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S061026

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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

(HONORABLE PETER M. SCHULTZ, JUDGE, of the Superior Court)

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DEATH PENALTY

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

Before trial, appellant moved to suppress the testimony of Mychael Jackson as a product of the illegal interrogation and arrest of appellant. (1 CT 47-57; 12 CT 3367-3369.)[1] The trial court denied appellant's motion to suppress Jackson's testimony, finding that: (1) even absent the portion of appellant's statement taken in violation of *Miranda*,[2] there was sufficient evidence known to the police to arrest him, and (2) alternatively, even assuming appellant's arrest was unlawful, suppression of Jackson's testimony was not required. (See E RT (Mar. 13, 1996, proceedings) 18-19.)

The trial court erred in finding that appellant's arrest was lawful, because there was no probable cause to justify the arrest. Moreover, the trial court erred in admitting Jackson's testimony, which constituted the "fruit" of the illegal interrogation and illegal arrest of appellant. (See AOB, Argument II, hereby incorporated by reference as if fully set forth herein.) Jackson's testimony was extremely prejudicial, because it was virtually the only evidence directly linking appellant to Maria Piceno.

The trial court's erroneous finding that appellant's arrest was lawful,

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[1] For the sake of clarity, the instant argument is numbered Argument XVII and follows Arguments I through XVI, which were raised in Appellant's Opening Brief (hereinafter, "AOB"). In addition, appellant refers to the record on appeal in the same manner as in his opening brief. (See AOB, fn. 2.)

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

and its erroneous admission of Jackson's testimony, violated appellant's right to be free of unlawful searches and seizures, his right against self-incrimination, and his rights to counsel and to due process, and compels reversal of the guilt verdicts, the kidnap-murder special circumstance, and the death sentence. (U.S. Const., Amends. IV, V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 13, 15; *Missouri v. Seibert* (2004) 542 U.S. 600; *Miranda v. Arizona* (1966) 384 U.S. 436; *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488; Evid. Code, § 940.)

A. Procedural History

As described in Argument II of Appellant's Opening Brief, law enforcement officials interrogated appellant from approximately 10:00 p.m. on April 30, 1995, until approximately 4:00 a.m. on May 1, 1995. (C RT 308-309, 319, 321, 323, 327; D RT (Jan. 19, 1996, proceedings) 20, 23, 56, 59, 95, 111.) At that point, Lieutenant Mark Bingaman of the Kings County Sheriff's Department handcuffed appellant and told him that he was under arrest for murder. (Exh. 1D, pp. 8-16; 3 Aug. CT 822-830; D RT (Jan. 19, 1996, proceedings) 163-164, 173, 181-187, 198.) Shortly thereafter, appellant was informed that Bingaman lacked the authority to arrest him and that in fact he was not under arrest. (D RT (Jan. 19, 1996, proceedings) 207-209, 221-222, 235-236.) Appellant was subsequently detained pursuant to a "confinement order" issued by the ship's captain. (*Id.* at pp. 231-234, 237.)

On May 3, 1995, Officer Patrick Jerrold of the Lemoore Police Department submitted a declaration in support of the issuance of a warrant for appellant's arrest. (A CT 4-5.) In his declaration, Officer Jerrold declared that he had reviewed each of the written reports and statements lodged with the court in connection with the instant case, that those reports

and statements were attached to the declaration and incorporated by reference, and that they provided reasonable cause to believe that appellant committed offenses against the People of the State of California and therefore supported the issuance of an arrest warrant. (*Id.* at p. 4.) The declaration itself did not contain any facts connecting appellant to the charged offenses, such as statements made by appellant.[3]

That same day, Judge Maciel of the Kings County Municipal Court signed a warrant for appellant's arrest. (A CT 6, 16; 2 Aug. CT 316.)

On January 6, 1996, appellant filed his motion to suppress, among other things, the testimony of prosecution witness Mychael Jackson as the fruit of the illegal interrogation and illegal arrest. (1 CT 47-57.) In his motion, appellant noted that the parties had agreed to have all suppression-related issues heard before trial. (1 CT 47.) That same day, the prosecution filed an opposition, arguing that the police had probable cause to arrest appellant, notwithstanding the challenged interviews. (1 CT 58-61, 68.)

A hearing on appellant's motion to suppress was held on January 19, 22 and 23, 1996. At the outset of the hearing, both parties commented that appellant had been the subject of a warrantless arrest. (D RT (Jan. 19, 1996, proceedings) 3.) Based upon his understanding that there had been no arrest warrant, the prosecutor stated that the prosecution bore the burden of proof as to the issues to be litigated at the hearing. (*Ibid.*)

Accordingly, the prosecution called several witnesses (Lieutenant Bingaman, Special Deputy United States Marshal Bruce Ackerman, Special

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[3] Neither the record on appeal nor the court file contains any such reports or statements that purportedly were attached to Officer Jerrold's declaration.

