IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **GENE ESTEL McCURDY,** Defendant and Appellant.	S061026 **CAPITAL CASE**

Kings County Superior Court No. 95CM5316
Peter M. Schultz, Judge

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DEATH PENALTY

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STATEMENT OF THE CASE

On October 18, 1995, the district attorney filed information number 95CM5316 in the Kings County Superior Court, charging appellant Gene Estel McCurdy with, in count one, the murder of Maria P. (Pen. Code, § 187[1]), with the special circumstance allegation that the murder took place during the course of a kidnapping (§ 190.2, subd. (a)(17)). (1 CT 6-7.) The information charged appellant with, in count two, kidnapping (§ 207, subd. (a)); in count three, misdemeanor possession of child pornography (§ 311.11, subd. (a)); and in count four, misdemeanor duplicating of a videotape containing child pornography (§ 311.3). (*Ibid.*)

On December 4, 1995, the trial court denied appellant's motion to strike count two and the kidnapping-murder special circumstance allegation. (1 CT 44.)

On March 13, 1996, the trial court granted in part and denied in part, appellant's section 1538.5 motion to suppress evidence. (1 CT 74-80.)

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1. Hereafter, all statutory references are to the Penal Code, unless otherwise indicated.

On April 15, 1996, the trial court granted appellant's motion to sever counts three and four from counts one and two.[2] (E (Apr. 26, 1996) RT 8-9.)[3]

On April 26, 1996, the trial court granted the prosecution's motion to amend the information to include a count alleging that appellant violated section 207, subdivision (b), by kidnapping Maria P. for the purpose of committing an act in violation of section 288. (1 CT 137, 148, 156.)

On May 7, 1996, the trial court denied appellant's motion for a change of venue. (1 CT 269.)

On January 6, 1997, the prosecutor filed an amended information, which amended count two, to allege a violation of section 207, subdivision (b) (kidnapping for the purpose of committing a section 288 offense), and added, in count three, a violation of section 207, subdivision (a) (kidnapping). (12 CT 3415-3416.)

On January 21, 1997, the guilt phase of appellant's trial began. (12 CT 3377-3379.) On January 31, 1997, the jury returned guilty verdicts on counts one through three, and found the kidnapping special circumstance to be true. (12 CT 3412-3413.)

On February 11, 1997, the penalty phase began. (13 CT 3623-3624.) On February 13, 1997, the jury returned a verdict of death. (13 CT 3630-3631.)

On April 22, 1997, the trial court denied appellant's motion for a new trial. (13 CT 3665-3674, 3700-3703.) The trial court also denied his motion for modification of the death verdict and sentenced appellant to death on count one. The court stayed the sentences on counts two and three pursuant to section 654. (13 CT 3700-3703; E RT (Apr. 22, 1997, proceedings) 25-30.)

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2. The court remanded the misdemeanor counts to the municipal court for further proceedings. (E (Apr. 26, 1996) RT 8-9.)

3. The Reporter's Transcript includes several volumes identified by letter, rather than by number.

Appeal is automatic. (Cal. Rules of Court, rule 34.)

STATEMENT OF FACTS

Introduction

On a spring day in 1995, eight-year-old Maria P. walked two blocks from her home to a nearby Food King to buy some tuna fish for her mother. Thirteen days later, her lifeless body was found partially buried in a sandbank near Poso Creek. Cogent evidence tied appellant to the crime. An eyewitness had seen appellant holding Maria's hand in the Food King parking lot. Appellant admitted, and a receipt confirmed, that he had rented three adult videotapes in a video store near the Food King at about the time Maria was abducted. That night, a woman heard a young child whimpering in appellant's upstairs apartment.

Appellant had earlier lived near the area where Maria's body was found, and a shower curtain resembling one owned by appellant was discovered not far from her body. Although appellant adamantly denied any involvement in the crime, his bizarre behavior in the days following the abduction, and later, when questioned by authorities, provided persuasive proof of his guilt.

Guilt Phase

On March 27, 1995, Maria's mother, Arcelia Ferrell, lived in an apartment in Lemoore that was two blocks away from Food King. (10 RT 1505, 1508.) A little before 3:00 p.m. that day, Maria arrived home from third grade and told Ferrell that she was hungry. (10 RT 1506-1507, 1525.) Since Maria liked tuna sandwiches and there was no tuna in the house, Ferrell asked Maria if she would like to purchase some at the nearby Food King. (10 RT 1508, 1510.) Maria excitedly replied in the affirmative, and Ferrell gave her three one-dollar bills. (10 RT 1508.) Shortly after 3:00 p.m., Maria left for the

store, while Ferrell remained at home. (10 RT 1509.)

When Maria did not return after twenty minutes, Ferrell walked to the Food King with her two other children to look for her. (10 RT 1509.) Ferrell spoke to several people inside the Food King to ask if they had seen Maria. (10 RT 1514.) She described Maria as wearing green pants with a green print on them, a pink blouse with a southwest design on it, and green socks. Maria had also been wearing a ponytail holder in her hair. (10 RT 1515-1516.) Underneath Maria's blouse, she had been wearing a "Little Mermaid" t-shirt. (10 RT 1516.) Ferrell reported that Maria had a broken tooth on the left side of her mouth. (10 RT 1518.) She identified People's Exhibits 5A through 5D as the clothes Maria was wearing that day. (10 RT 1520-1522.)

Edna May Lowery, a checker at Food King, sold Maria a can of tuna that afternoon. (10 RT 1529-1531.) The receipt from Maria's purchase indicated that she purchased the tuna at 3:18 p.m. (10 RT 1537.)

At approximately 3:43 p.m., Eric Douglas saw Maria inside the Food King on the aisle where ice cream products are sold. (10 RT 1559.) Maria, whose face Douglas later recognized from fliers and news broadcasts, was happily running along and playing in the store. (10 RT 1559-1561.) Fifteen minutes later, when Douglas left the Food King, he saw Maria at the front of the 99 Cent Store. (10 RT 1562.) Maria caught Douglas's attention because she was wearing bright clothes, and she was talking to herself. (10 RT 1563.)

A receipt indicated that at 3:28 p.m. that afternoon, appellant rented three unrated "adult" videos from Video World, a store within the same strip mall as the Food King.[4/] (10 RT 1571-1572, 1576-1577, 1580.) Another receipt confirmed that at 3:34 p.m., appellant rented three x-rated movies from

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4. Video World manager John Bush explained that "adult" films are not rated and may be rented by persons under the age of 18, while one must be 18 years or older to rent rated-x movies. (10 RT 1572, 1577-1578.)

Lee TV, another video store in Lemoore, which is approximately a half mile and two minutes by car from Video World. (12 RT 2101, 2103-2108, 2110.) At approximately 4:10 p.m., a third receipt confirmed that appellant rented three pornographic movies at Video Zone, which is located four and a half minutes by car from Lee TV. (12 RT 2112-2115; 15 RT 2642-2643, 2645-2646.) According to Video Zone employee Jana Watson, the clock on the store register may have been fast by as much as ten minutes at that time. (12 RT 2116-2120.)

Sometime after 6:30 or 7:00 p.m. that evening, appellant's neighbor, Mary Alliene Smith, was visited by her mother, Mary Lazaro.[5/] (11 RT 1684, 1696-1698, 1736, 1738, 1762, 1789, 1796, 1799.) About 40 minutes later, Lazaro went upstairs to use the bathroom. (11 RT 1765.) When Lazaro stopped to catch her breath at the top of the stairs, she thought she heard a whimpering noise. (*Ibid.*) The noise came from the part of appellant's apartment which shares a common wall with Smith's apartment. (11 RT 1684-1685, 1700, 1714, 1769, 1772, 1780, 1783.) Lazaro went into the bathroom, and she kept hearing soft whimpering. (11 RT 1766.) To Lazaro, the high pitched noise sounded like a child reacting to breaking a toy which could not be fixed. (11 RT 1766-1767.)

When Lazaro walked back downstairs, she asked Smith if the person next door had any children. Smith replied, "No," and commented that appellant was not home. (11 RT 1778.) Lazaro then asked Smith if there had been a child on television. However, from glancing at the movie on the television, Lazaro determined that there had been no children in the movie. (*Ibid.*) Lazaro also reasoned that when she had heard the whimpering, there had not been any background music or other sounds accompanying the whimpering. (11 RT 1767.) It was already dark outside when Lazaro heard the whimpering sounds.

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5. Smith confirmed that March 27, 1995, was the date her mother came over because her stepfather's birthday was the day before. (11 RT 1755.)

(11 RT 1771.)

Lazaro did not tell the authorities about the whimpering until October 1996, when Smith gave her permission to divulge those facts. (11 RT 1775-1776.) Lazaro explained that neither she nor Smith initially wanted to become involved in the case. (11 RT 1773-1774.) Smith had been attempting to reconcile with her husband, and neither Smith nor Lazaro wanted anyone to know that Smith had briefly been romantically involved with appellant while she had been separated from her husband. (11 RT 1775-1776.)

Smith explained that in October of 1994, she had moved into the apartment next door to appellant. (11 RT 1684.) The apartments shared a common upstairs wall, and through this wall Smith could hear noises from appellant's apartment. (11 RT 1684-1685.) In November of 1994, Smith met appellant. (11 RT 1685.) The two were briefly sexually involved, then their relationship evolved into a friendship. (11 RT 1686-1687.) Appellant occasionally watched television with Smith at her apartment. (11 RT 1687-1688.)

On March 28, 1995, appellant was watching television at Smith's apartment when a news bulletin came on about Maria's abduction. (11 RT 1717.) Appellant sat up from where he had been lying on the couch, faced the television and shifted uncomfortably, as if he was uneasy to be in the company of others while watching the bulletin. (11 RT 1689-1690.) He remarked that he hated it when bulletins interrupted his show. (RT 1691.) Smith joked that appellant was acting "kind of sadistic." (11 RT 1691; 14 RT 2429-2431.) At this, appellant laughed and went outside to smoke a cigarette.[6] (*Ibid.*)

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6. Smith believed she and appellant were watching Melrose Place. (11 RT 1689, 1717, 1720.) However, she conceded that Melrose Place aired on Monday nights, and March 28, 1995, was a Tuesday. (11 RT 1745.) Smith maintained that she and appellant watched the news bulletin the night after her mother had heard the sobbing. (11 RT 1747.)

