

SUPREME COURT COPY

STATE OF CALIFORNIA

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May 21, 2014

SUPREME COURT
FILED

MAY 21 2014

Mr. Frank A. McGuire, Clerk
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-3600

Frank A. McGuire Clerk

Deputy

Re: People v. Gene Estel McCurdy, No. S061026

Dear Mr. McGuire:

Oral argument in the above-referenced case has been calendared for 1:30 p.m. on May 29, 2014. At that argument, I may refer to the following matters, which are not cited in any of the briefs:

1. *People v. Story* (2009) 45 Cal.4th 1282, 1289-1295. There, this Court held that a first degree murder charge based solely on the theory of felony murder with underlying felonies of rape and burglary to commit rape was a "sexual offense" within the meaning of Evidence Code section 1108. In so holding, this Court discussed several cases, particularly *People v. Walker* (2006) 139 Cal.App.4th 782 and *People v. Pierce* (2002) 104 Cal.App.4th 893, which are also discussed in appellant's briefing.
2. *People v. Cottone* (2013) 57 Cal.4th 269, 276-292. There, this Court held, among other things, that (1) the presumption of incapacity codified in Penal Code section 26 applies when the prosecution seeks to prove that the defendant committed an unadjudicated sexual offense before reaching age 14; (2) whether a defendant understood the wrongfulness of an unadjudicated sexual offense allegedly committed before age 14 is an evidentiary question for the court to determine; (3) before evidence of an unadjudicated sexual offense may be admitted, the prosecution must prove by clear and convincing evidence that the defendant appreciated the wrongfulness of that offense; and, (4) once such evidence is admitted, the jury does not reassess the court's ruling, including issues of capacity, but instead determines whether the evidence establishes the defendant's propensity to commit the charged sexual offenses.

DEATH PENALTY

3. *People v. Jandres* (2014) ___ Cal.Rptr.3d ___, 2014 WL 2086569, *7-12. There, the Court of Appeal held that the trial court erred in admitting evidence of a prior attempted kidnaping as a sexual offense under Evidence Code section 1108. Specifically, the trial court abused its discretion under Evidence Code section 352, where the evidence did not support the prosecutor's suggestion that the defendant had intended to rape the prior victim, and where the prejudicial effect of that evidence outweighed its comparatively low probative value. Moreover, the court held that the jury instructions misstated the law regarding the sexual propensity evidence (1) by erroneously identifying "attempted kidnaping" as the prior sexual offense; (2) failing to set forth the elements of the correct alleged sexual offense, or to set forth the applicable burden of proof; and, (3) failing to instruct the jurors that the evidence could be used to establish defendant's propensity to commit only the charged sexual offenses.

Thank you for bringing this letter to the Court's attention.

Sincerely,



GARY D. GARCIA
Senior Deputy State Public Defender

DECLARATION OF SERVICE BY MAIL

Case Name: **People v. Gene Estel McCurdy**
Case Number: **Supreme Court Crim. No. S061026**
Kings County Superior Court No. 95CM5316

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 1111 Broadway, Suite 1000, Oakland, California 94607. I served a copy of the following document(s):

NOTICE OF ADDITIONAL AUTHORITIES

by enclosing it in envelopes and

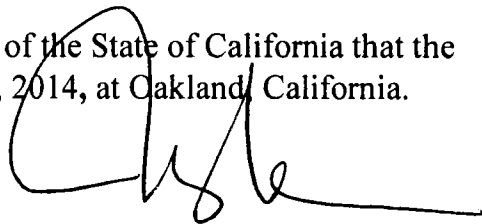
/ / **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/X/ **placing** the envelopes for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed on **May 21, 2014**, as follows:

Kamala Harris
Attorney General of the State of
California
Attn.: Catherine Tennant
P.O. Box 944255
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Gene Estel McCurdy
CSP-SQ
Box K-50300
San Quentin, CA 94974

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Signed on May 21, 2014, at Oakland, California.



NEVA WANDERSEE