales's confessions were involuntary, they were admissible under the unique circumstances present in this case. Although this Court has declared that "the primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings" (*People v. Badgett*, *supra*, 10 Cal.4th at p. 347), the unique and specific details provided by Bales established the reliability of his statements. (See Section A, *supra*.) Therefore, the admission of Bales's confessions would not have violated *appellant's* right to due process. (*Jackson v. Denno* (1964) 378 U.S. 368, 376 ["[i]t is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity

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[43] Respondent apparently addresses only Bales's confession to the abduction and murder of Maria Piceno. (RB 117-119.) Appellant, however, argued that the trial court erred in excluding Bales's confessions as to both Maria Piceno and Angelica Ramirez. (AOB 221-253.)

of the confession . . . ."].)[44]

Moreover, admission of Bales's confession would not have implicated the other reason for excluding coerced statements: that is, "'the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will' [citation] and because of the "the deep-rooted feeling that the police must obey the law . . . ." [Citation.]'" (*Jackson v. Denno*, *supra*, 378 U.S. at pp. 385-386). This case involved a third party's confession representing exculpatory and mitigating evidence, not inculpatory evidence wrung out of appellant. (Cf. *People v. Badgett* (1995) 10 Cal.4th 330, 342; *People v. Underwood* (1964) 61 Cal.2d 113, 124.)

Under these circumstances, Bales's confessions were admissible.

C. The Trial's Denial Of A New Guilt Trial Constituted Reversible Error Under State Law And The Federal Constitution

The standard of review for denial of a new trial motion is whether the trial court abused its discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) In determining whether the trial court abused its discretion in denying a motion for new trial on the ground of newly discovered evidence, "each case must be judged from its own factual background." (*People v. Dyer* (1988) 45 Cal.3d 26, 50.) As this Court has explained,

"[t]o entitle a party to a new trial on the ground of newly discovered

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[44] Respondent's reliance upon *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044-1046, is misplaced. (RB 119.) That case does not concern coerced statements, but rather the admissibility of statements obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436.

evidence, it must appear, – '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' . . . [¶] 'Applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed except for an abuse of discretion, . . .'" [Citation.]

(*People v. Martinez* (1984) 36 Cal.3d 816, 821.) Applying these criteria to the instant case, it is clear that the trial court abused its discretion in denying appellant's motion for a new trial. (See AOB 232-237.)

It is probable that admission of Bales's confessions would have led to a more favorable verdict on retrial. (See *People v. Williams* (1962) 57 Cal.2d 263, 274-275 [holding that "where the 'newly discovered evidence' contradicts the 'strongest evidence introduced against' defendant [citation] and comes from an unexpected source [citation], it would appear proper that defendant should have the opportunity of trying to present such evidence for the consideration of the trier of the facts"].) His confessions inevitably would have contradicted even the "strongest evidence introduced against" appellant, and Bales himself represented an unlikely source of information in that he did not know appellant and otherwise had no reason to benefit appellant by confessing falsely.

Therefore, because the State cannot demonstrate beyond a reasonable doubt that the trial court's error was harmless beyond a reasonable doubt, appellant's death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if this Court were to apply the lower standard of review set forth in *People v. Brown* (1988) 46 Cal.3d 432, 446-447, appellant's death sentence must be reversed, because there exists a

reasonable possibility he would not have been sentenced to death if the trial court had not erred.

Accordingly, under any standard of review, the judgment of death must be vacated.

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IX

APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PROVIDING THE JURY WITH MISLEADING INSTRUCTIONS REGARDING MITIGATING CIRCUMSTANCES

In his opening brief, appellant argued that throughout the death-qualification portion of the jury voir dire process, the trial court provided the jury with misleading instructions regarding mitigating circumstances. First, the trial court departed from the language of Penal Code section 190.3, factor (k), by defining mitigating circumstances as "things . . . which might have some logical or reasonable bearing on what you would determine the proper punishment to be." Second, the trial court gave examples of mitigation that were so extreme they undercut, even nullified, the effect of the mitigating evidence offered on appellant's behalf. As a result, the trial court's instructions violated appellant's constitutional rights to due process, a fair trial and a reliable penalty determination. (AOB 254-261.)

Respondent argues that appellant waived the argument by failing to object to the trial court's statements during voir dire. (RB 119-120.) Moreover, respondent argues, appellant's contention is groundless. (RB 120-122.) Respondent's position is incorrect.

Respondent mistakenly contends that appellant's failure to object to these jury instructions waives the issue. (RB 119-120.) For the reasons set forth in his opening brief, the argument is cognizable on appeal because the trial court had a sua sponte duty to give correct instructions regarding the nature of mitigating evidence. (AOB 255-256, fns. 94, 95.)

Respondent's reliance upon *People v. Cooper* (1991) 53 Cal.3d 771, 843, is misplaced. (RB 120.) That case involved allegedly improper argument by the prosecutor, not instructional error. Whereas claims of misconduct arising from a prosecutor's argument ordinarily are waived where the defendant failed to pose a contemporaneous objection (see, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 547), claims arising from erroneous instructions are not (see *People v. St. Martin*, *supra*, 1 Cal.3d at p. 531).