On another day, Smith was working at her job at Jack-in-the-Box when appellant drove through the drive-thru where Smith was stationed. (11 RT 1692-1693.) Referring to fliers which had been posted around the restaurant to publicize Maria's disappearance, Smith started to say that she felt bad that Maria was missing. (*Ibid.*) Appellant abruptly and hostilely interrupted Smith, and asked her what time she was getting off work. (11 RT 1192-1194.) His reaction struck Smith as odd because he did not make eye contact with her as he usually did, and he typically listened to whatever she had to say.[7] (11 RT 1694-1695.)

Photographs of appellant taken during a March 26, 1995, ATM transaction showed that he had a mustache on that date. (12 RT 2042-2036; see also 16 RT 2762, 2848.) However, sometime at the end of March, Smith noticed that he had shaved off his mustache. (11 RT 1700; 14 RT 2428.) That struck her as odd because appellant had previously told Smith that he liked his mustache, and without it, he looked too young. (11 RT 1702.) Roy Blanton and Claude Hudson, who both served in appellant's Navy squadron, also noticed that appellant shaved his mustache around that time. (13 RT 2196-2200, 2213, 2215.)

On the afternoon of March 27, 1995, Mychael Jackson played basketball in Visalia, California, then drove to Lemoore, where he was supposed to pick

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7. Smith was first interviewed by the police on April 21, 1995. (11 RT 1711; 14 RT 2427-2428.) At that time, she did not report that her mother had heard sobbing or whimpering in the apartment next door, nor did she mention the encounter at work. (11 RT 1711-1713, 1721-1722, 1739; 14 RT 2429.) Smith explained that she did not think to tell the police about those events. (11 RT 1713.) Approximately a year and a half later, when Smith was again questioned by law enforcement, she remembered the incidents she had earlier forgotten to mention. (11 RT 1725.) She explained that her mother had reminded her about hearing the noise next door, and the conversation with her mother had jogged her memory as to the other incidents. (11 RT 1725-1727.)

up the children of his girlfriend, Kathy Curry. (12 RT 1878, 1943-1945, 1993-1995, 2010.) Jackson did not know if the children were supposed to get out of school at 2:30 or 3:00 p.m. (12 RT 1945-1946.) He had advised them that if he was not there within 15 minutes after they got out of school, they were to go to their babysitter's house. (12 RT 1945-1946, 1995-1996.)

Jackson arrived in Lemoore at 4:00 p.m. according to his car clock. He noted, however, that the clock was ten minutes fast, and it was actually 3:50 p.m. (12 RT 1878-1880, 1948-1957, 1994-1995, 2005.) Jackson drove to Curry's house, but realized he had forgotten the house keys. (12 RT 1880-1883, 1996, 2006.) He left and drove past the spot where he was supposed to pick up the children. As he expected, they were not there. (12 RT 1884, 1996, 2001-2002.)

Jackson then briefly stopped at Food King to purchase some orange juice. The cashier was an African American woman who he had seen before.[8/] (12 RT 1884-1885, 1996, 1998, 2000-2002.) Following this transaction, Jackson walked out of the Food King to the parking lot and saw appellant speaking with Maria. (12 RT 1886-1887, 1895-1899, 1901, 1908, 1919, 2000, 2006.) Appellant had a mustache and was wearing aviator-style sunglasses, which were attached to a black or grey band. He was wearing a dark blue shirt, with a circular emblem with writing on it, on the left front of the shirt. (12 RT 1901-1902, 1917-1919, 1922, 1978, 1982, 1984-1987.) Appellant was squatting down behind a van and talking to Maria, as he held her hand. (12 RT 1890-1893.)

Jackson immediately noticed appellant because he thought it was strange

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8. At a re-enactment of the crime following the October 1995, preliminary hearing, Jackson walked up to Edna Lowrey and identified her as the cashier from whom he had purchased the orange juice. Lowrey, however, did not remember Jackson and could not recall whether he had been in the store. (10 RT 1550, 13 RT 2311.)

for an older Caucasian male to be with a young Hispanic girl. (12 RT 1893, 1900.) As Jackson approached, appellant looked straight at him, and the two briefly made eye contact. (12 RT 1900-1901.) Jackson could see appellant's eyes, because appellant had pulled his sunglasses down to the end of his nose. (12 RT 1901.) After the two made eye contact, appellant quickly turned his head away from Jackson and continued to talk to Maria and hold her hand. (12 RT 1901-1902.) Jackson saw that appellant had a big bald spot on the back of his head. (12 RT 1904.)

When Jackson arrived at his car, which was parked approximately 10 to 15 feet from appellant's pickup, he saw appellant stand up. (12 RT 1903.) Jackson could see appellant by looking through the front windshield of a van that was parked in between Jackson's car and appellant's truck. (12 RT 1904.) Appellant's truck was a two-toned Chevy S-10 pickup, with gray or silver on the top and a dark color on the bottom, with a red stripe. (12 RT 1920, 1976.) Appellant walked several steps to the passenger door of his truck, then he opened the passenger-side door. (12 RT 1907-1908, 1979.) Jackson could not see Maria because the van was obstructing his view, but he saw the truck move as if someone was getting into the passenger seat. (12 RT 1909-1911, 1916, 1979.) Appellant slammed the door, then walked quickly around the rear of the truck to the driver-side door. (12 RT 1911, 1980.) After Jackson backed out of the parking space, he did not see Maria anywhere in the parking lot.[9] (12 RT

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9. At trial, Jackson identified a photograph of Maria as the Hispanic girl he had seen with appellant. (12 RT 1920.) He also identified a photograph of appellant's truck as the truck he had seen appellant drive, and a pair of black sunglasses with a neck band attached to the back, marked as People's Exhibit 23, as those which appellant had been wearing. (12 RT 1921-1922.) Jackson identified a blue Notre Dame t-shirt (People's Exh. 12), as the shirt appellant was wearing. (*Ibid.*) He identified photographs taken at an ATM machine near the time of the abduction, as looking like appellant did on March 27, 1995. (12 RT 1938.) In those pictures, appellant was wearing his aviator sunglasses, and he had a mustache. (*Ibid.*)

1914.)

Sometime later, Jackson saw a television news broadcast that showed footage of appellant being escorted by the police into Hanford. (12 RT 1925-1926, 1958-1959.) The broadcast did not indicate why appellant was being taken to jail and did not show any pictures of Maria. (12 RT 1926.) Jackson's girlfriend at that time, Deanna Turney, informed Jackson that appellant was being brought to jail regarding something to do with a girl in Lemoore. (12 RT 1927, 1959.) Prior to that, Jackson had not seen any stories regarding Maria, since he never watched the news and read only the sports section of the newspaper. (12 RT 1927.)

As Jackson viewed the news broadcast, he immediately recognized appellant's face, although he could not initially remember where he had seen appellant. (12 RT 1924-1928.) Jackson remarked to Turney that he had seen appellant before, but he did not know where.[10/] (12 RT 1928.) The next morning Jackson saw appellant's photograph in *The Visalia Times-Delta*. Jackson drew a mustache and some glasses on appellant's photograph and became certain he had seen appellant before, but he still could not remember where. (12 RT 1929-1931, 1960, 1967-1968.) For the next few days Jackson kept racking his brain to try to remember where he had seen appellant. He had difficulty sleeping because he kept seeing appellant's photograph in his mind. (12 RT 1931-1932.) Jackson eventually realized he had seen appellant in the Food King parking lot. (12 RT 1931-1932, 1966.)

About two or three days after drawing on appellant's photograph, Jackson told Turney where he had seen appellant, and she prodded him to call the police. (12 RT 1933-1934, 1976-1978.) Jackson was reluctant to call the police because he does not trust them. (12 RT 1932.) Jackson had also

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10. Turney corroborated Jackson's testimony on these points. (12 RT 2019-2021.)

suffered a felony conviction for Workman's Compensation fraud while appellant's case was pending, and he was not anxious to reinitiate contact with law enforcement. (12 RT 1933.)

On May 10, 1995, Jackson spoke to Lemoore Police Investigator Rick Bradford.[11] (12 RT 1939-1940, 2014.) Jackson maintained that he never expected to receive any benefit as a result of his testimony, nor did he receive any. (12 RT 1940-1941.) Bradford confirmed that Jackson described seeing appellant drive a two-tone blue, black or gray vehicle, with the top portion being silver or blue. (13 RT 2170.) Jackson described appellant to Bradford as wearing a dark blue or black shirt with writing on the left breast portion of the shirt. (*Ibid.*) Jackson was able to identify appellant's truck out of pictures of three other two-tone pickup trucks in the Hanford area. (13 RT 2180, 2184-2186.) Jackson also told Bradford that appellant had a mustache and was wearing dark sunglasses with black frames and black lenses. (13 RT 2172.)

Jackson's former girlfriend, Kathy Curry, confirmed that Jackson was supposed to pick up her children on March 27, 1995, but failed to do so. (12 RT 2034-2040.) In early May of 1995, Curry was with Jackson when he saw a picture of appellant on the news. At that time, Jackson informed Curry that he had seen appellant with Maria in the Food King parking lot on the same day he was supposed to have picked up her children. (12 RT 2038.) Jackson was upset as he described the incident to Curry, and he was troubled by the fact that he could have saved Maria had he realized what was happening. (12 RT 2040.)

Sometime around April 5 or 6, 1995, Roy Blanton helped appellant move out of his apartment in preparation for a six-month naval cruise that was

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11. Jackson spoke to Bradford once alone and a second time with Officer Patrick Jerrold. (13 RT 2169, 2172-2173; 14 RT 2415-2416, 2424-2426.)

set to leave on April 10, 1995. (13 RT 2197-2199, 2210.) Blanton noticed that appellant seemed agitated and frustrated in contrast to his normally quiet and calm nature. (13 RT 2206-2210.)