Agent Harold Fuller of the Air Force Office, Special Investigations, and Special Agent Michael Devine of the Naval Criminal Investigative Service) to testify about the circumstances surrounding the interrogation and arrest of appellant. (D RT (Jan. 19, 1996, proceedings) 6-130; D RT (Jan. 22, 1996, proceedings) 138-243.) The parties also stipulated that the trial court should review the preliminary hearing transcripts, specifically agreeing that the trial court should review the testimony of witnesses Mychael Jackson, Carole Cacciaroni, Maria Kincaid, Annie Snowden, Claudeen Jackson and Robin Smith. (D RT (Jan. 19, 1996, proceedings) 131-135.)

As the final day of the suppression hearing commenced, and after all evidence had been presented, defense counsel advised the court, "Apparently there was an arrest warrant issued prior to Mr. McCurdy being returned to the States and Mr. McCurdy was held in custody under the authority of that warrant once he arrived in California." (D RT (Jan. 23, 1996, proceedings) 253.) Defense counsel requested that the trial court take judicial notice of or review the arrest warrant and declaration supporting the arrest warrant. (*Id.* at pp. 251-252.) However, the prosecutor did not offer the arrest warrant and/or declaration into evidence and, more importantly, the trial court did not state its ruling as to defense counsel's request.

After defense counsel noted the existence of an arrest warrant, the parties proceeded with their respective arguments. (D RT (Jan. 23, 1996, proceedings) 251-263.) Neither the trial court nor counsel referred to any specific reports or statements offered in support of the declaration.[4]

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[4] Defense counsel argued that "[i]t is our position that . . . with the involuntary and unreliable statements contained in the declaration redacted that there would be insufficient probable cause to have issued that warrant . . . ." (D RT (Jan. 23, 1996, proceedings) 251.) In fact, the only

(continued...)

Moreover, reiterating their prior agreement, both counsel stipulated that all issues relating to both *Miranda* and the voluntariness of appellant's statements be heard at the hearing. (D RT (Jan. 23, 1996, proceedings) 259.) A review of the procedural history, including that set forth in this section, makes clear that the parties intended, and the trial court understood that they intended, that the trial court should rule on all issues relating to *Miranda* and to the voluntariness of appellant's statements based upon the evidence offered at the suppression hearing. (See, e.g., D RT (Jan. 23, 1996, proceedings) 257-259.)

On March 13, 1996, the trial court denied appellant's motion to suppress with respect to the testimony of Mychael Jackson. First, the trial court ruled that, even absent that portion of appellant's statement taken after his *Miranda* rights had been violated, there was sufficient evidence known to the police to arrest appellant. The trial court explained, "There was evidence that the corpus of the crime of motive on behalf of the defendant with opportunity, the defendant's presence at the area of the scene, and finally, strong evidence of an unnatural consciousness of guilt displayed at the Cacciaroni interview." (E RT (Mar. 13, 1996, proceedings) 18-19.)[5]

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[4](...continued)
substantive statements contained in Officer Jerrold's declaration are summarized on pages 2-3, *supra*. (A CT 6, 16; 2 Aug. CT 316.)

[5] Appellant recognizes that the first portion of the trial court's ruling – "[t]here was evidence that the corpus of the crime of motive on behalf of the defendant with opportunity" – is not fully intelligible. However, during record correction proceedings, the court reporter affirmed that no change should be made to the record as the trial court's statement appears in this fashion in her notes. (3rd Supp. Aug. CT 1341.) Appellant reads the statement as referring to "the corpus [delecti] of the crime, of motive on

(continued...)

Second, the trial court ruled that, even assuming that appellant's arrest were unlawful, Jackson's testimony was not suppressible on the ground that both the United States Supreme Court and California Supreme Court had held "that a defendant's face cannot be suppressible fruit of an illegal arrest." (*Id.* at p. 19.) The trial court commented that if Jackson could make an in-court identification of appellant, an illegal arrest would not insulate appellant from identification. (*Ibid.*)

Third, the trial court ruled that even assuming a defendant's face were a suppressible fruit of an illegal arrest, Jackson's voluntary act of coming forward as a witness was the product of a non-governmental party's news broadcast and therefore was not sufficiently related to the alleged governmental illegality to justify suppression of his testimony. (*Ibid.*)

In denying appellant's motion as to Jackson's testimony, the trial court did not refer explicitly, if at all, to the arrest warrant. (E RT (Mar. 13, 1996, proceedings) 18-19.)

As demonstrated below, the trial court erred in denying appellant's motion to suppress.