The cases upon which respondent relies in arguing that the trial court committed no error are similarly inapposite. First, those cases are distinguishable to the extent they involve comments by the prosecutor rather than instructions from the trial court. (Cf. *People v. Seaton* (2001) 26 Cal.4th 598, 635-636 and *People v. Medina* (1995) 11 Cal.4th 694, 741, cited at RB 120-121.) Although *Seaton* addressed statements by the trial court as well as the prosecutor, there was no indication, nor did the defendant argue, that the judge's comments essentially constituted jury instructions. (*People v. Seaton*, *supra*, 26 Cal.4th at pp. 635-636.)

Second, the examples given in this case were so wholly unlike the actual facts that they could only have distorted the jurors' understanding of mitigating evidence. Almost all of the trial court's examples involved situations that not only were not, but could not have been, present in this case: a man who had lived a love-filled, productive and crime-free life into his 70's; a young woman who had performed an heroic act or "lived an almost heroic life," or had grown up in a horribly abusive home; and, a middle-aged man so severely mentally retarded that he can barely understand what is happening around him. (3 RT 354-355; 4 RT 506-508, 634-636; 7 RT 854-857, 996-999; 9 RT 1185-1189, 1309-1312; 10 RT 1418-1424.)

The trial court itself acknowledged that its examples were extreme or somewhat extreme. (3 RT 355; 4 RT 508, 636; 7 RT 857, 999; 9 RT 1189, 1312.) Nevertheless, its qualifications could only have reinforced the jury's understanding that mitigation must involve extreme circumstances.[45] That is, the trial court's qualifications plainly suggested that it was giving the "flavor" or representative examples of mitigating evidence. Its comments did not, however, convey the notion that mitigating evidence may be less dramatic than its examples. Consequently, these statements precluded the jury from meaningfully evaluating the mitigating evidence.

Respondent mistakenly suggests that the trial court presented these examples "as hypothetical situations that had no connection to the case." (RB 121.) Surely the jurors recognized that the trial court intended its examples to have some connection to the case, and that they were not gratuitous utterances the jury was free to ignore. Consequently, the court's

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[45] Specifically, the trial court commented as follows: "I give you these examples, which are somewhat extreme, just to try to convey to you an idea of what we're talking about . . . ." (3 RT 355); "[T]hese are kind of extreme examples, but I'm trying to give you a flavor of what we're talking about . . . ." (4 RT 508); "And even though they're extreme, I offer them to you to help you to try to understand the types of things we're talking about . . . ." (4 RT 636); "[T]hese examples are somewhat extreme, but I give them to you just to try to help you understand the nature of what additional evidence might be offered in a penalty phase . . . ." (7 RT 857); "These are kind of extreme examples that I give you in a hypothetical case for the purpose of trying to convey some of the things that might be considered . . . ." (7 RT 999); "[Y]ou should understand that maybe these are extreme examples of what aggravating and mitigating circumstances would be. The reason I give them to you is to try to help you understand what we're talking about . . . ." (9 RT 1189); and, "These may be extreme examples of what mitigating and aggravating circumstances, I just offer them to you as examples of the types of other things that the law says should be considered . . . ." (9 RT 1312).

examples of mitigation operated impermissibly to set the bar too high. While the jury had been primed to expect mitigation on the order of a long and crime-free life, an heroic life, or profound mental retardation (3 RT 354-355; 4 RT 506-508, 634-636; 7 RT 854-857, 996-999; 9 RT 1185-1189, 1309-1312; 10 RT 1418-1424), the evidence actually presented included evidence of financial hardships endured by his family (25 RT 3136-3139, 3142), the positive role that appellant played within his family (25 RT 3140-3142, 3144-3150), and the fact that his family members continued to care for him (25 RT 3146-3153).

Therefore, the trial court's statements in this case were far more extreme than those in *People v. Medina*, *supra*, 11 Cal.4th 694 and *People v. Seaton*, *supra*, 26 Cal.4th 598. In *Medina*, the prosecutor "indicated to several ultimate jurors that mitigating evidence was the kind of evidence showing the 'positive factors' in defendant's life, such as being a war hero or Boy Scout leader." The prosecutor further indicated that aggravating evidence would involve "negative evidence," such as a prior criminal conviction. (*People v. Medina*, *supra*, 11 Cal.4th at p. 741.) In *Seaton*, the prosecutor, in illustrating mitigating evidence, "often mentioned a hypothetical defendant who had received the Congressional Medal of Honor, was a war hero, had saved someone's life, or had no prior criminal history." (*People v. Seaton*, *supra*, 26 Cal.4th at p. 635.) The trial court used similar illustrations. (*Ibid.*)

In both *Seaton* and *Medina*, this Court concluded that the prosecutor's statements, "though somewhat simplistic, were not legally erroneous, and defendant had ample opportunity to correct, clarify, or amplify the prosecutor's remarks through his own voir dire questions and comments." (*People v. Seaton*, *supra*, 26 Cal.4th at p. 636, quoting *People*

v. Medina, *supra*, 11 Cal.4th at p. 741.) Indeed, it is conceivable that a middle-aged capital defendant could have served as a Boy Scout leader. It is even conceivable that such a defendant could have been a war hero, a circumstance which, after all, may arise from a single instance of courage.

Appellant acknowledges that this Court has suggested that "it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case." (*People v. Medina*, *supra*, 11 Cal.4th at p. 741.) However, it seems at least as likely that because these instructions were given so early in the trial proceedings, they colored the jurors' perceptions of both appellant and the nature of mitigating evidence throughout the entire trial. (See, e.g., *Abdul-Kabir v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1654, 1661 [in considering claim that jury instructions prevented jury from giving meaningful consideration to constitutionally relevant mitigating evidence, high court considered the effect of comments made by the prosecutor during voir dire].) This is especially so in light of the presumption that the jury followed those instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.)