Approximately a week before the naval cruise departed, appellant, who was Blanton's supervisor, ordered Blanton to clean the floor of a hangar at Naval Air Station (NAS) Lemoore. (13 RT 2212.) Appellant complained that the floor looked "like shit." When Blanton protested that it would be pointless to clean the floor because it was raining, and people would keep on tracking in dirt while it continued to rain, appellant responded, "Just get your ass out there and clean it up, do your job." (*Ibid.*) This struck Blanton as unusual because appellant usually allowed those he supervised to do their jobs however they saw fit, as long as they got the job done. (13 RT 2211-2212.) Appellant continued to appear agitated and frustrated after they left on the naval cruise. (13 RT 2213-2215.) Instead of casually interacting with Blanton as he had earlier, appellant drastically changed his attitude towards Blanton and would completely ignore him. (*Ibid.*)

On April 9, 1995, Joseph Graf took his three sons rafting on Poso Creek near Highway 99. (10 RT 1584-1585.) He and one of his sons drove downstream in order to meet Graf's two other boys, who were floating downstream on a raft. (10 RT 1585-1586.) When 45 minutes or more had passed and the two boys had not appeared on the raft, Graf became worried and started walking upstream. (10 RT 1586.) He finally saw his sons, and they informed him that they had seen a body further up the stream. (*Ibid.*) Graf eventually found the body of a girl partially buried in a sand bar in the middle of the creek. (10 RT 1587, 1600.) Graf traced his way back to the Highway, then called the Wasco Sheriff's Department to retrieve the body. (10 RT 1591-1592.)

At 9:10 p.m. that night, Kern County Sheriff's Deputy Ronald Taylor

was dispatched to Poso Creek, where he found the body of a young female dressed in blue-green pants and a pink top. (11 RT 1664.) He placed the body in a body bag and transported it to the Kern County Morgue. (11 RT 1666.) Taylor opined that the body could have been thrown from the bridge which crosses Highway 99 into Poso Creek. (11 RT 1669-1670.) He explained that there is also a canal service road from which one could gain access to the creek. (11 RT 1672.) In Taylor's opinion, the body had probably been dropped in the creek a distance away from the highway bridge, since the creek had earlier been flowing several feet higher than it was at the time he discovered the body. (11 RT 1673.)

Forensic pathologist George Bolduc, M.D., performed an autopsy on Maria's body. (13 RT 2125-2130.) She was wearing a long-sleeved pink shirt with southwestern designs on it over a white Little Mermaid t-shirt, green paisley pants on her lower body, and she had a green sock and shoe on her right foot, but nothing on her left foot. (13 RT 2130.) Maria was 51 inches tall and weighed 63 pounds. (13 RT 2132.)

Bolduc saw no evidence that Maria had been strangled. (13RT 2138.) He found a blue-red bruise on the front anterior portion of Maria's right shoulder. (13 RT 2139.) In examining Maria's genitalia, Bolduc could not find a hymen, which he explained could be consistent with molestation or with decomposition of the body. (13 RT 2140-2141.) Bolduc did not see any other evidence indicating that Maria had been molested, and he noted that a fondling-type of molestation would not leave any physical injuries. (13 RT 2141-2142.) He also noted that if there had been semen on the body, it most likely would have been washed away while the body was floating in the water. (13 RT 2143-2144.)

In examining Maria's lungs, Bolduc found only small amounts of expressible fluid, indicating that Maria most likely did not drown. (13 RT

2145-2146.) At the junction of the posterior thoracic and lumbar spine, Bolduc found a hemorrhage in the subcutaneous tissue, which is the tissue layer that underlies the upper layer of the skin. (13 RT 2148.) There were no fractures to Maria's skull. (*Ibid.*) The bruises he found on Maria were blunt force injuries, but they would not have caused her to die. (13 RT 2149.) In Bolduc's opinion, Maria died from suffocation. (*Ibid.*) Bolduc explained that if both of her airways had been blocked, she could have suffocated within three to five minutes. (13 RT 2150.)

Based on the temperature of Poso Creek and the level of decomposition of Maria's body, Dr. Bolduc concluded that her body could have been in the water for as long as two weeks. (13 RT 2151-2152.) The decomposition of Maria's body would make it difficult to retrieve DNA evidence, since such evidence would also decompose.[12/] (13 RT 2144-2145.)

On April 11, 1995, Carole Cacciaroni, a special agent with the Naval Criminal Investigative Service (NCIS), left on the same six-month naval cruise as appellant. (10 RT 1601-1602.) Shortly thereafter, she received a request from either the NCIS in Lemoore or the Lemoore Police Department, to question appellant regarding Maria's disappearance. (10 RT 1603.) Cacciaroni had received information over the wire regarding Maria's disappearance, but she had not spoken with anyone from Kings County about the case. (*Ibid.*) At approximately 10:33 a.m., on April 18, 1995, Cacciaroni called appellant and asked if she could speak to him. She did not tell him the nature of the investigation. (10 RT 1605, 1607.) Appellant replied that he was in the middle of something, but would come to her office in about 15 minutes. (10 RT 1605.) Fifteen minutes later, appellant arrived in Cacciaroni's office, where

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12. Forensic scientist Rodney Andrus confirmed that no useful DNA evidence, such as spermatozoa, was found in connection with Maria's homicide. (14 RT 2411-2412.)

Cacciaroni's partner, Special Agent Kelly Rigsby, was also present. (10 RT 1605-1606.)

When Cacciaroni asked appellant if he knew why she had summoned him, he instantly responded that he thought it was in regard to the girl who was abducted in Lemoore. (10 RT 1606-1607.) Cacciaroni was surprised at this, and she asked appellant how he had known the nature of the investigation. Appellant responded that he had been at a video store in the shopping center where the girl had last been seen, and he might have been there at the time she was taken. (10 RT 1607.) Appellant told Cacciaroni that he had been wracking his brain to try to remember if he saw anything peculiar that day. (*Ibid.*) He had not notified the authorities about his presence at the Food King parking lot that day because he was preparing to leave for the six-month cruise. (10 RT 1608.)

Appellant suggested that in order to help Cacciaroni's investigation, he could be hypnotized to see if he could remember anything. (10 RT 1608.) In response to Cacciaroni's inquiries, appellant informed her that prior to leaving on the cruise, he had been living in an apartment at 9932 Greenfield in Hanford. (10 RT 1608-1610.) He moved out of the apartment on April 6, then lived at the naval barracks. (10 RT 1609.) Appellant told Cacciaroni that he owned a two-toned, black and silver 1988 Chevy S-10 pickup with Washington State license plates. (10 RT 1611.) While on leave in Hanford, he had visited his parents, who lived approximately 90 miles away in Bakersfield, almost every weekend. (10 RT 1612, 1618.) Typically, appellant would leave on a Friday and return on a Sunday when visiting them. (10 RT 1612.) Appellant maintained that he had not had any visitors or friends in his apartment during his leave. (10 RT 1618.)

When Cacciaroni asked appellant how he had heard about Maria's abduction, he initially stated that he had heard about it the next day on the radio

or on television. (10 RT 1618.) Later, he told Cacciaroni that it could have been two or three days after the incident that he heard about it. (10 RT 1619.) Appellant also told Cacciaroni that he had heard about the abduction on "America's Most Wanted." (10 RT 1623.) Appellant knew Maria had been abducted from a grocery store on Bush Street. (10 RT 1619.) He admitted that he had rented three pornographic tapes from a store near where Maria had been abducted at about the same time as the abduction. (*Ibid.*)

Cacciaroni asked appellant if he knew what had happened to the little girl, and he replied, "No." (10 RT 1620.) He then asked Cacciaroni if she had been found. Cacciaroni replied in the affirmative. Appellant asked, "Was she dead?" then paused and explained, "I presume." (*Ibid.*) When Cacciaroni nodded her head, appellant became very upset. He put his head in his hands and started crying. (10 RT 1620-1621.) He explained that he was crying because he had recently quit smoking, and he had been under some stress. (10 RT 1621.) In what Cacciaroni described as "almost a mumble," appellant asked if Maria had been molested. (*Ibid.*) Cacciaroni told him she did not know. (*Ibid.*) Cacciaroni could see that appellant was visibly shaken. (*Ibid.*) He was upset and still crying. (10 RT 1622.) Cacciaroni asked appellant what he thought should happen to the person who took the little girl. Appellant replied, "You don't want to know." (10 RT 1622.) He eventually stated that the punishment should be "an eye for an eye." (10 RT 1623.) Cacciaroni's interview with appellant ended at 1:00 p.m. that day. (10 RT 1624.)

At approximately 4:06 p.m., Cacciaroni saw appellant in one of the ship's passageways. Appellant told her that he needed to talk to her. (10 RT 1624.) He explained that he had remembered more details regarding the day he had rented the videos. (10 RT 1625.) He claimed he had seen a couple of boys outside the video store, and they had complimented him on either a cap or a t-shirt that appellant had been wearing that day. (10 RT 1626.) He also told

Cacciaroni that he had seen the America's Most Wanted program regarding Maria's abduction on April 1, at his parents' house. (*Ibid.*) At the close of this interview, appellant informed Cacciaroni that he would come back and talk to her again. (10 RT 1627-1628.)

At 12:41 p.m. on April 19, appellant entered Cacciaroni's office and told her he was very disturbed. (10 RT 1628.) Appellant was visibly upset and his eyes were red and teary. (*Ibid.*) When he turned to look at Cacciaroni, appellant's movements were shaky and his whole body would jerk. (10 RT 1629.) Cacciaroni also noticed that his fists were tightly clenched. (*Ibid.*) Appellant told Cacciaroni that he had been in his work space with three other petty officers, when Petty Officer Hudson mentioned that he had just read a newspaper article regarding the police finding Maria's body in Bakersfield. (10 RT 1630.) Appellant had left the space immediately and was sick to his stomach that her body had been found in Bakersfield. (*Ibid.*)

Appellant admitted to Cacciaroni that he was feeling paranoid because everyone was pointing fingers at him. (10 RT 1631.) He remarked that the Lemoore Police Department may have seen him in Bakersfield. (*Ibid.*) With respect to Cacciaroni's investigation, appellant remarked, "Maybe I shouldn't say anything more." (10 RT 1632.) Appellant then told Cacciaroni that he did not know if he should get an attorney. (*Ibid.*) When Cacciaroni asked appellant why he felt he might need a lawyer, appellant started crying and rocking in his chair as he moved his hands up to his head and down to his lap. (*Ibid.*)

Appellant asked Cacciaroni if he was a suspect and if the salesperson in the video store had mentioned his name. (10 RT 1633.) Cacciaroni assured appellant that the reason she was talking to him was to find out if he had seen anything. (10 RT 1634.) Appellant, who was sobbing with tears streaming down his face, again mentioned that perhaps he should be hypnotized in the event that he might have seen something. (10 RT 1634-1636, 1657-1658.)

Later appellant asked Cacciaroni if he was going to be handcuffed and taken to Hawaii as had been done with a rape suspect a week earlier. (10 RT 1637-1638.) When Cacciaroni joked with appellant that he just wanted to go to Hawaii, appellant looked down and said, "I shouldn't be doing this to myself. It should never happen to anyone and I don't know after this." (10 RT 1639.) Appellant was still crying at this point. (10 RT 1640.)