B. Appellant's Arrest Was Unlawful

In finding that the police had probable cause to arrest appellant, the trial court focused on three categories: (1) appellant's supposed motive to commit the offenses; (2) his presence at the area of the scene of Maria's abduction (or, put another way, "opportunity"); and (3) "an unnatural consciousness of guilt displayed" during an interview which took place prior to the interrogation challenged in Argument II of Appellant's Opening

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[5](...continued)
behalf of the defendant, with opportunity, the defendant's presence at the area of the [abduction] scene . . . ."

Brief. (E RT (Mar. 13, 1996 proceeding) 19.)

However, as appellant explains in Section B.1 of the instant argument, *infra*, the police lacked probable cause to arrest appellant prior to the interrogation discussed in Argument II of Appellant's Opening Brief. Moreover, as appellant demonstrated in Argument II, all of his statements during the interrogation were obtained in violation of *Miranda* and/or were involuntary; therefore, to the extent that probable cause supporting the arrest was based on those statements, appellant's arrest was the fruit of the unlawful interrogation. Finally, even if this Court should conclude that the trial court was not required to suppress some or all of the statements challenged in Argument II, there still did not exist probable cause to arrest appellant.

Under these circumstances, the trial court erred in finding that appellant's arrest was lawful.

1. The Police Lacked Probable Cause To Arrest Appellant Prior To Their Unlawful Interrogation of Appellant

A person may be arrested only upon a showing of probable cause that he or she committed a specific offense. (Pen. Code, § 817, subd. (a).) Probable cause is shown only if "a man of ordinary caution or prudence would be led to believe and cautiously entertain a strong suspicion of the guilt of the accused. . . ." (*People v. Fischer* (1957) 49 Cal.2d 442, 446.) A review of the evidence presented at the suppression hearing (including the evidence at the preliminary hearing, which, as noted above, the trial court was to consider in ruling on the motion to suppress) demonstrates that there did not exist probable cause to arrest appellant prior to the unlawful interrogation challenged in Argument II of Appellant's Opening Brief. Therefore, the trial court erred in ruling that, even absent that portion of the

defendant's statement taken in violation of *Miranda*, there was sufficient evidence known to the police to arrest appellant. (E RT (Mar. 13, 1996, proceedings) 19.)

The evidence known to police prior to the shipboard interrogation of appellant was described at the hearing on his suppression motion. According to Lieutenant Bingaman, appellant first came to the attention of the authorities when his sister, Donna Holmes, reported her suspicion that he might be responsible. She informed law enforcement officials that: appellant lived in the Lemoore area and was familiar with the area where Maria's body had been found; he had molested her (Donna), and later told her that he had never married for fear that he would molest his own children; and appellant had behaved in a strange manner at a family gathering around the time of the offenses. (D RT (Jan. 19, 1996, proceedings) 7-9, 19, 28-34.)

The police also determined that appellant had rented videotapes at a store in the Food King shopping center around the time Maria disappeared. (*Id.* at pp. 9-11, 35.) The police subsequently searched a storage unit rented by appellant, where they found adult videotapes and magazines, some of which featured porn star Traci Lords. (*Id.* at pp. 12-13, 36-38, 40.)

Finally, Bingaman testified that he requested that a Naval Investigative Services agent, Carole Cacciaroni, interview appellant. (*Id.* at pp. 15-16, 18.) When Cacciaroni summoned appellant for an interview and asked what he thought it related to, he essentially replied, "Is it about the little girl in Lemoore that was kidnaped?" (*Id.* at pp. 16-17, 45, 48.) During the interview, appellant inquired about Maria's condition, eventually asking if she was dead; at another point, he asked whether she had been molested. Appellant was sick to his stomach, crying

uncontrollably, and visibly upset. On subsequent occasions, appellant went to her office unsolicited and distraught. (*Id.* at pp. 17, 44-46.) Appellant told her that he felt like a suspect because he had been in Bakersfield. (*Id.* at pp. 17, 47.) Cacciaroni later informed Bingaman that, based on the interviews, she believed appellant deserved further scrutiny. (*Id.* at pp. 15-16, 18.)[6]

This information, even viewed in its totality, would not lead "a man of ordinary caution or prudence . . . to believe and cautiously entertain a strong suspicion of [appellant's] guilt . . . ." (*People v. Fischer, supra*, 49 Cal.2d at p. 446.) Holmes's suspicion that appellant was involved in the offenses appears to have been based on nothing more than the following: he had engaged in incestuous conduct with her, he was familiar with Poso Creek, and he lived near Lemoore. First, as Bingaman noted (D RT (Jan. 19, 1996, proceedings) 17), Poso Creek is located in the vicinity of Bakersfield. A person of ordinary caution could not possibly believe that appellant alone had ties to both Lemoore and the relatively large city of Bakersfield.