Third, the trial court further misled the jury regarding the nature of mitigation when it said that mitigating circumstances "can be things . . . which might have some logical or reasonable bearing on what you would determine the proper punishment to be." (4 RT 635.)[46] This definition however, is true of both mitigating *and* aggravating evidence. It is reasonably likely that this instruction confused the jurors, and prevented them from reliably and properly evaluating appellant's mitigating evidence.

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[46] Respondent fails to address appellant's argument that this comment was erroneous. (See AOB 258-259.)

(See *Brown v. Sanders* (2006) 126 S.Ct. 884, 891, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 885 [due process requires that a defendant's death sentence be set aside if an eligibility factor permits the jury to draw an adverse inference from conduct which should militate in favor of a lesser penalty]; *People v. Davenport* (1986) 41 Cal.3d 247, 289.) For instance, the jury may have interpreted this instruction as meaning that evidence offered in mitigation could be considered as aggravation, i.e., supported a judgment that the "proper punishment" was death.

Although the mitigation presented by appellant was constitutionally relevant, there is a reasonable likelihood that the trial court's definition seriously misled the jurors as to what constituted mitigating evidence and effectively precluded them from giving effect to that evidence, in violation of his state and federal constitutional rights. (See, e.g., *Brewer v. Quarterman* (2007) ___ U.S. ___, 127 S.Ct. 1706, 1714; *Abdul-Kabir v. Quarterman, supra,* ___ U.S. ___, 127 S.Ct. at pp. 1665-1666; *Lockett v. Ohio* (1978) 438 U.S. 586.) Therefore, even if the trial court gave the defense ample time to educate the potential jurors on the type of mitigating evidence it intended to present (RB 122), the jury likely followed the court's comments in considering what constituted mitigating evidence. (See *Boyde v. California* (1990) 494 U.S. 370, 384 [arguments of counsel generally carry less weight with a jury than do instructions from the court].)

For the reasons stated above and in the opening brief, reversal of appellant's judgment is required.

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THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

In his opening brief, appellant argued that the California death penalty statute and the instructions are unconstitutional because they fail in several respects to set out the appropriate burden of proof. Specifically, the statute and jury instructions fail to: assign a burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death; delineate a burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision; and, require jury unanimity as to the existence of aggravating factors. As appellant has demonstrated, these critical omissions in the California capital sentencing scheme run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (AOB 262-296.)

Respondent notes that appellant's arguments have been previously rejected by this Court, and argues that he has not provided any reasons for this Court to depart from its previous rulings. (RB 123.) Appellant has sufficiently raised this claim in his opening brief, but addresses the specific contentions set forth by respondent.

As respondent points out (RB 123), this Court has recently declared that *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered its conclusions regarding the burden of proof at the penalty phase. (*People v. Huggins* (2006) 38 Cal.4th 175, 250-251.) This Court has justified its position on the theory that "the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary

decision to impose one prison sentence rather than another." (*People v. Prieto* (2003) 30 Cal.4th 226, 275.)

This Court's analogy, however, is unavailing. The discretion afforded under California law to sentencing judges in noncapital cases recently came under this Court's scrutiny in *Cunningham v. California* (2007) ___ U.S. ___ [127 S.Ct. 856, 868]. In *People v. Black* (2005) 35 Cal.4th 1238, 1254, 1258, this Court had held that California's Determinate Sentencing Law (DSL) did not run afoul of the bright line rule set forth in *Blakely* and *Apprendi* because "[t]he judicial factfinding that occurs during [the selection of an upper term sentence] is the same type of judicial factfinding that traditionally has been a part of the sentencing process." The United States Supreme Court rejected that analysis, finding that circumstances in aggravation under the DSL (1) were factual in nature, and (2) were required for a defendant to receive the upper term. (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 860-863.) The United States Supreme Court held that "[b]ecause the DSL authorizes the judge, not the jury, to find the facts permitting an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." (*Id.* at p. 871, fn. omitted.) The high court further remarked as follows:

> The *Black* court's examination of the DSL, in short, satisfied it that California's sentencing system does not implicate significantly the concerns underlying the Sixth Amendment's jury-trial guarantee. Our decisions, however, leave no room for such an examination. Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, we have said, is the *very* inquiry *Apprendi's* "bright-line rule" was designed to exclude. See *Blakely*, 542 U.S., at 307-308, 124 S.Ct. 2531. But see *Black*, 35 Cal.4th, at 1260, 29 Cal.Rptr.3d 740, 113 P.3d, at 547 (stating, remarkably, that

"[t]he high court precedents do not draw a bright line").

(*Id.* at p. 869.)

Although this Court has concluded that "[t]he *Cunningham* decision involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law and has no apparent application to the state's capital sentencing scheme" (*People v. Prince* (2007) 40 Cal.4th 1179, 1297), the *Cunningham* decision itself suggests otherwise. Again, in that case the United States Supreme Court discussed at length, and ultimately rejected, this Court's insistence that California's determinate sentencing law survived the *Apprendi* and *Blakely* decisions intact. (*Cunningham v. California*, *supra*, 127 S.Ct. at pp. 868-871.)