Approximately 10 minutes after appellant left Cacciaroni's office, he returned in a completely different emotional state. (10 RT 1642.) He was not teary-eyed and appeared to be much more relaxed. (10 RT 1643.) He told Cacciaroni that he had remembered a few more things about the day he rented the videotapes. (*Ibid.*) He referred to a map that he had earlier drawn for Cacciaroni on some yellow paper, and he pointed out the residential area from which he had heard Maria had been walking by herself. (10 RT 1644.) Appellant remarked, "You should never let them out of your sight." (10 RT 1645.)

At 6:57 p.m. on April 21, Cacciaroni again came into contact with appellant in a passageway on the ship. (10 RT 1645.) Cacciaroni asked appellant if he was looking for her, and he replied in the negative. (10 RT 1646.) Appellant asked if Cacciaroni had heard anything, and she told him she had not. (*Ibid.*) Appellant acted much more standoffish on that occasion and was not receptive towards Cacciaroni. (10 RT 1647.)

On April 20, 1995, Lemoore Police Officer Pat Jerrold conducted a search of the storage unit appellant had rented in Lemoore. (12 RT 2063-2064.) The search uncovered a box marked as People's Exhibit 30, which contained several magazines.[13] (12 RT 2063-2065; 13 RT 2190-2195.) United

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13. People's Exhibit 45 was a list of the titles of the magazines contained in Exhibit 30, which was prepared by Lemoore Police Sergeant Ted Johnston. (12 RT 2066-2067.)

States Marshall Bruce Ackerman, an expert in the area of persons with a sexual interest in minor children and child pornography, examined the magazines contained in People's Exhibit 30. (12 RT 2071-2073.) He explained that the magazines had titles and content which referred to teenage females engaged in sexually explicit poses. (12 RT 2074.) The magazines were similar to others that Ackerman had found on several occasions when conducting a search of an individual who had an express sexual interest in minor children. (12 RT 2074-2075.)

During the last part of April 1995, Ackerman conducted a tape-recorded interview of appellant aboard a U.S. aircraft carrier in the sea of Japan. (12 RT 2075.) Appellant acknowledged that he had purchased the magazines for approximately $20 each. In appellant's opinion, the females shown in the magazines looked younger than 18 years old. (12 RT 2076.) Appellant acknowledged that he had purchased the magazines because they were sexual in nature. (12 RT 2077.)

Ackerman indicated that in his experience, he had never found such magazines in the possession of a person who had no interest in children or minors. (12 RT 2093.) He explained that since child pornography magazines are difficult to obtain, persons with a sexual interest in children often purchase similar magazines that contain photographs of teenagers made up to look like children. For example, some of the girls in the magazines had shaved genitalia or had their hair in pigtails, and they were shown holding a lolly pop or a teddy bear. (12 RT 2094-2096.)

Ackerman asked appellant what he had seen in the Food King parking lot on the day of Maria's disappearance. (12 RT 2077.) Appellant told Ackerman that he remembered seeing a black man with short curly hair get into an Impala. (12 RT 2077, 2080.) He also remembered that two boys had asked

him about the shirt and hat he was wearing that day. (12 RT 2088, 2099.) When appellant was backing out of a parking space, he saw a blonde woman in a two-door car, perhaps with two children. (12 RT 2078-2080, 2086.)

Appellant was unable to tell Ackerman where he had gone after renting some adult videos in the area of the Food King. (12 RT 2083.) He explained that he had been trying to remember what happened that day, but he had been "blanking out." (*Ibid.*) Appellant remembered the day Maria had disappeared because it was the same day as his niece's birthday. (12 RT 2084.)

On April 30, the Navy conducted a "command search" on appellant's space and lockers. (10 RT 1648.) Following the search, Cacciaroni had appellant's belongings packed in boxes and sent to NCIS at Lemoore Naval Air Station. (10 RT 1648-1649.) In one of the boxes, Lemoore Police Commander Kimberly Morrell found a pair of dark sunglasses with a band on the back and a blue t-shirt with a yellow Notre Dame logo on it. (13 RT 2156-2157.)

Appellant's sister, Donna H., is two years younger than appellant. When appellant was five, he began fondling Donna's vagina when the two children went to bed. (11 RT 1805.) Two years later, when Donna was five and appellant was seven, the McCurdy family moved to a small town in Noble, Oklahoma. (11 RT 1806-1807.) Again, Donna shared a room with appellant. There, appellant's molestation of her increased to a nightly occurrence. (11 RT 1807.) Appellant would take off his underwear or expose himself, take off Donna's underwear, then get on top of Donna in her bed and act as if he was having sex with her. (11 RT 1808.)

When Donna was nine or ten years old, the family moved to Spencer, Oklahoma, where the molestation continued, even though Donna had her own bedroom. (11 RT 1809.) Appellant found some pornographic magazines, and he would take Donna inside her bedroom closet to look at the pictures. (11 RT

1810-1811.) Appellant was starting to have erections. He would ask Donna if he could penetrate her. Donna always refused. (*Ibid.*) Donna was pretty successful in pushing appellant away, but when she would not allow him to have intercourse, he would try to convince her to have anal sex. (11 RT 1812.) Appellant also occasionally tried to fondle Donna's breasts and kiss her. (*Ibid.*)

The McCurdy family moved to Midwest City, Oklahoma, when Donna was 12 years old. (11 RT 1812.) Even though Donna and her younger sister shared a room, appellant's molestation of her continued on almost a nightly basis. (11 RT 1812-1813.) When Donna would take a shower, appellant would tell his mother that he had to use the bathroom really badly. Their mother would insist that Donna let appellant in the bathroom. Appellant would then try to grab Donna's breasts while she was taking a shower. (11 RT 1815-1816.)

When appellant got his driver's license, he once drove Donna to a wooded area and started to touch her legs and reach inside her clothes to touch her breasts and her vagina. (11 RT 1817-1818.) He tried to convince Donna to perform oral sex on him. (*Ibid.*) At first Donna resisted. She then attempted to perform oral sex on him for a few seconds before quitting. (11 RT 1819.)

The McCurdy family moved to Wasco, California, when Donna was 15 years old. (11 RT 1820.) Appellant's sexual abuse of Donna continued, but it was less frequent. (11 RT 1821.) The abuse included appellant fondling Donna's breasts and vagina, and rubbing his exposed penis against her vaginal area. (11 RT 1821-1822.) The last incident of abuse occurred when Donna was 16 and a half or 17. (11 RT 1823.) She had gone into her parents' bedroom and locked the door behind her to take a shower. When she finished, she walked out of the bathroom wearing a towel and saw appellant inside her parents' room. Appellant had somehow found a way to unlock the door to the bedroom. Appellant came towards her and started grabbing her towel, saying, "Oh, you know you want it." (11 RT 1822.) Appellant got on top of Donna

and tried to penetrate her, while Donna fought him and told him to leave her alone. (11 RT 1823.) She threatened appellant that if he did not leave her alone, Donna would tell her boyfriend, who would "kick his ass." (*Ibid.*) Shortly after this time, appellant graduated from high school and left for the Navy. (*Ibid.*)

Donna never told her parents about the sexual abuse because appellant threatened that if she told them, he would claim Donna had initiated it. (11 RT 1824.) On another occasion, appellant threatened to kill Donna if she told her parents about the abuse. (11 RT 1824-1825.) Donna also explained that as she got older, there were several times she complained to her parents that appellant had beaten up on her, but they never did anything about it. (11 RT 1825.) In addition, once, after Donna's grandfather had started to molest her, Donna reported this to her mother, but her mother did not do anything about it. (*Ibid.*) From these incidents, Donna did not think her parents would protect her from appellant's sexual abuse. (*Ibid.*)

In 1991, years after Donna had left the family home, she confronted appellant about the years of molestation. (11 RT 1827.) By that time, Donna's own daughter was two years old, and Donna was concerned about having appellant around the baby. (11 RT 1828.) During their conversation, appellant admitted the molestation had occurred, and he told Donna he was sorry about it. (11 RT 1829.) Appellant confessed that one of the reasons he had never gotten married was his fear that he would molest his own children. (11 RT 1830.) Donna urged appellant to get counseling, but he said that he did not need it and could handle the situation on his own. (*Ibid.*) Donna indicated that children seemed to be drawn to appellant, who was very good with them. (11 RT 1833.) She also confirmed that appellant was familiar with Poso Creek from having lived in Wasco. (*Ibid.*)

Lisa Teays met appellant 13 years ago in Oxnard, California, and she

considers him to be a close friend. (13 RT 2223-2225.) Approximately seven years ago, Teays moved to Washington where appellant lived, and she began to see him again on occasion. (13 RT 2226, 2237.) At that time appellant lived in a house on Highway 20 in Oak Harbor with Kellie Carrion, Lisa Kuehne, Kuehne's three children, and another woman also named Lisa. (RT 2226, 2231.) Teays visited the house quite often. (13 RT 2227.) She identified a peach shower curtain marked as People's Exhibit 4, as looking exactly like the shower curtain in the bathroom appellant used at the house in Oak Harbor. (13 RT 2232-2235.)

Lisa Kuehne has known appellant for about 21 years. (13 RT 2244.) At one point while appellant was living in Washington where Kuehne was raised, Kuehne gave appellant two shower curtains, one green and one peach. (13 RT 2251.) Kuehne described the peach shower curtain as having ruffles on the top and being made out of cloth. (*Ibid.*) The curtain was fastened to the shower by burnt orange half-moon-shaped rings. (13 RT 2251-2252.) Kuehne identified People's Exhibit 4, as looking identical to the shower curtain she gave to appellant. (13 RT 2256-2257.)

On October 11, 1995, officials again searched Poso Creek. During the search, they found a shower curtain (People's Exhibit 4) buried in the sand that was upstream from where Maria's body had been found. (13 RT 2313-2315, 2327-2333.)