Second, as appellant pointed out in Argument III, Section B, of his opening brief, appellant's incestuous conduct with a sister just two years younger than him was in no way probative of an adult sexual interest in

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[6] Bingaman's account of Cacciaroni's interviews with appellant was generally consistent with Cacciaroni's preliminary hearing testimony regarding those interviews. (B RT 172-200.) However, at the preliminary hearing, Cacciaroni also testified that: appellant had volunteered to be hypnotized in case he saw something that had registered in his subconscious (B RT 196-198, 200); and that she had interviewed one Norman Perry, who reported that appellant had told him that he wanted to go back to the Phillipines and that 11 and 12 year old girls were the best (B RT 192-193).

young girls, let alone of an intent or motive to commit the offenses against Maria. Similarly, appellant's possession and rental of the adult magazines and videotapes, not one of which depicted a prepubescent child, failed to establish any connection between appellant and the kidnap and murder at issue. (See AOB, Argument III, Section D, hereby incorporated by reference as if fully set forth herein.)

Third, appellant's mere presence in the vicinity of Maria's abduction was not sufficient to establish probable cause of his guilt. (See, e.g., *United States v. Brown* (1991) 951 F.2d 999, 1004.)

Finally, even assuming appellant appeared to be agitated in the weeks following the crime, as Agent Cacciaroni, Mary Smith, Claude Hudson, and Roy Blanton testified, appellant had good reason to be anxious: he was about to leave for a six-month Navy detachment, and had taken a new position, one which carried a great deal of responsibility. (10 RT 1601-1613; 11 RT 1617-1661, 1688-1690, 1692-1694, 1717, 1720; 13 RT 2202-2206, 2210-2211, 2216; 14 RT 2550-2552.) If he had succeeded, he would have been in line for a promotion. (14 RT 2550-2552.) Alternatively, appellant's agitation may have reflected displaced feelings of guilt related to his past incestuous conduct. Moreover, the record reveals that appellant was particularly vulnerable to the stress of being interrogated, so much so that he wrote a letter apologizing for the murder of Angelica Ramirez, a crime of which he was demonstrably innocent. (See F RT (Dec. 23, 1996, proceedings) 4; 14 RT 2406-2412; 12 CT 3367-3368.)[7]

Bingaman acknowledged that, prior to the interview with Cacciaroni,

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[7] Defense counsel explained that, in his letter, appellant wrote something to the effect, "[T]hey tell me I did it, I don't know if I did or not, I'm sorry." (F RT (Dec. 23, 1996, proceedings) 5-8.)

appellant had not been identified as a suspect, and probably would not have been arrested. (*Id.* at pp. 17, 47-48.) Nothing appellant said or did during the interview with Cacciaroni, however, helped establish probable cause to arrest him. For instance, appellant's guess that Cacciaroni wished to speak to him about Maria's disappearance was neither surprising nor suggestive of guilt, given the widespread publicity the case had received prior to his departure on the Navy cruise. (11 RT 1688, 1692; see also AOB, Arg. I, hereby incorporated by reference as if fully set forth herein.) In addition, appellant's alleged statement to Norman Perry should be accorded no weight whatsoever, particularly in light of the fact that Perry apparently evaded a subpoena issued by the prosecutor and, in any event, was never subjected to cross-examination (e.g., regarding the context of appellant's supposed statements, and as to whether Perry was motivated to lie about appellant, who, as Perry's supervisor, had disciplined him on a couple of occasions). (B RT 192-193; 7 CT 1991; see also fn. 5, *supra*.) Finally, appellant's concern that he was blocking out information likely reflected his fear that he had witnessed the crime and, having failed to recognize what was taking place, did not prevent it (B RT 196); in addition, as noted above, appellant was especially vulnerable to the pressure of being interrogated, to the point of apologizing for a crime he did not commit (see F RT (Dec. 23, 1996, proceedings) 4; 14 RT 2406-2412; 12 CT 3367-3368).

The factors apparently identified by the trial court in support of its finding that there was sufficient evidence known to the police to arrest appellant even absent his statements – i.e., the corpus delecti of the offenses, as well as motive, opportunity, presence at the scene of the abduction, and his emotional state during the Cacciaroni interview – failed to establish probable cause, whether viewed singly or in combination. (E

RT (Mar. 13, 1996, proceedings) 19.) Therefore, the trial court erred in finding that, even absent the portion of the interrogation which took place after appellant's *Miranda* rights were violated, there was sufficient evidence known to the police to arrest him. (*Ibid.*)