Accordingly, appellant has demonstrated that in the absence of various procedural protections, such as an assignment of a burden of proof and the application of a "beyond a reasonable doubt" standard in the penalty phase, California's death penalty violates the principles affirmed in *Apprendi*, *Ring* and *Blakely*, and therefore is unconstitutionally flawed. (AOB 263-277.) As in *Cunningham*, reconsideration of the instant argument is required.

Respondent also cites *People v. Welch* (1999) 20 Cal.4th 701, 767-768, but to no avail. (RB 124.) *Welch* pre-dated *Apprendi* and thus did not grapple with the implications of that decision. Respondent's reliance upon *People v. Ochoa* (2001) 26 Cal.4th 398 is similarly misplaced. (RB 124.) There, this Court reaffirmed its position that the death penalty is not unconstitutional by failing to require jury unanimity on aggravating factors. (*Id.* at p. 462.) However, in so holding, this Court cited *People v. Fairbank*

(1997) 16 Cal.4th 1223, 1255-1256, a pre-*Apprendi* decision. (*Ibid.*)[47]

Respondent also notes that this Court has held that California law is not constitutionally deficient because it does not provide for a presumption in favor of life. (RB 124, citing *People v. Avila* (2006) 38 Cal.4th 491, 615, and *People v. Maury* (2003) 30 Cal.4th 342, 440.) However, appellant urges this Court to reconsider its holdings on this matter. *Avila* merely cites *Maury*, setting forth no independent analysis. (*People v. Avila, supra*, 38 Cal.4th at p. 615.) *Maury*, in turn, relies upon *People v. Samayoa* (1997) 15 Cal.4th 795, 852-853, and *People v. Holt* (1997) 15 Cal.4th 619, 684, both of which pre-date *Apprendi, Ring* and *Blakely*. Moreover, although this Court has declared that "[n]othing in *Ring* alters our analysis" (*People v. Maury, supra*, 30 Cal.4th at p. 440, fn. 25, citing *People v. Prieto* (2003) 30 Cal.4th 226, 262-263), the *Cunningham* decision should prompt this Court to revisit its position that the reasoning of *Apprendi* and *Ring* does not apply to the penalty phase determination in California (*People v. Prieto, supra*, 30 Cal.4th at p. 263). *Cunningham* makes clear how seriously the United States Supreme Court regards the principles set forth in the *Apprendi* line of cases. (*Cunningham v. California, supra*, 127 S.Ct. at pp. 868-871.)

Contrary to respondent's suggestion, appellant's argument is not

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[47] Although the portion of *Ochoa* cited by respondent does address *Apprendi*, it does so in the context of addressing the defendant's claim that *Apprendi* requires the jury to find beyond a reasonable doubt that the evidence establishes that unadjudicated prior acts involved the attempted, threatened or actual use of force or violence. (RB 124, citing *People v. Ochoa, supra*, 26 Cal.4th at pp. 452-454.) In any event, for the reasons set forth in the opening brief and in the preceding paragraphs, this Court was incorrect in concluding that "*Apprendi* does not extend to require a jury to find beyond a reasonable doubt the applicability of a specific [Penal Code] section 190.3 sentencing factor." (*Id.* at p. 452.)

undermined by the fact that the trial court instructed the jury pursuant to CALJIC Nos. 8.85 and 8.88. (RB 124-125.) As appellant explained in Arguments XI and XII of his opening brief, which are incorporated by reference as if fully set forth herein, those instructions were unconstitutionally flawed. (AOB 297-323.) Those instructions, therefore, could not have cured the defects in California's sentencing scheme identified by appellant.

Finally, respondent apparently suggests that defense counsel's argument somehow ensured that the jurors were properly informed of their penalty options. (RB 125.) However, as the United States Supreme Court has pointed out,

> arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation] and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. [Citations.]

(*Boyde v. California* (1990) 494 U.S. 370, 384.) Indeed, during the guilt phase, the trial court instructed the jury that "[y]ou must accept and follow the law as I state it to you . . . If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions." (12 CT 3420, 16 RT 2697 [CALJIC No. 0.50 (1995 New)].) During the penalty phase, the trial court instructed the jurors that "[y]ou shall consider the instructions previously given to you relating to . . . your conduct as jurors," with certain exceptions not pertinent here (e.g., the jurors were now to disregard the guilt-phase instruction requiring them not to consider the subject of penalty or punishment). (13 CT 3638, 25 RT 3225.) Moreover,

the error was exacerbated by certain instructions given by the trial court during voir dire, which instructions precluded the jury from meaningfully evaluating the mitigating evidence. (See Argument IX, incorporated by reference as if fully set forth herein.)

For the reasons set forth in the opening brief and in the paragraphs above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XI

THE INSTRUCTIONS REGARDING THE MEANING OF MITIGATING AND AGGRAVATING FACTORS AND THEIR APPLICATION IN APPELLANT'S CASE RESULTED IN AN UNCONSTITUTIONAL DEATH SENTENCE

Respondent claims that appellant offers no persuasive reasons for the Court to reconsider its prior rulings that CALJIC Nos. 8.85 (13 CT 3640-3642; 25 RT 3226-3227) and 8.88 (13 CT 3643-3645; 25 RT 3228-3229), together with the application of the statutory sentencing factors, do not operate to render a defendant's death sentence unconstitutional. (RB 125-128.) Appellant disagrees, and asks this Court to reconsider those rulings for the reasons set forth in his opening brief. (AOB 297-310.)[48]

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[48] In support of its argument, respondent cites *People v. Moon* (2005) 37 Cal.4th 1, 41-43, quoting that decision at length. (RB 125-128.) In that case, this Court merely recited its prior holdings and expressly declined to "revisit [its] prior rejections of these arguments." (*People v. Moon*, *supra*, 37 Cal.4th at p. 41.) Appellant has adequately addressed those "prior rejections" in his opening brief. (AOB 297-310.)