Defense

On May 4, 1995, Kern County Sheriff's Detective Mark Jorn conducted a search at Poso Creek with several other law enforcement officers. (14 RT 2363.) Jorn started the search approximately 150 feet above Highway 99 and, with others, searched the creek bed on his hands and knees. (14 RT 2363-2364.) Jorn was wearing a wetsuit, and he searched the creek bed to a point approximately 100 yards below the weir. (14 RT 2364.) Jorn found many

things that did not appear to belong in that area of the creek bed, including a nylon-type bag and a large chunk of concrete. (14 RT 2365.) He did not find a shower curtain during this search. (*Ibid.*)

Claudeen Jackson, who has a child with Mychael Jackson and has known him for approximately 16 years, believes he is an "impulsive liar." (14 RT 2370-2372.) When Claudeen was married to Mychael, he lied to her about other women he was seeing and other children he had fathered. (14 RT 2374.) Claudeen admitted she was convicted of welfare fraud in April of 1997. (14 RT 2372.) She did not know whether Mychael was lying about his testimony in this case. (14 RT 2393.)

Video World manager John Bush indicated that appellant rented three adult movies on March 27, 1995, at 3:28 p.m. (14 RT 2398-2399.) Appellant rented an additional three adult movies on March 28, 1995, at 6:08 p.m. (14 RT 2400.)

Lemoore Police Officer Patrick Jerrold assisted in interviewing Mychael Jackson on May 10, 1995. (14 RT 2415.) At that time, Jackson did not mention seeing anything on the back of the t-shirt appellant was wearing at the time of the abduction. (14 RT 2416.) Jackson told Jerrold that he had arrived in Lemoore at approximately 4:00 p.m., according to the clock in Jackson's car. Jackson did not mention anything unusual about the clock. (14 RT 2417.) Jackson indicated that the clerk offered to give him a receipt, but he told her he did not want it, and she threw it in the trash. (14 RT 2418.) Jerrold informed Jackson that the clerk had gone on a lunch break at 4:02 p.m. (14 RT 2419.) At a later time following this interview, Jackson informed Jerrold that he had checked his car clock and found out that it was ten minutes fast. (14 RT 2433.)

Lemoore Police Sergeant Kimberly Morrell interviewed Mary Alliene Smith on April 21, 1995. (14 RT 2428.) Smith told Morrell that appellant claimed to have shaved his mustache because he was going on a cruise, and he

did not want to take care of it while he was out on the boat (*Ibid.*) On that date, Smith did not mention anything about her mother hearing sobbing or whimpering in the apartment. (14 RT 2429.)

Annie Snowden[14] was married to Mychael Jackson, and Jackson is the father of her son. She explained that she lived with Jackson for two years. (14 RT 2435, 2437.) In Snowden's opinion, Jackson lies about everything. (14 RT 2435.) On cross-examination, Snowden explained that she first determined Jackson was a liar when she found out that he was cheating on her while she was pregnant with their son. (13 RT 2438.)

Tulare County Sheriff's Detective Jess Gutierrez investigated the disappearance of ten-year-old Angelica R. (14 RT 2445, 2449.) On March 4, 1994, Angelica disappeared from a swap meet in Visalia where her parents were vendors. (14 RT 2446.) Her parents last saw her at approximately 10:00 a.m. that morning, when she walked to the rest room area at the swap meet. (14 RT 2447.) Two days later, Angelica's body was found in an irrigation ditch near Pixley, a town just off of Highway 99, south of Visalia. (14 RT 2449.) Angelica had a sock on each foot and was nude from the waist down at the time she was found. (14 RT 2451.) An autopsy revealed that she died from ligature strangulation, resulting from a rag that had been tied around her neck. (14 RT 2450, 2455.) There was also evidence that Angelica had been raped. There was a vaginal penetration and a lot of tearing along the vaginal area. Investigators found semen in her vaginal cavity. (14 RT 2451.) Maria's body was found approximately 45 miles away from where Angelica's body was found. (14 RT 2454.) At the time of her disappearance, Angelica was wearing earrings and a necklace. Neither was found on her when her body was found.

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14. Counsel stipulated that Ms. Snowden was unavailable for trial. Her October 4, 1995, preliminary hearing testimony was read into the record. (14 RT 2433-2434.)

(14 RT 2455.) Gutierrez agreed that serial killers often remove personal belongings from their victims and keep them as a type of trophy. (14 RT 2456.)

Forensic scientist Robert Andrus has performed forensic work in the instant case, as well as the case involving the 1994 death of Angelica R. (14 RT 2408.) Andrus compared DNA from appellant with DNA extracted from sperm found in Angelica R.'s vaginal cavity. (14 RT 2409-2410.) Andrus concluded that appellant's DNA did not match the DNA of the sperm found in Angelica R.'s vaginal cavity. (14 RT 2411.)

Appellant took the stand and testified in his own behalf. Appellant is 36 years old and is a First Class Petty Officer in the United States Navy. (14 RT 2461.) In 1995, he was stationed at the Lemoore Naval Air Station, and he lived in an apartment on Greenfield Avenue in Hanford. (*Ibid.*) On March 27, 1995, appellant drove to Fresno to return 12 adult videotapes to four different video stores. (14 RT 2462-2463.) After doing this, he drove back to Lemoore and stopped at Video World III on Bush Street, where he rented three adult videos at 3:28 p.m. (14 RT 2464.) Appellant next picked up U.S. mail at the post office in downtown Lemoore. (14 RT 2465.) He stopped by Lee TV, where he rented another three adult videos at 3:34 p.m. (14 RT 2466-2467.) Appellant then rented three more adult videos from Video Zone at 4:10 p.m. (14 RT 2467-2468.) Appellant claimed it was raining in Lemoore that day. (14 RT 2572-2573.)[15/]

After renting these videos, appellant stopped at the Quiki-Mart on Lacey Boulevard in Hanford, where he bought a soda. He then went home to his apartment and watched all nine adult videos. (14 RT 2470.) Appellant explained that he was able to watch all nine that night by watching the sex

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15. In rebuttal, Martin Veloz, manager of the Hanford office of the National Weather Service, reviewed climatological data for the Hanford area and determined that it did not rain there between March 27, 1995, and March 31, 1995. (15 RT 2633-2636.)

scenes in the fast forward mode of play. (14 RT 2470, 2515.) The next day appellant returned the videos and rented three more adult videos according to his routine. (14 RT 2471, 2473, 2521, 2547-2548.) The following day appellant returned the videotapes to Video World III and rented three more, which he watched that night. (14 RT 2472-2473.)

Appellant shaved his mustache on April 6, 1995, the last night he was cleaning his apartment before leaving on a six-month naval cruise. (14 RT 2473-2474.) He decided to shave his mustache with an electric razor, which he was not going to take on the cruise. (14 RT 2474.)

Appellant admitted being romantically involved with his neighbor, Mary Smith, but he claimed that he did not go over to her apartment after February 1995, when her husband moved back in with her. (14 RT 2475-2476.) He denied watching a news broadcast regarding Maria's abduction at Smith's house. Appellant also denied speaking to Smith at Jack-in-the-Box in the time period after Maria's abduction. (14 RT 2477.)

When Carole Cacciaroni called appellant into her office, he believed she wanted to interview him about Maria's abduction because he had been in the same location as Maria on the same date she had been abducted. (14 RT 2495.) Appellant had learned about Maria's abduction from watching television broadcasts. (*Ibid.*) Appellant told Cacciaroni that he was renting adult movies at Video World III that day, and he offered to be hypnotized if it would help the investigation. (14 RT 2496.) On a later day, appellant returned to Cacciaroni's office when he was extremely upset. He explained that Claude Hudson had walked into his work center on the ship and announced that Maria had been found in Bakersfield. Appellant had previously told Cacciaroni that he regularly traveled to Bakersfield on the weekends. When appellant went to Cacciaroni's office, he felt very paranoid, and he wanted to find out if what Hudson had said was true. (14 RT 2497-2498.)

Appellant admitted engaging in incestuous simulated sex with his younger sister, Donna, while they were growing up. (14 RT 2498.) This began when appellant was seven and Donna was five years old. The sex ended ten years later when appellant was 17 and Donna was 15. (14 RT 2499.) Appellant maintained that he never forced Donna to have sex with him. (14 RT 2499, 2586.) He claimed that the last time they had sex, they were both playing hooky from school. Donna came into the living room while appellant was watching television, and she seduced him while wearing her mother's negligee. (14 RT 2586.) According to appellant, Donna was upset because appellant ejaculated and soiled the negligee. (14 RT 2587-2588.) Donna would never allow him to have sex with her after that, even though for several months appellant continued to ask her if they could have sex. (14 RT 2588.)

Approximately five years ago, Donna admitted to appellant that she had been molested by their uncle. She asked appellant if he had also been molested, and he acknowledged that he had been molested by his uncle over a ten-year time period. (14 RT 2500-2501.) At that time, appellant asked Donna to forgive him. He might have told her that he never got married because he felt he might molest his own children. (14 RT 2501-2502.) Appellant explained that he had read that people who are molested often go on to molest other children. (14 RT 2502.) He denied having a sexual interest in children. (*Ibid.*)

In March of 1995, appellant taught a class to sailors at the base from 8:00 a.m. to 3:00 p.m., on Wednesdays and Thursdays of each week. (14 RT 2504.) Appellant did not miss teaching any of these classes. (*Ibid.*) Appellant denied ever owning or possessing a shower curtain resembling People's Exhibit 4. (14 RT 2482-2493.) He also denied that he had anything to do with Maria's disappearance or death. (14 RT 2505.)

On cross examination, appellant indicated that he was driving a two-tone Chevy S-10 in March of 1995. (14 RT 2524.) He agreed that on March 27, he

would have arrived in Lemoore at about 3:10 p.m. and left at about 4:10 p.m. (14 RT 2539-2540.) He believed he parked his truck in one of the three spots in front of Video World III on the afternoon of March 27, 1995. (14 RT 2524.) Appellant was wearing a Notre Dame baseball cap and a Notre Dame t-shirt. (14 RT 2525-2526.) He claimed he saw a black man walk out of the video store and get into a car with a white blonde female with two children in the car. (14 RT 2528-2529.) The car was parked to the left of appellant's car. (14 RT 2530.)

Appellant denied that he ever asked Ms. Cacciaroni if he was going to be handcuffed and taken to Hawaii. (14 RT 2579.) When appellant was interviewed on April 30, by Ackerman, at one point appellant mentioned that he could not stop shaking. Appellant explained that he was nervous. (15 RT 2597.) Appellant also told Ackerman, "I don't want to remember." (*Ibid.*) Appellant explained that he had been blaming himself for perhaps seeing something in the shopping center parking lot and not reacting. Appellant felt that he might have been able to save Maria's life if he had been more on the ball. (15 RT 2598.) Appellant admitted, however, that he had lied to the investigators about the true events that had taken place on the day of Maria's disappearance because he was embarrassed about renting nine adult videotapes. (15 RT 2602-2603.) He also had lied to the investigators when he told them that he did not remember anything else that had happened the afternoon of March 27. (15 RT 2608.)