2. Even Considering The Challenged Interrogation Statements, The Police Still Lacked Probable Cause to Arrest Appellant

As demonstrated in Argument II, all of appellant's statements were obtained in violation of *Miranda* and/or were involuntary. To the extent that probable cause supporting the arrest was based on those statements, appellant's arrest was the fruit of the unlawful interrogation. (*Oregon v. Elstad* (1985) 470 U.S. 298, 307-308; *Wong Sun v. United States*, *supra*, 371 U.S. at pp. 487-488.) In any event, none of the information elicited during the interrogation would have led "a man of ordinary caution or prudence . . . to believe and cautiously entertain a strong suspicion of the guilt of the accused . . . ." (*People v. Fischer*, *supra*, 49 Cal.2d at p. 446.)[8] Therefore, even if this Court finds that the trial court was not required to suppress some or all of the statements challenged in Argument II of Appellant's Opening Brief, there still did not exist probable cause to arrest appellant. (See 1 CT 48 [defense counsel's assertion that appellant was arrested "without justification, probable cause or even legal authority"].)

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[8] As appellant noted in his opening brief (AOB, p. 60), the trial court found that, from a certain point in the interrogation on, appellant's statements were involuntary. (1 CT 91; E RT (Mar. 13, 1996, proceedings) 1-17.) Of course, the trial court would not have considered the statements it found to be involuntary in determining whether there was probable cause to arrest appellant, a ruling it made immediately afterward. (E RT (Mar. 13, 1996, proceedings) 18-19.)

In finding probable cause, the trial court focused on three categories: (1) appellant's motive; (2) appellant's presence at the area of the scene of Maria's abduction; and (3) "an unnatural consciousness of guilt displayed at the Cacciaroni interview." (E RT (Mar. 13, 1996 proceeding) 19.) As noted in the previous section, however, the evidence offered in support of these categories did not tend to raise a suspicion of appellant's guilt.

During those portions of the interrogation discussed in Argument II, the investigators elicited statements which were prejudicial, if not actually inculpatory. For instance, appellant admitted that he owned numerous adult magazines and videotapes, some of which featured models whom he believed were or appeared to be younger than 18 years old (Exh. 1A, second pp. 9-11, 17, 21; 3 Aug. CT 697-699, 705, 709). Although there was evidence that the police had seized adult magazines and videotapes from a storage locker rented by appellant, the interrogators elicited his personal admission that those items were in fact his. Appellant also stated that he saw a man who may have been African-American in the Food King parking lot (Exh. 1A, pp. 55-56; 3 Aug. CT 687-688); he expressed concern that he was blocking out information (Exh. 1A, p. 17; 3 Aug. CT 649); he feared that he was a suspect because he had been going to Bakersfield every weekend and was in the area (i.e., near Food King) when Maria was taken (Exh. 1A, p. 14; 3 Aug. CT 646); and, he discussed his incestuous conduct with his sister (Exh. 1A, second pp. 25-29, 44-46; 3 Aug. CT 713-717, 732-734).

At least some of this information – specifically, appellant's statements admitting ownership of the magazines and videotapes, his reference to an African-American man, and his statements regarding the incest – constituted information the investigators apparently did not possess

prior to the interrogation. However, none of this newly-obtained information helped establish probable cause to arrest appellant.

First, as noted above, evidence relating to appellant's incestuous conduct and to his possession of adult-oriented magazines and videotapes was not probative of an adult sexual interest in young girls, let alone of an intent or motive to commit the offenses against Maria. (AOB, Argument III.)

Second, appellant's recollection that he may have seen a "black" man at the Food King shopping center (Exh. 1A, pp. 55-56; 3 Aug. CT 687-688), when viewed in context, in no way corroborates Jackson's preliminary hearing testimony that he observed appellant at the shopping center (B RT 201-236; C RT 263-280, 294-296). Appellant recalled seeing a blonde woman sitting in the *passenger* seat of a car, and two children were in the back seat. (Exh. 1A, pp. 55-56; 3 Aug. CT 687-688.) Appellant then recalled, "You know. It's, yeah, I think she got it, uh a guy came out[.] I think he was black." (Exh. 1A, p. 55; 3 Aug. CT 687.) He also commented that the woman and/or the man may have been *Mexican*. (Exh. 1A, p. 56; 3 Aug. CT 688.) Although appellant's recollection of the scene was admittedly (and, given the passage of time, understandably) hazy, it is reasonable to infer that the man to whom appellant referred was with the woman and children. Jackson, however, testified that he was alone when he observed appellant. (B RT 216; C RT 249-250.) As such, appellant's possible observation of a black man was in no way corroborative of Jackson's identification testimony.[9]

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[9] As noted above, the parties stipulated that the trial court should review the preliminary hearing testimony of Mychael Jackson as well as the testimony (continued...)

Under these circumstances, there was no probable cause – with or without the challenged statements -- to arrest appellant.