XII

THE INSTRUCTIONS DEFINING THE NATURE AND SCOPE OF THE JURY'S SENTENCING DECISION VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

In his opening brief, appellant argued that CALJIC No. 8.88 (13 CT 3643-3645, 25 RT 3228-3229) is constitutionally flawed because it failed to adequately convey several critical deliberative principles and was misleading and vague in crucial respects. (AOB 311-323.) Respondent claims that appellant offers no persuasive reasons for this Court to reconsider its prior rulings rejecting this argument. (RB 125-128.) Appellant disagrees, and asks this Court to reconsider those rulings for the reasons set forth in his opening brief.[49]

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[49] Appellant has adequately addressed respondent's reliance upon *People v. Moon* (2005) 37 Cal.4th 1, 41-43 (RB 125-128). (Arg. XI, fn. 48, hereby incorporated by reference as if fully set forth herein.)

XIII

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S EIGHTH AMENDMENT PROTECTION AGAINST THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY

Respondent claims that appellant offers no persuasive reasons for the Court to reconsider its prior rulings that intercase proportionality review is not required in California. (RB 128.) Appellant disagrees, and asks this Court to reconsider those rulings for the reasons set forth in his opening brief. (AOB 324-327.)

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XIV

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

Respondent claims that appellant does not provide sufficient reasoning for this Court to reconsider its prior rulings that the use of the death penalty does not violate international law. (RB 128.) Appellant disagrees, and asks this Court to reconsider those rulings for the reasons set forth in his opening brief. (AOB 328-332.)

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XV

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT COLLECTIVELY UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Respondent disputes appellant's argument that reversal is required based on the cumulative effect of error, maintaining that he received a fair trial. (RB 128.)[50] However, appellant could not have had a fair trial where, for example: (1) the prosecution of appellant took place in Kings County amidst the hysteria erupting from the abductions and murders of three little girls (including Maria) within a relatively short span of time; (2) the prosecution was permitted to introduce a wide array of inflammatory, yet completely irrelevant character evidence regarding his sexual interests (e.g., evidence relating to long-past incestuous conduct with a sister close in age to appellant, evidence that he had lawfully rented of adult videotapes featuring *adult* females, and evidence that he possessed a number of adult magazines, none of which featured prepubescent children); (3) the prosecution's case that appellant was the perpetrator rested largely on the suspect credibility of Mychael Jackson, who, among other things, had been convicted of a fraud-related offense; (4) the trial court repeatedly gave misleading examples of mitigating evidence, giving rise to a reasonable likelihood that the jurors disregarded the mitigating evidence; (5) the trial

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[50] In his opening brief, appellant inadvertently numbered this argument Argument XVI, rather than Argument XV. (AOB 333.) For the sake of clarity, appellant seeks to correct the error. Accordingly, Argument XVI is now renumbered as Argument XV, and Argument XVII (contained in the supplemental opening brief) is now renumbered as Argument XVI. Appellant apologizes for any confusion this may have caused.

court excluded critical "lingering doubt" evidence, specifically, evidence that a third party had confessed to the crimes against Maria; and, (6) the trial court denied appellant's motion for a new trial when evidence of the third party's confession emerged.

Accordingly, for the reasons set forth in the opening brief and in the instant brief, the combined impact of the various errors in this case requires reversal of appellant's convictions, special circumstance finding, and death sentence.

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XVI

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE TESTIMONY OF MYCHAEL JACKSON, WHICH WAS FRUIT OF APPELLANT'S UNLAWFUL ARREST

In his supplemental opening brief, appellant argued that the trial court denied appellant's motion to suppress the testimony of prosecution witness Mychael Jackson, which constituted the "fruit" of the illegal interrogation and illegal arrest of appellant.[51] Specifically, appellant contended that the trial court should have suppressed Jackson's testimony implicating appellant as the perpetrator, which surfaced solely because of the newspaper photograph, which in turn resulted directly from the unlawful arrest. Jackson's testimony was extremely prejudicial, because it was virtually the only evidence directly linking appellant to Maria Piceno. (Supp. AOB 1-23.)[52]

Respondent, however, contends that probable cause supported appellant's arrest and that Jackson's testimony was properly admitted at trial. (Supp. RB 1-13.) Respondent's position is incorrect.

As a preliminary matter, respondent is incorrect in arguing that ample probable cause supported appellant's arrest prior to any illegal

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[51] As he pointed out in the introduction to this brief (p. 2, fn. 2, *supra*), appellant raised this argument in a supplemental opening brief. Respondent, in turn, filed a supplemental respondent's brief. For the sake of clarity and convenience, appellant addresses this argument in the instant brief, rather than in a separate pleading.