Appellant had visited the Poso Creek area twice when he lived in Wasco. (15 RT 2610.) He felt suspicious when he learned Maria's body was found in Bakersfield because he had been traveling there every weekend. (15 RT 2613.)

Although appellant claimed to have no sexual interest in minor children, he admitted having 30 magazines with the word "teenage," "school girl," or

"teener" in the title. (15 RT 2614.) Appellant kept blankets over his drapes in his apartment in Lemoore. He explained that he had done this to keep the sun out so he could sleep during the day after working the late shift. (15 RT 2619.) Appellant had continued to keep the blankets on the windows after his late shift ended in January of 1995. (15 RT 2620.)

Penalty Phase

Victim Impact Testimony

Arcelia Ferrell testified through an interpreter that Maria was a good and noble child. She was also a very helpful and thoughtful daughter and sibling. (25 RT 3129-3130, 3132.) Ferrell indicated that Maria had wanted to be a doctor when she grew up so that she could take care of children and older people. (25 RT 3130.)

The day before Maria disappeared, she and her mother looked at wedding catalogs because a friend was getting married. Maria became very emotional as she showed her mother a picture of the wedding dress she wanted. Ferrell bought a similar dress to bury Maria in. (25 RT 3130-3131.)

Until Maria was found, Ferrell sometimes thought she was still alive. At times she could almost hear Maria speaking. Ferrell heard Maria saying, "Please, mom, please." One night Ferrell could not sleep, and she sat awake all night. (25 RT 3133.) When Ferrell saw Eva Murillo of the Victim Witness Assistance Program and police officers at her front door, she felt her blood rush to her feet, and she imagined that the worst had happened to Maria. Ferrell felt like she was going crazy, and she wanted to hide from the whole world. (25 RT 3133-3134.)

After Maria was abducted, Ferrell was very afraid. She would hide under her bed out of fear, and she eventually moved to a different apartment.

Ferrell was also afraid for the safety of her other children, and she started to dress her other daughter Lucero as a boy. (25 RT 3134-3137.) Ferrell was extremely angry that Maria had died and felt as if her heart had been ripped out. (25 RT 3134, 3140-3141.)

Ferrell continued to have nightmares after Maria died. (25 RT 3137-3140.) At the time of trial, she and Lucero were still in counseling. (25 RT 3140-3141.) Ferrell brought mementos of Maria, such as pictures and a pillow Maria had made, to court when she testified. (25 RT 3132.)

Mitigation Case

Appellant's mother, Anetta McCurdy, explained that appellant is the oldest of four children. (25 RT 3135-3136.) As a child, appellant was baptized in the Catholic church, and he participated in the Boy Scouts. (25 RT 3143-3144.) The family first lived in Oklahoma, and they were very poor. (25 RT 3146-3147, 3149, 3152.) They eventually moved to California, where their financial hardships continued. At Christmas, there was little money for presents, and appellant and his siblings would receive only small gifts, such as a pair of pajamas or shoes. (25 RT 3147.) Anetta tried to hide the fact that they were so poor from her children. She would feed the children first, and eat whatever was left on their plates. (25 RT 3147.)

Anetta described appellant as a helpful son, who never caused her any trouble or heartache. (25 RT 3164.) He started working around the age of 16, and always had a job thereafter. (25 RT 3150, 3152.) After graduating from high school, appellant joined the Navy, partly to obtain an education and benefits. (25 RT 3154, 3159.) While in the Navy, appellant made sure to communicate with his family, and he visited them when he could. (25 RT 3155, 3158.) Appellant earned several awards in the Navy, including a Naval Achievement Medal. (25 RT 3157-3160.) After appellant joined the Navy, he made the family's Christmases much better. He always made sure that his

siblings' children had something unique, and he was interested in their education. (25 RT 3156.)

Appellant's situation had been extremely difficult for the family, and the ordeal had taken a toll on his father's health. (25 RT 3163.) Anetta had experienced several nightmares, and she was very afraid that appellant would be put to death. (25 RT 3162.) Anetta wanted appellant to live, even if he were to be locked up for the rest of his life. (25 RT 3164.)

ARGUMENT

I.

BY FAILING TO RENEW HIS CHANGE OF VENUE MOTION AFTER VOIR DIRE, APPELLANT FAILED TO PRESERVE IT ON APPEAL

Appellant contends that the court committed reversible error when it denied his pretrial motion for change of venue without prejudice. (AOB 97-113; see E RT (May 7, 1996) 1-2.) To the contrary, by failing to renew the motion following voir dire, and agreeing to the jury without exhausting his peremptory challenges, appellant failed to preserve this issue for appeal, and it is now waived. (*People v. Hart* (1999) 20 Cal.4th 546, 598; *People v. Williams* (1997) 16 Cal.4th 635, 654-655.) In any event, the gag order imposed early in this case, and the subsequent individualized and thorough voir dire conducted by the trial court, ensured that appellant received a fair and unbiased jury. Therefore, a change of venue was not warranted.

A change of venue must be granted when the defendant shows a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. (*People v. Harris* (1981) 28 Cal.3d 935, 948-949; accord, *People v. Welch* (1972) 8 Cal.3d 106, 113; *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 294; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383.) In making this determination, the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable. (*Harris, supra*, 28 Cal.3d at p. 949; *People v. Welch, supra*; *People v. Tidwell* (1970) 3 Cal.3d 62, 68-69; *Maine v. Superior Court, supra*, 68 Cal.2d at p. 382.) The factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim. (*Harris, supra*, at p.948; see also *Odle v. Superior Court* (1982) 32 Cal.3d 932, 937; *Martinez*

v. Superior Court (1981) 29 Cal.3d 574, 577-578.)

Harris noted that

> ". . . after conviction in determining whether a defendant received a fair and impartial trial under the 'reasonable likelihood' standard, the review is *retrospective*. . . ." In other words, voir dire may demonstrate that pretrial publicity had no prejudicial effect, or conversely may corroborate the allegations of potential prejudice.

(*People v. Harris, supra*, 28 Cal.3d at p. 949, quoting *People v. Martinez* (1978) 82 Cal.App.3d 1, 13, original italics; *People v. Tidwell, supra*, 3 Cal.3d at p. 62; accord, *People v. Williams* (1989) 48 Cal.3d 1112, 1125.) *People v. Caldwell* (1980) 102 Cal.App.3d 461, at page 471, noted that "lack of significant exposure to and recall of the publicity is a very strong indication that a defendant was not tried by a biased jury." Furthermore, in such cases, a defendant "cannot complain if inferences of possible prejudice, available on a semi-silent record, have been refuted by the actualities of voir dire and of trial." (*People v. Quinlan* (1970) 8 Cal.App.3d 1063, 1070; see also *People v. Whalen* (1973) 33 Cal.App.3d 710, 716.)

Here, a review of the pertinent factors, as well as the voir dire, demonstrates that appellant had a fair trial in Kings County.

A. The Motion For Change Of Venue And The Trial Court's Ruling

In his April 26, 1996, motion for change of venue, appellant argued that the substantial amount of publicity in the case would prevent him from having a fair trial in Kings County. (1 CT 159.) Appellant attached to his motion copies of 61 newspaper articles regarding the case contained in The Hanford Sentinel, The Lemoore Advance, and The Fresno Bee. (1 CT 167-256.) He noted that the case had been featured on "America's Most Wanted." (B RT 182-183, 195; 11 RT 1623, 1627, 1655; 14 RT 2567-2569.) He also argued that a Kings County law enforcement officer, who wished to remain anonymous because of the "gag" order in place on the case, had leaked to the press that

appellant "basically admitted to everything. . . He's guilty as sin." (1 CT 160.) Appellant contended that the case was one of exceptional interest and notoriety in Kings County, and for these reasons, the trial should be moved to a different venue. (*Ibid.*)

In the prosecution's May 2, 1996, opposition, the prosecutor argued that although appellant was charged with a capital offense, he had not met his burden of showing he could not receive a fair trial in Kings County. (1 CT 263.) The prosecutor noted that Kings County is not so small as to make it difficult to find impartial jurors. He emphasized that both appellant and the victim were unknown in the community prior to the crimes. Finally, he pointed out that the news coverage had not been inflammatory, sensational or hostile, but had primarily been limited to the procedural aspects of the case. The prosecutor further maintained that the effect of any publicity could be measured during the jury selection process. (*Ibid.*)

On May 6, 1996, the trial court conducted a hearing on the motion. (1 CT 268-269; E RT (5/6/1996) 1-13.) Defense counsel again emphasized the continuous publicity in the case.

> MR. LEE: . . . Our change of venue motion is based on the fact that this case has dominated headlines for a year; that there's an intense public interest in it that has been exacerbated by the kidnap or the killing of yet another child, female child in the same age group in February of this year for which another person is charged.
>
> . . . [T]wo very unusual events to occur in Kings County and I've lived here most of my life and I don't recall really ever a single charge of this nature much less two that have occurred, you know, while the other one . . . is pending.
>
> I think there's a really heightened awareness of the cases and what's going on in the case and that's very–that's very disturbing from a defense point of view because in this particular case there has been a suppression motion that was brought and granted concerning the statement that my client had made to authorities, lengthy statements that were reported consisting of, you know 30, 37 hours of interviews over three days in which any interested member of the public in this

community now knows is not going to be presented into evidence.

The nature of the defense challenge has been reported as a violation of constitutional rights and that's, and that's true, but typically the reportage has been such that it mentions violation of *Miranda*[16] rights which, in the common vernacular, most people think of as legal technicalities. It's just statements were suppressed.

Exacerbating that even further is the reportage by one newspaper in this county that the statements amounted to an admission of all charges, and the expression of an opinion by Kings County, apparently a Kings County law enforcement personnel that my client was guilty based on those statements.

We'll never really know even if we go to jury selection whether or not one or more members of the jury that we have selected may have read these matters, became aware of these matters and chose not to be candid or at least as completely candid as they might be about the effect of that.

These are hard matters to put out of our minds even if a juror tries to, although they can, if the case turns out to be close.

If the evidence is very evenly balanced, which we have reason to expect that it would be, the slightest predisposition to consider my client may be guilty for reasons that aren't before the court could make the difference between an acquittal and a conviction.