C. All Jackson's Testimony Was The Tainted Fruit Of Appellant's Unlawful Arrest

But for appellant's involuntary statements and ensuing illegal arrest, Mychael Jackson would not have come forward and testified against appellant. Appellant's arrest led directly to the televised broadcast of a videotape showing appellant being escorted to the Kings County Jail. More important, the unlawful arrest led directly to the publication of appellant's photograph in a newspaper which resulted in Jackson's coming forward to testify that appellant was the man who abducted Maria in the Food King parking lot. The publication of appellant's image in both the television news broadcast and newspaper, as well as Jackson's testimony implicating appellant, were the fruits of appellant's unlawful arrest and therefore should be suppressed. (*Wong Sun v. United States*, *supra*, 371 U.S. at pp. 487-488.) The trial court erred in admitting Jackson's testimony.

The record in this case is clear. Jackson watched a television broadcast which showed a side view of appellant, who was seated in the back of a police car. The police car was "far away." (B RT 221-222; C RT 255-256, 260.) However, Jackson materialized as a witness against appellant only because, on the day after the television broadcast, he saw

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[9](...continued)
of several witnesses called by the defense to impeach him, i.e., Maria Kincaid, Annie Snowden, Claudeen Jackson, and Robin Smith. (D RT (Jan. 19, 1996, proceedings) 131-135.) Because Mychael Jackson did not approach the authorities until *after* appellant's arrest, any testimony concerning Jackson's purported observation of appellant at the scene of the abduction had no bearing on whether there was probable cause to arrest appellant.

appellant's picture in the Visalia Times-Delta newspaper. (B RT 220; C RT 257-260.)[10] It was after seeing the newspaper photo that Jackson recognized appellant. (B RT 220, 223-226; C RT 257-260.)

In denying appellant's motion to suppress Jackson's testimony, the trial court erred first in finding that appellant's face cannot be suppressible as the fruit of an illegal arrest, and second in finding that Jackson's voluntary act of coming forward as a witness was the product of a non-governmental party's news broadcast and therefore was not sufficiently related to the alleged governmental illegality to justify suppression of his testimony. Therefore, as shown below, Jackson's testimony should have been suppressed.

1. The Publication Of Appellant's Image And Mychael Jackson's Resulting Testimony Implicating Appellant Constituted Fruits Of His Illegal Arrest

As appellant contended at trial, Mychael Jackson's testimony implicating appellant as Maria's abductor was inadmissible because it resulted from a photograph of appellant that was obtained as a direct result of his arrest, which in turn was a direct result of his unlawful interrogation. (1 CT 55-56; D RT (Jan. 23, 1996, proceedings) 259-261.) The trial court should have suppressed Jackson's testimony implicating appellant as the perpetrator, which surfaced solely because of the newspaper photograph. (See B RT 220, 223-226; C RT 257-260.)

The trial court was mistaken in ruling that appellant's face is not

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[10] During the preliminary hearing, Jackson identified the newspaper photograph. (12 RT 1961-1968; Exhibit 31.) One of the two photographs in the newspaper article identified by Jackson was appellant's booking photo. (See Exh. 31.)

suppressible as the fruit of an unlawful arrest. It is true that a plurality of the United States Supreme Court in *United States v. Crews* (1980) 445 U.S. 463, ruled that a defendant's face cannot be a suppressible fruit of an illegal arrest. (*Id.* at p. 477 (conc. opn. of Powell, J.); *id.* at pp. 477-478 (conc. opn. of White, J.).) However, the phrase "defendant's face" referred to a defendant's presence in the courtroom at trial, not to a photograph or other identification testimony. The *Crews* holding was based largely on the concern that suppression of a victim's in-court identification would effectively prohibit the defendant's presence in the courtroom and insulate the defendant from conviction, even where the victim has an independent and untainted recollection. (*Id.* at p. 477 (conc. opn. of Powell, J.); *id.* at pp. 477-479 (conc. opn. of White, J.).) Here, appellant does not contend that his presence at trial should have been suppressed. Rather, he claims 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.

The trial court also was mistaken in ruling that Jackson's action in coming forward as a witness against appellant was not sufficiently related to the unlawful arrest to justify suppression. As explained above, there was an immediate, causal nexus between the appellant's illegal arrest and Jackson's emergence as a witness against him. In this way, this case is similar to *Davis v. Mississippi* (1969) 394 U.S. 721, in which the defendant's identity and connection to the crime were first discovered through an illegal detention. In *Davis*, a woman had been raped in her home, and during the next ten days, the local police rounded up scores of black youths, randomly stopping, interrogating, and fingerprinting them.

Davis' fingerprints were discovered to match a set found at the scene of the crime, and on that basis he was arrested and convicted. Those fingerprints subsequently were ordered suppressed as the fruits of an unlawful detention; had it not been for his illegal detention, his prints would not have been obtained and he would never have become a suspect.