[52] Jackson testified at trial that he recognized appellant from seeing his picture on television, and that he subsequently contacted law enforcement and informed them about what he had witnessed on the day of Maria's abduction. (12 RT 1294-1298, 1939-1940, 2014.)

interrogation. (RB 78-79; Supp. RB 9-12.) Appellant has adequately stated his position that the police lacked probable cause to arrest him (Supp. AOB 7-15), but here addresses respondent's misleading suggestion that "[p]articularly probative were [sic] appellant's collection of magazines containing juvenile girls made up to look like younger children." (Supp. RB 10.) In fact, none of appellant's magazines was devoted to such depictions. (12 RT 2096-2097.) More important, although the essential subject matter of the magazines was sexuality among *teenagers* (not prepubescent children), Ackerman was unable to determine whether any of the models was actually under the age of 18. (12 RT 2074-2075, 2090-2091.)

Respondent is also incorrect in arguing that Jackson's testimony was properly admitted at trial. (Supp. RB 7-9.) Ignoring *Davis v. Mississippi* (1969) 394 U.S. 721 and relying upon *United States v. Crews* (1980) 445 U.S. 463, 471-473, respondent argues that Jackson's in-court identification of appellant at the preliminary hearing was unconnected to appellant's arrest. (Supp. RB 7-8.)[53] Respondent further relies upon *United States v. Ceccolini* (1978) 435 U.S. 268, 279-280, to argue that the trial court

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[53] In *Davis*, cited by appellant in his supplemental opening brief (Supp. AOB 17-18), the defendant's identity and connection to the crime were first discovered through an illegal detention. The United States Supreme Court concluded that, but for the defendant's illegal detention, his fingerprints would not have been obtained and he would never have become a suspect. Accordingly, the Court held that his fingerprints had been improperly admitted at trial. (*Davis v. Mississippi*, *supra*, 394 U.S. at pp. 726-728.) Similarly, but for appellant's unlawful arrest, Jackson would not have come forward to the police and would not have testified. Therefore, Jackson's testimony should have been suppressed as the "fruit" of that arrest.

properly admitted Jackson's testimony because it was sufficiently attenuated from any governmental misconduct. (Supp. RB 8-9.) However, respondent's reliance on those cases is misplaced.

Both *Crews* and *Ceccolini* are distinguishable from the instant case. In *Crews*, the United States Supreme Court emphasized several factors in finding a robbery victim's identification testimony admissible, notwithstanding the illegality of the defendant's arrest. First, the victim notified the authorities immediately after the attack and gave them a full description of her assailant. (*United States v. Crews*, *supra*, 445 U.S. at p. 471.) Second, the situation was not one in which her identity was "discovered [and] her cooperation secured only as a result of an unlawful search or arrest of the accused." Rather, her identity was known long before the police misconduct. (*Id.* at pp. 471-472.) Third, the defendant's illegal arrest did not infect the victim's ability to give accurate identification testimony.

> Based upon her observations at the time of the robbery, the victim constructed a mental image of her assailant. At trial, she retrieved this mnemonic representation, compared it to the figure of the defendant, and positively identified him as the robber. [Footnote omitted.] No part of this process was affected by [the defendant's] illegal arrest.

(*Id.* at p. 472.)

In contrast, Jackson's testimony did not result from an independent recollection of the crime. His identity was not known to the police until after the police misconduct. He did not give a description of the perpetrator prior to the unlawful interrogation and arrest of appellant. Jackson approached the police after seeing appellant's photograph, which was obtained as a direct result of appellant's illegal arrest. (1 CT 54.) In short,

without appellant's illegal arrest, Jackson would not have materialized as a witness to give in-court identification testimony.

Respondent is similarly incorrect in asserting that Jackson's identification of appellant was sufficiently attenuated from any governmental misconduct. (Supp. RB 9.) Notwithstanding the lack of an independent and untainted recollection on Jackson's part, the trial court ruled that, even if appellant's "face" could be suppressed, Jackson's voluntary act of coming forward as a witness was based on a nongovernmental party's news broadcast, and therefore was not sufficiently related to the governmental illegality to justify suppression of his testimony. (E RT (Mar. 13, 1996, proceedings) 19.) This ruling is erroneous. But for the illegal arrest, there would have been no photograph for Jackson to observe. (See Supp. AOB 17-18.) Therefore, the intervening third party action, i.e., publication of the appellant's image in the media, did not sufficiently attenuate the identification from the unlawful arrest. Under these circumstances, Jackson's testimony should have been suppressed because the record did not establish that it rested upon a recollection independent from, and untainted by, the illegality of appellant's interrogation and arrest. (See *State v. Holman* (Idaho 1985) 707 P.2d 493, 503 [witnesses' identification of illegally seized truck while it was in sheriff's custody was tainted by illegal seizure, and because the witnesses' testimony was based on the tainted identification rather than an independent recollection, their identification testimony was inadmissible].)

United States v. Ceccolini, *supra*, 435 U.S. at pp. 279-280, cited by both the trial court (E RT (Mar. 13, 1996, proceedings) 19) and respondent (Supp. RB 8-9), is factually distinguishable from the instant case on two key points: the inevitable discovery of the witness and the passage of time

between the police illegality and discovery of the witness. Among other things, in *Ceccolini*, the witness whose testimony was challenged as the fruit of an illegal search was employed by the defendant, a shop owner accused of conducting an illegal gambling operation; therefore, the high court observed, the witness's identity and relationship to the defendant would have been known to the police regardless of the illegal search. (*United States v. Ceccolini*, *supra*, 435 U.S. at pp. 269-270, 279-280.) In addition, substantial periods of time (about four months and about a year, respectively) elapsed between the time of the illegal search and the initial contact with the witness, and between the time of that initial contact and the witness's trial testimony. (*Id.* at p. 279.) In short, there was no proximate link between the illegal search and the discovery of the witness, which led directly to his identification testimony.