This county is not large. The coverage that has occurred has come through television stations and newspapers that have daily circulation in Kings County and weekly circulation.

(E RT (5/6/1996) 2-4.)

In response, the prosecutor pointed out that Kings County is not so small to make it difficult to find unbiased jurors. (E RT (5/6/1996) 9.) The prosecutor also noted that appellant was not an outsider, nor did he belong to a group that had been ostracized by the community. In addition, the victim was not prominent in the community. (E RT 5/6/1996) 9-10.) Regarding the publicity in the case, the prosecutor observed:

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16. *Miranda v. Arizona* (1966) 384 U.S. 436.

> . . . Because there has been a gag order in this case, the publicity has been minimal.
>
> There's been lots of coverage, but it's rather factual and not sensational; has been simply these are the proceedings as we proceed along and based upon that I don't see that a change in venue is appropriate at this point in time.
>
> The argument that there's been an intentional violation of the gag order designed to taint the jury pool, I don't think counsel has any evidence that the gag order violation was intended to taint the jury pool.
>
> There's nothing put forward to that and I don't think he'll be able to present any evidence to that fact.
>
> Regardless, it seems to me that it's a separate factor; that it's simply just another consideration within the nature and extent of the publicity.
>
> In other words, it doesn't matter what the reason was that somebody spoke to the press. What matters is what was in the press and what's been put forth to the community and how they perceive that and, really, you're not going to be able to judge that until we actually sit jurors down and ask them questions.
>
> Just from looking at the articles themselves in the paper, they do not appear to me to be the type which engender a hostile community towards Mr. McCurdy; factual in nature regarding the proceedings and not sensationalized.

(E RT (5/6/1996) 11-12.)

On May 7, 1996, the court denied the motion without prejudice to renew it. (E RT 1-2.)

B. Change Of Venue Factors

1. Nature And Gravity Of The Offense

Appellant argues that the nature and gravity of the offense in this case called for a change of venue. (AOB at 47-48.) Undoubtably, the kidnapping and murder of a an eight-year-old girl from a shopping center in Lemoore was a shocking crime. However, these facts did not "'weigh *compellingly* in favor of a venue change.'" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159, italics

added [husband's murder of his pregnant wife for profit with a shotgun fired at close range did not weigh compellingly in favor of a venue change].)

In contrast to other cases where a change of venue was found justified, the information available about the instant crimes did not involve lurid details, nor was it particularly sensational. (See, in contrast, *Frazier v. Superior Court*, *supra*, 5 Cal.3d at pp. 289, 293 [prominent local doctor and his family murdered]; *People v. Tidwell*, *supra*, 3 Cal.3d at pp. 65, 70, 72 [three citizens murdered, two of whom were well known community members]; *Fain v. Superior Court* (1970) 2 Cal.3d 46, 49, 51 [murder of a popular high school athlete; kidnapping and rape of two school girl companions]; *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 385, 388 [kidnaping and assault of a popular teenage couple from well-known family in the community; the female was raped and murdered]; *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 874-876, 877 [murder of 25 transient agricultural laborers whose bodies were discovered in a ranch orchard].)

The fact that appellant was charged with capital murder also did not compel a change of venue, as this Court has often upheld denial of venue change in capital cases. (See, e.g., *People v. Fauber* (1992) 2 Cal.4th 792, 817-818; *People v. Edwards* (1991) 54 Cal.3d 787, 806-809; *People v. Hamilton*, *supra*, 48 Cal.3d at p. 1159.)

2. Size Of The Community

In *People v. Coleman* (1989) 48 Cal.3d 112, at page 134, this Court noted that the size of a community is important because "in a small rural community, a major crime is likely to be embedded in the public consciousness more deeply and for a longer time than in a populous area." According to appellant's motion for change of venue, at the time of trial, Kings County had a population of 116,312, and the jury pool averaged 15,000 to 20,000. (1 CT 159.) Appellant argues that the small size and rural composition called of

Kings County called for a change of venue. (AOB 56-57.)

However, while Kings County is not a major population center, its size at the time of appellant's trial did not weigh heavily in favor of a change of venue. (See *People v. Proctor* (1992) 4 Cal.4th 499, 525-526 [population of Shasta County (approximately 122,100) weighed "somewhat in favor of a change of venue"].) In addition, a review of the voir dire in this case shows that Kings County was not so small as to make it unusually difficult to find fair and unbiased jurors. As will be discussed in more detail below, the jury voir dire confirms that the majority of potential jurors were only vaguely familiar with the case from hearing about it on the news or reading about it, and a substantial amount of time had passed since they had heard about the case. (See Part 3, voir dire, *infra*.)

3. Community Status Of Defendant And Prominence Of Victim

Contrary to appellant's contentions (AOB 57-58), neither appellant nor the victim had any particular status, popularity or prominence in the community comparable to other cases where a change of venue was granted. (See, in contrast, *People v. Williams, supra,* 48 Cal.3d at pp. 1127-1129 [white female victim's family had prominence in the small community of Placer County, while defendant was an outsider and black, in a county with less than one percent blacks].) Rather, both appellant and Maria were unknown in the community prior to the crimes.

Appellant argues that he gained special notoriety at the time of his arrest. He claims that "a large, hostile mob awaited him at the Kings County Jail." (AOB 57-58.) He bases this contention on the comments of two potential jurors during voir dire. One juror was questioned by the court as follows:

> Q. Can you remember anything else that you read or heard about his arrest, what happened to him before he was arrested or after he was arrested, things like that?

A. No. All I know is I heard that he was going to be right here in Kings County, but other than that–I think I remember there was–in the news that there was a commotion or something that the media was there waiting for him to show up over here or something like that. But other than that–after that I guess it died down and then it didn't come up again until recently.

(9 RT 1360.)

Another juror was questioned during voir dire as follows:

[THE COURT] We do need you to search your memory for us and tell us any additional details that you can possibly recall reading or hearing about the case, if any?

A. Well, admittedly I don't–I just scanned the front page of the newspaper, I'm a headline reader. The only thing that really stands out that I remember was the crowds that were here . . . at the jail. And I remember seeing in the newspaper the pictures of the people standing out there and shouting and such. But really, other than that, I can't–I think I may have read something about DNA testing, but other than that, I really don't remember much of anything.

(9 RT 1365.)

Appellant also points to a May 5, 1995, Hanford Sentinel article, which observed:

Child murder suspect Gene Estel McCurdy appeared subdued as he arrived at the Kings County government complex Thursday afternoon, his chin tucked into the collar of a bullet proof vest.

Insults and jeers were hurled as McCurdy passed by a crowd who gathered to watch the spectacle. "No rope too short. . .Death penalty, you bet," onlookers called out.

(1 CT 225.) In addition, he quotes a reporter who commented in a May 4, 1995, article, "One could almost feel the deep sigh of relief the entire city of 13,000 breathed when news got out that someone had been caught in connection with the month-old murder." (AOB 58; 1 CT 217, 219.)

However, none of these references establish that appellant was particularly notorious or that there was an angry backlash against him that pervaded his trial. In addition, as demonstrated by the voir dire process and the

above quoted responses of potential jurors, most of the jury pool had not closely followed the case and were not familiar with appellant. Moreover, by the time jury selection began on January 9, 1997, most potential jurors had forgotten much of what they might have read or heard about the case. (See transcript of voir dire at 4 RT-10 RT; *People v. Proctor, supra,* 4 Cal.4th at p. 525 [the impact of pretrial publicity may be mitigated due to the lapse of time between publication or issuance of news reports and commencement of jury selection].)

4. Nature And Extent Of The Media Coverage

A motion for change of venue must be granted whenever it is determined that because of the dissemination of potentially prejudicial news "there is a reasonable likelihood that in the absence of relief, a fair trial cannot be had." (*Maine v. Superior Court, supra*, 68 Cal.2d at p. 383.) In *Powell v. Superior Court* (1991) 232 Cal.App.3d 785, the Court of Appeal held that the nature and extent of publicity concerning charges of police brutality in the arrest of Rodney King, which included massive print media coverage, extensive radio coverage, and graphic TV coverage, established that a change of venue was necessary to assure fair and impartial trial. The court found that the Los Angeles Times, with a daily circulation of 1,242,864 and an additional 300,000 on Sundays, and other smaller papers had "blanketed" Los Angeles County with coverage of the incident and related issues. (*Id.* at p. 796.) The coverage had included front page pictures, feature stories, in depth analyses, editorials, letters to the editors, results of numerous polls conducted by individual newspapers, pictures of key individuals, and biting political cartoons. (*Ibid.*) The court also noted that articles had appeared daily since the incident, sometimes with several related stories in the same edition. The court concluded, "It is impossible to pick up a copy of the Los Angeles Times and not find at least one related story, including one recent article wherein it is charged

that officers who publicly criticized the chief are suffering retaliation within the department." (*Ibid.*)

The *Powell* Court also found that radio coverage regarding the case had been extensive, and radio news was available "around the clock to persons in their homes and offices and to the hundreds of thousands of commuters on the freeways." (*Powell, supra*, 232 Cal.App.3d at p. 797.) In addition, the television coverage had been "graphic and devastating." (*Ibid.*) The court concluded that there was a "substantial probability Los Angeles County is so saturated with knowledge of the incident, so influenced by the political controversy surrounding the matter and so permeated with preconceived opinions that potential jurors cannot try the case solely upon the evidence presented in the courtroom." (*Id.* at p. 801; see also *Smith v. Superior Court* (1969) 276 Cal.App.2d 145 [fair trial could not be had in Los Angeles County where pervasive publicity, including 275 articles, had deluged county concerning the case].)

In contrast, here the publicity in the case was significantly limited by the following gag order entered by Judge Maciel at appellant's May 5, 1995, arraignment:

> . . . I have issued an order barring communications relating to this case. I will read it into the record at this point. It is as follows:
>
> The arraignment of defendant, Gene Estel McCurdy, came on for hearing at 11:30 a.m. on May 5th, 1995, before the Honorable Ronald J. Maciel in Department 2 of the above referenced court. The Court, noting that this promises to be a high profile case, that it is being heard in a relatively small community, and wishing to avoid any possibility of tainting the jury or need for change of venue, orders as follows:
>
> One. Todd H. Barton, Chief Executive Officer of the Kings County Consolidated Courts is hereby designated as the sole person authorized to communicate with media personnel and/or other persons inquiring about the proceedings in this case. Communications made by Todd Barton will be limited to the communication of times and dates of hearings and nature of proceedings during the pendency of this case.