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. (*Wong Sun v. United States, supra*, 371 U.S. at pp. 487-488.)

2. The Trial Court's Error Was Prejudicial

The trial court's error in admitting Jackson's testimony was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Jackson's testimony was the only direct evidence that appellant had had any contact whatsoever with Maria Piceno. Jackson was the only witness to testify that appellant was with Maria in the parking lot of the Food King shopping center (12 RT 1886-1902, 1964-1965, 2006); that appellant appeared to have led her into his truck (12 RT 1903-1916, 1979-1981, 2006); that appellant was wearing aviator-style sunglasses with a band, and a blue shirt with an emblem in the left chest area (12 RT 1901, 1917-1919, 1922-1923, 1977-1978, 1981-1987, 2011-2016), items which were consistent with articles found in appellant's possession (13 RT 2156-2161); and, that appellant drove a two-toned Chevy S-10 truck with a red stripe (12 RT 1920-1922, 1974-1977), a description consistent with that of appellant's truck (13 RT 2171-2172, 2184-2188).

Moreover, the jury obviously found Jackson's testimony to be important. The jury requested that the following testimony be read back or

replayed: (1) Jackson's testimony as to the date when he first drew on appellant's photograph; (2) Officer Bradford's testimony regarding his first and second interviews of Jackson; (3) Jackson's testimony regarding what he saw in the parking lot; (4) videotapes of the sheriff's car in which appellant was transported to the Kings County Jail, which Jackson testified he saw in a news broadcast; and (5) Jackson's testimony surrounding his observations of Maria and appellant just before and during the time he left the parking lot. (12 CT 3404, 3409.)

Apart from Jackson's testimony, the evidence connecting appellant and Maria was remarkably weak. All that remained was thin circumstantial evidence, particularly: (1) evidence that appellant was at the shopping center around the time of the abduction; (2) evidence that, on the evening of March 27, 1995, Mary Lazaro heard what sounded like a child whimpering or sobbing in appellant's bathroom; (3) evidence that appellant had ties to both Lemoore and the Poso Creek area; (4) the discovery at Poso Creek of a shower curtain resembling one appellant had owned; (5) Bruce Ackerman's testimony that appellant had told him that, while he was in the shopping center parking lot on the day of the abduction, he saw a blonde woman in a two-door car, perhaps with two children, and a man, possibly African-American, coming out of the store; and (6) Agent Carole Cacciaroni's testimony regarding her interviews of appellant, especially her testimony regarding his demeanor. Such evidence, even considered together, did not establish beyond a reasonable doubt his guilt of any offense.

First, although there was evidence that appellant rented videotapes at the shopping center at 3:28 p.m. (10 RT 1572, 1576-1577, 1579-1580; 14RT 2399, 2401-2403), this did not establish that appellant perpetrated the

crimes. (See, e.g., *United States v. Gainey* (1965) 380 U.S. 63, 70; *People v. Gentry* (1953) 118 Cal.App.2d 501, 503.) That appellant committed the offenses is even more implausible given that, at 3:34 p.m., appellant selected and rented three more movies from another video store located approximately 2 to 2½ minutes away. (12 RT 2101, 2103-2108, 2110; 13 RT 2166, 2177-2180.) Then, at around 4:10 p.m., appellant selected and rented three more movies at a video store located approximately 4½ minutes from the second store. (12 RT 2112-2120; 15 RT 2642-2643, 2645-2646.) There was no evidence that anyone was with appellant at either location.

In fact, the chronology developed at appellant's trial suggested that appellant was not, and could not have been, at the Food King shopping center at the time of Maria's abduction. Mychael Jackson testified that he exited the freeway at 3:50 p.m., and saw Maria with her abductor a few minutes later (12 RT 1886-1887, 1895-1899, 1901, 1908, 1919, 2000, 2006), and Eric Douglas saw her alone in the 99 Cent Store at a few minutes after 4:00 p.m. (10 RT 1563-1564). Meanwhile, at 4:10 p.m., appellant selected and rented three more movies at a video store located some distance from the shopping center. (12 RT 2112-2120; 15 RT 2642-2643, 2645-2646.)