In contrast, this case involved the type of direct taint that the *Ceccolini* Court would have found impermissible. (*Id.* at pp. 279-280.) Jackson's testimony can be traced back directly to appellant's unlawful arrest, but, in contrast to *Ceccolini* (*id.* at p. 279), there is nothing to suggest that the police would have ever become aware of Jackson's identity had he not seen appellant's photograph. Moreover, unlike *Ceccolini* (*ibid.*), this case did not involve an extended passage of time between the illegal police conduct and initial contact with the witness; rather, Jackson's initial contact with the police occurred within a few days after the unlawful interrogation, appellant's unlawful arrest, and the publication of appellant's photograph. (A CT 6; B RT 7, 167; C RT 308-309; D RT (Jan. 19, 1996, proceedings) 19-20; D RT (Jan. 22, 1996, proceedings) 233; 12 RT 1933-1934, 1976-1978.) Contrary to respondent's position, then, Jackson's testimony was not sufficiently attenuated from the illegal interrogation and arrest of

appellant to permit its admission.

Moreover, still other factors suggest that Jackson's testimony was not the result of an independent recollection of the crime, which, as respondent acknowledges (Supp. RB 8), is a key factor under *Crews*. First, as appellant noted in his suppression motion (1 CT 55-56), his likeness was the only one being "paraded. . . before an impressionable public," and therefore Jackson's initial identification of appellant was made under highly suggestive conditions. In addition, the law enforcement officials exploited the photograph insofar as it allowed them to discover, and elicit information from, Jackson. (See *Simmons v. United States* (1968) 390 U.S. 377, 383-384 [the improper use of photographs by police may cause a witness to provide an erroneous identification, especially where the witness obtained only a brief glimpse of the criminal or saw him under poor conditions].)[54] Also, where there is an initial misidentification, regardless of how it arose, the witness is thereafter apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification. (*Ibid.*; see also *United States v. Field* (9th Cir. 1980) 625 F.2d 862, 868-869.)

Second, Jackson did not know appellant, so his identification was not based upon any previous familiarity with appellant. (Cf. *People v.*

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[54] Appellant acknowledges that, in *Simmons*, the police showed photographs of the defendant to the witnesses (*Simmons v. United States*, *supra*, 390 U.S. at p. 382), whereas Jackson initially viewed appellant's image while watching a television broadcast. However, as appellant has explained, the media's intervening actions did not sufficiently attenuate the identification from the unlawful arrest. (See p. 98, *supra*.) In addition, exploitation of appellant's photograph by law enforcement officials was improper where, as he explains in the following paragraphs, various factors operated to render Jackson's identification unreliable.

Hoiland (1971) 22 Cal.App.3d 530, 540-541 [because of the witness's pre-existing familiarity with the defendant, the police identification procedure was not impermissibly suggestive], cited at 1 CT 56.) In other words, it cannot be said that the reliability or accuracy of Jackson's identification was enhanced by "prior contacts with the alleged perpetrator." (CALJIC No. 2.92; 12 CT 3461.)

Third, Jackson had little opportunity to observe the perpetrator. (Cf. *People v. Rist* (1976) 16 Cal.3d 211, 216 [rejecting challenge to accuracy and reliability of robbery victim's identification testimony where victim had unobstructed view of defendant for at least three minutes, presumably from within a few feet], superceded by statute on another ground as stated in *People v. Collins* (1986) 42 Cal.3d 378, 393 and cited at 1 CT 56.) Jackson's own testimony established that he saw appellant for only the amount of time it took to walk a distance of no more than 35 to 60 feet, and to get into his car. (12 RT 1889, 1895, 1978-1979.)

Fourth, Jackson had no incentive or other particular reason to observe the interaction between the perpetrator and Maria. (Cf. *People v. Williams* (1973) 9 Cal.3d 24 [rejecting challenge to identification of defendant where record made it clear that each of the victims who identified him had ample opportunity to observe him at the time of the commission of the crimes, and most of the victims had reason to observe him especially closely], disapproved on another ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3, and cited at 1 CT 56.) Jackson claimed that he noticed them because, in light of the fact that appellant was Caucasian and the girl was Hispanic, and given the obvious age difference between the two, something did not seem right. (12 RT 1886-1887, 1889-1902, 1908, 1917-1919, 1922, 1978, 1982, 1984-1987, 2000, 2006.) However, there is

nothing inherently noteworthy about interracial or interethnic families or friendships in our society, and the scene was all the more unremarkable in light of the absence of evidence that Maria exhibited any signs of fear or distress at that point.

Fifth, a significant amount of time elapsed between Jackson's observations and the identification. Specifically, Jackson did not view the photographs of appellant until the first week of May, 1995, more than a month after Maria's abduction (12 RT 1934, 1976-1978). (Cf. *People v. Ware* (1978) 78 Cal.App.3d 822, 839-840 [rejecting argument that sexual assault victim's in-court identification at preliminary hearing was based on impermissibly suggestive photographs where (1) the victim had ample opportunity to observe the defendant while he accosted her, (2) she described her assailant immediately after the attack but prior to reviewing the suggestive photographs, and (3) the photographic identification was made shortly after the attack].)