Second, the testimony of Mary Alliene Smith and Mary Lazaro that, on the night of March 27, 1995, Lazaro heard what sounded like a child whimpering or sobbing in appellant's bathroom (11 RT 1699, 1737, 1740, 1765-1772, 1776, 1778, 1780, 1783, 1799) did not establish that there was in fact a child, let alone Maria, in appellant's apartment. In addition, the evidence provided good reason to doubt the accuracy, even the veracity, of their testimony. Smith claimed that, although she was contacted by thepolice a month later, somehow she did not then remember that her

mother had heard what sounded like a child crying in appellant's apartment. (11 RT 1739, 1741-1742.) She did not tell the police about the supposed incident until September, 1996, a year and a half after the homicide; her mother did not talk to the police until October, 1996, even though she had known much earlier that appellant was a suspect. (11 RT 1742-1744, 1772-1776.) Moreover, Smith acknowledged that she had given various accounts as to the date her mother purportedly heard the whimpering; Smith's explanation as to how she finally determined that it occurred on March 27, 1995, bordered on the absurd. (11 RT 1743-1751, 1755; see also AOB, pp. 8-10.)[11]

Third, although appellant had ties to both Lemoore and the Poso Creek area, the same had to be true of many other individuals as well, and it in no way tends to prove that he committed the crimes.

Fourth, absent Jackson's testimony, the jury likely would have disregarded evidence that a shower curtain recovered from Poso Creek (Exh. 4A) resembled one which appellant had owned. The jury may have been more likely to find a reasonable doubt that the shower curtain belonged to appellant in light of: Lisa Kuehne's testimony that, although Exhibit 4A resembled a shower curtain she had left in appellant's apartment in November, 1990, she could not testify that it was in fact the same one (13 RT 2251-2252, 2256-2257, 2259-2261, 2263-2264, 2275, 2278); Kellie Carrion's testimony that, although Exhibit 4A looked like a shower curtain that had hung in a bathroom she had shared with appellant, the

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[11] Smith's testimony as to how she figured out the date was convoluted, but ultimately she claimed that she did so by referring to her work schedule and by reference to the date her mother, Mary Lazaro, visited her apartment to pick up a doll she (Lazaro) had ordered. (11 RT 1743-1751, 1755.)

curtain in their bathroom was vinyl, not cloth (13 RT 2226-2227, 2284-2291, 2294, 2296, 2299); the testimony of Lisa Teays (who had been in appellant's bathroom only three or four times) that, although Exhibit 4A appeared to be the shower curtain from the bathroom shared by appellant and Carrion, she was not absolutely certain that it was (13 RT 2228, 2233-2235, 2237-2238, 2240); and, testimony that, although the authorities conducted a search of Poso Creek around the time Maria's body was found, they did not find the shower curtain until six months later (13 RT 2329-2330).

Fifth, Cacciaroni's testimony regarding appellant's demeanor and statements, which the prosecution apparently introduced to show consciousness of guilt, most likely reflected appellant's particular susceptibility to police coercion. For instance, appellant wrote a letter of apology to the parents of Angelica Ramirez, even though forensic evidence demonstrated that he did not commit the offenses against her. (F RT (Dec. 23, 1996, proceedings) 5-8.) Defense counsel explained that, in his letter, appellant wrote something to the effect, "[T]hey tell me I did it, I don't know if I did or not, I'm sorry." (*Id.* at p. 8.)

Finally, it is likely that admission of Jackson's testimony, like the admission of appellant's statements, impelled appellant to testify and explain his version of events and interpretation of his statements, where otherwise he would not have done so. (See *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1064.)

Under these circumstances, appellant submits that, but for the admission of Jackson's testimony, the jury would have been more likely to reach a more favorable verdict. Jackson's testimony was a crucial part of the prosecution evidence: he was the only supposed eyewitness to the

abduction, and he was the only person reportedly to have seen appellant and Maria together. Suppression of his testimony would have greatly weakened the prosecution's evidence.

Accordingly, the jury's guilt phase verdicts, special circumstance finding, and death verdict must be vacated.

DATED: July 18, 2006

Respectfully submitted,

MICHAEL HERSEK
State Public Defender

GARY D. GARCIA
Deputy State Public Defender
Attorney for Appellant

DECLARATION OF SERVICE

Re: People V. GENE ESTEL McCURDY

No. S061026
Kings County Sup. Ct.
No. 95CM5316

I, ROSEMARY MENDOZA, 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 SUPPLEMENTAL OPENING BRIEF

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

Bill Lockyer
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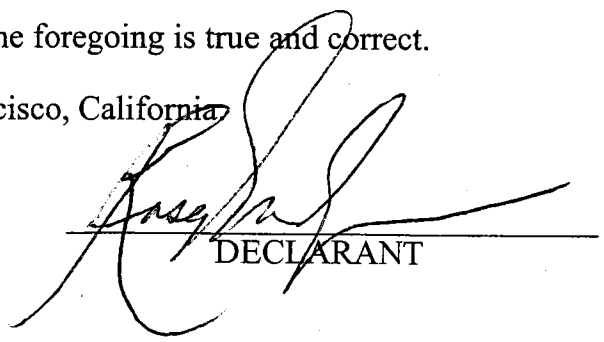
Each said envelope was then, on July 18, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on July 18, 2006, at San Francisco, California.



DECLARANT