Sixth, Jackson's credibility was open to serious question. He had a lengthy history of unreliability. (1 CT 56.) Jackson was not only convicted of Workman's Compensation fraud while the instant investigation and prosecution were pending (12 RT 1933, 1941-1942), but several witnesses testified that he was not trustworthy. (14 RT 2370-2375, 2377, 2383-2384, 2386-2390, 2392, 2394-2397, 2434-2441.) For example, his wife, Claudeen Jackson, testified that he was an "impulsive liar." (14 RT 2370-2372, 2377.) Among other things, she testified that Jackson once explained his failure to attend a court proceeding by falsely claiming that his child had died. (14 RT 2372-2373.) Jackson's ex-wife, Annie Snowden, testified that he was the "biggest liar you'll ever run into" and that he lied about everything. (C RT 393; 14 RT 2434-2441.)

Moreover, Jackson's explanation as to how he came to view appellant's photograph and identify him as Maria's abductor was entirely implausible. According to Jackson, he never watched the news on television; he read only the sports section of the newspaper, and he threw away the other sections. (12 RT 1927.) Somehow, however, Jackson saw a photograph of appellant in the newspaper, and then drew a mustache and glasses on the photograph. (12 RT 1929-1931, 1960, 1967-1968.) Jackson claimed that, although he then realized that he had seen appellant before but could not remember where, he did not read the accompanying article to help him recall where he had seen him. (12 RT 1931, 1960-1962.) Then, after several days spent trying to figure out where he had seen appellant, Jackson supposedly realized suddenly that he had seen him in the Food King parking lot on March 27, 1995. (12 RT 1931-1932, 1961, 1963, 1966.)

Indeed, reading Jackson's testimony, one might get the sense that he was making it up as he was going along. For instance, his testimony as to why he traveled from Visalia to Lemoore was virtually nonsensical. Although he supposedly drove to Lemoore to pick up his girlfriend Kathy Curry's children from school, he did not know exactly what time they got out of school. (12 RT 1877-1878, 1943-1947, 1995.) Although he arrived in Lemoore well after they got out of school, he was not paying attention to the fact that he was late and that the children probably would not be at the appointed meeting place. (12 RT 1948.) Although he instructed the children to go to their babysitter's house if he did not arrive within 15 minutes after they got out of school, he did not know where the babysitter lived. (12 RT 1945, 1947.) When he realized they were not at the appointed meeting place, he decided to return to Visalia. (12 RT 1882-1884, 1997, 2000-2003). After stopping at his girlfriend's house to use her

bathroom, he realized he had forgotten the house key and decided to stop at the Food King to buy orange juice; he did not use a restroom until returning to Visalia. (12 RT 1882-1885, 1944-1945, 1996-1997.) Moreover, although Jackson insisted that he was in Lemoore on March 27, 1995, a Monday, Curry was certain he was in Lemoore on a Tuesday. (12 RT 1877, 2006, 2008-2010, 2038-2039.)[55] Certainly, the foregoing factors cast doubt that Jackson's identification of appellant was independent and untainted.

For the reasons stated in the opening brief and in the preceding argument, the jury's guilt phase verdicts, special circumstance finding, and death verdict must be vacated.

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[55] Appellant sets forth other evidence casting Jackson's veracity into doubt at pages 21-28 of his opening brief.

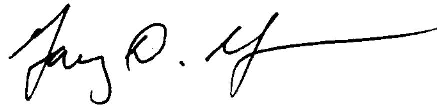
CONCLUSION

For the reasons set forth above and in appellant's opening brief, the judgment in this case must be reversed.

DATED: October 1, 2007

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



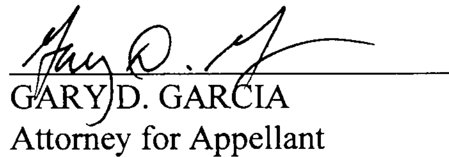
GARY D. GARCIA
Deputy State Public Defender

Attorneys for Appellant

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 8.6.30(b)(B)(2)

I, GARY D. GARCIA, am the Deputy State Public Defender assigned to represent appellant GENE ESTEL McCURDY in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 28,124 words in length.

DATED: October 1, 2007



GARY D. GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: People V. GENE ESTEL McCURDY No. S061026

I, VICTORIA MORGAN, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

EDMUND G. BROWN
Attorney General of the State of California
Attn.: Catherine Tennant
P.O. Box 944255
Sacramento, CA 94244-2550

Gene Estel McCurdy
San Quentin State Prison
Box K-50300
San Quentin, CA 94974

HON. PETER M. SCHULTZ
Kings County Superior Court, Dept. 2
1426 South Drive
Hanford, CA 93230

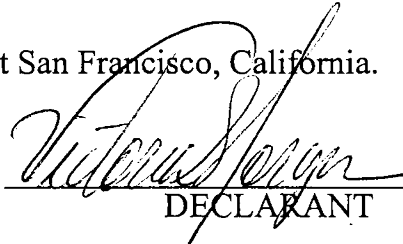
David Lee
(Trial Counsel)
129 3rd Street
Eureka, CA 95501

Patrick Hart
(Trial Counsel)
P.O. Box 714
Three Rivers, CA 93271

Each said envelope was then, on October 1, 2007, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 1, 2007, at San Francisco, California.



DECLARANT