> Two. The District Attorney, his deputies, his staff, or any other prosecutory personnel shall not make any statement to the media or to persons or entities not associated with the case. "Statement" includes but is not limited to statements or communications of any kind concerning the parties, evidence, strategy, facts, testimony or outcome of any proceedings in this case. "Persons associated with the case" to whom statements may be made include only: members and staff of the District Attorney's Office, law enforcement personnel necessary to the prosecution of the case, members and staff of the office of defendant's counsel, experts retained by either side for the prosecution or defense of this matter, court personnel necessary to the proceedings, and judges presiding over the proceedings. "Other prosecutory personnel" includes experts or other personnel retained by the District Attorney for assistance in the prosecution of this case, including those to whom statements regarding this case may be made under this order.
>
> . . . Defendant's counsel, and his office, staff, or any other persons and/or personnel associated with that counsel and/or that counsel's office, shall not make any statement to the media or to persons or entities not associated with the case. . . .
>
> Four. All members of law enforcement and law enforcement personnel, including but not limited to the Hanford Police Department, Kings County Sheriff's Department, Lemoore Police Department, Visalia Police Department, the Tulare County Sheriff's Department, the Bakersfield Police Department, and the Kern County Sheriff's Department, shall not make any statement to the media or to persons or entities not associated with the case. . . .

(A RT (5/5/1995) 8-10.) The court's gag order also applied to all federal, military and international law enforcement agencies, and all Kings County court employees and county administrative personnel. (A RT (5/5/1995) 11-12.)

News coverage of the case, which at the time of appellant's arrest predictably engendered feelings of relief that law enforcement had a suspect, significantly dwindled after that time period, probably in large part due to the gag order. Of the approximately 61 articles attached by appellant to his motion for change of venue, 23 were written during May and June of 1995, shortly following his arrest. (See 1 CT 220-255.) Other articles published later in 1995, tracked the progress of the case and reported on various events, such as

the preliminary hearing and the court's ruling on various motions. (See 1 CT 167-207.) In contrast to the pervasive and sensationalized publicity in *Powell* and *Smith*, here the news coverage was not extensive and it primarily tracked the procedural events in the case.

Appellant complains about an October 5, 1995, article in the Lemoore Advance, in which an unidentified Kings County law enforcement official declared in violation of the gag order, "He never said, 'I did it,' but he did. He's guilty as sin." (AOB 50; 1 CT 168.) He also complains about various other articles which he claims were prejudicial because they reported that he was a suspect in the abductions of Angelica Ramirez and Tracy Renee Conrad,[17] he had molested his sister, there were sexually explicit materials found in his storage unit, and appellant had made incriminating statements to law enforcement. (AOB 53-56.) However, a review of the voir dire and the jurors' questionnaires demonstrates that by the time of jury selection in January of 1997, most jurors' memories about what they had read had dimmed, and they only possessed generalized information about the case. (See discussion of voir dire in Part 5 below.)

Finally, a review of the news articles attached to the motion for change of venue, indicates that the coverage was generally fair and not overly inflammatory. (See 1 CT 167-256.) Indeed, the publicity in this case pales in comparison with that found insufficient to compel a change of venue in a serial murder case tried in Orange County. (See *People v. Bonin* (1988) 46 Cal.3d 659, 677 [reports that the defendant was the "Freeway Killer," had a history of mental illness, had prior convictions, had been linked to as many as 44 killings, had admitted 21 killings, and had already been convicted of 10 murders in Los

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17. Respondent notes that other news articles exonerated appellant of the crimes in the Ramirez and Conrad cases. (See 1 CT 170 [Nothing Links McCurdy to Ramirez Killing]; 1 CT 208, 210, 213 [regarding arrest of Kevin Galik in Conrad case].)

Angeles and sentenced to death insufficient to require change of venue]; compare also *People v. Cummings* (1993) 4 Cal.4th 1233, 1275, fn. 16 [no need to change venue despite 51 newspaper articles and 24 television reports].) Accordingly, the trial court properly determined that the pretrial publicity in the case did not compel a change of venue.

5. Voir Dire

The voir dire also supports the trial court's ruling. In addition to the gag order, the trial court took several specific steps to ensure that appellant received a fair trial. Potential jurors were first given an 18-page questionnaire to fill out which contained the following questions that related to pretrial publicity:

24. What newspapers and/or magazines do you read on a regular basis?

PRETRIAL PUBLICITY

55. The defendant is charged with the March 27, 1995, abduction and murder of Maria Piceno from the Lemoore Food King parking lot. Maria's body was found on April 9, 1995, at Poso Creek in Kern County. Do you recall having read or heard of this incident? Yes___No___

If yes, please state your source(s) of information (i.e., newspaper, television, conversation with friends, etc.) and describe what you have heard about this case:

56. Were you contacted by any police officer or private citizen investigating this case, or did you participate in the search for Maria Piceno? Yes___ No___ If yes, please describe the nature and extent of that contact or participation.

57. Approximately how many articles have you read concerning this case?

58. Has anything you have read or heard caused you to reach any conclusions concerning any of the facts or legal issues of this case (such as guilt or innocence of the defendant, appropriate punishment for the crime, conduct of the police officers, etc.)? Yes___No___ If yes, please explain:

59. If you were a juror in this case could you set aside what you heard or read about the case and decide it strictly on the evidence presented to you in court? Yes___ No___ If your answer is no, explain what you could not successfully disregard.

60. If the court instructs you not to read, view or discuss any news media coverage of this case, will you follow the court's instructions?

61. Has anything you have read or heard concerning this case caused you to form an opinion as to whether or not the defendant is more likely guilty than innocent? Yes___No___

62. Based on anything you have read or heard concerning this case, have you ever expressed an opinion to another concerning any fact or issue of the case? Yes___No___Or the guilt or innocence of the defendant? Yes___No___ If yes to either of the above questions, what was the opinion you expressed?

63. Have you discussed the facts of this case with anyone? Yes___No___

64. Has anyone expressed an opinion to you concerning any of the facts or issues of this case? Yes__No___ Or the guilt or innocence of the defendant? Yes___No___If yes to either of the above questions, what was the opinion expressed to you?

65. If you have expressed an opinion or heard another's opinion, would you have any difficulty setting that aside if selected as a juror and deciding the case based solely on the evidence presented to you in court? Yes___No___

(3 (3 of 4) Augmented Record of CT 618, 626-628.)

After each potential juror completed the questionnaire, the court questioned each one individually and outside the presence of the other jurors to further inquire regarding the extent of his or her exposure to any publicity in the case. (See 4 RT-10 RT.) During this individualized voir dire, the court asked the jurors detailed questions about what they had read or heard about the case. For example, the court asked one potential juror the following questions.

Q. I need you to search your memory and tell us all of the details that you can remember reading or hearing about the case? . . . Q. Can you remember hearing or reading what, if any, evidence supposedly connected Mr. McCurdy with this crime other than you've related that

> it was reported that he lived in the area where the body was? Can you remember any other reports of evidence that supposedly connected him to the crime? . . . Q. Do you remember reading or hearing whether or not there was or wasn't supposed to be an eyewitness to any of the aspects of the crime? . . . Q. Can you remember hearing or reading anything about any scientific evidence like blood or hair or fingerprints or anything like that that tended to connect Mr. McCurdy to the crime?
>
> . . . Q. Do you remember hearing or reading anything about the circumstances of his arrest, what happened at the time of or after his arrest? . . . Q. Okay. Do you remember hearing or reading anything about any court proceedings in this case, for instance, motions by the District Attorney, motions by the defense, rulings by the Court, anything of that nature about this case?

(4 RT 717-720.) The court repeated this type of questioning with all potential jurors who had seen or read anything about the case. The court also allowed the attorneys to conduct voir dire during the individual examination of each potential juror. The court's careful procedures thus sought to reveal the impact of media coverage and screen out members of the panel who were influenced by such coverage. (See, e.g., *People v. Staten* (2000) 24 Cal.4th 434, 450.)

Of the 99 jurors who were independently questioned regarding what publicity they had heard or seen, 10 had not been exposed to any publicity in the case. (3 RT 220, 388, 405, 445; 4 RT 527, 530, 537-539, 543; 7 RT 874; 9 RT 1224, 1236.) The court excused 37 potential jurors for cause on grounds that were largely unrelated to exposure to pre-publicity, including their views on the death penalty, inability to judge others, or a physical disability or other hardship that had not been brought up during the initial hardship inquiry. (See 3 RT 231, 242, 250, 273, 310, 320, 332, 378, 451,462, 471, 566;4 RT 566, 576, 580, 589, 688, 738; 6 RT 782; 7 RT 949, 981, 1033, 1066, 1100, 1103, 1112, 1172; 9 RT 1112, 1172, 1223, 1245, 1266, 1289-90, 1293, 1334, 1343, 1350, 1400, 1407.) Only five jurors were excused for cause based on the court's determination that they had been overly exposed to pretrial publicity. (3 RT 482, 7 RT 948, 1030, 9 RT 1221, 1383.)

Of the remaining 47, the majority did not remember the specific nature of the publicity they had read because it had occurred over a year previously. (See, i.e., 3 RT 226-227 [juror heard about case on news but could not remember any details, it had been so long ago; 3 RT 266 [juror read that a little girl was kidnapped, but did not remember much else]; 3 RT 321-322 [juror did not remember what heard on television and from friends about case]; 3 RT 327-328 [heard news briefings a long time ago, but does not remember anything about case]; 3 RT 388 [could not remember much about case]; 3 RT 400 [read only general information about case in paper]; 3 RT 415 [only saw on television that a little girl was missing]; 3 RT 454 [juror was vague on what he had read about case]; 4 RT 551 [read articles in Fresno Bee and was aware victim's body found in Bakersfield]; 4 RT 555 [read in Hanford paper that girl was kidnapped and found in a creek]; 7 RT 1048 [heard one brief newscast about finding victim's body].) Every single juror who had been exposed to any publicity in the case represented that he or she could keep what had been seen or read separate from the trial and be impartial. (3 RT 226-227, 233, 238, 244, 255, 259, 268, 276, 286, 295, 314, 322, 328, 374, 380, 383, 395, 401, 416, 456, 435, 464, 476; 4 RT 519, 547, 552, 556, 564, 570, 601, 612, 656, 676, 692, 699, 709, 721, 743, 765; 7 RT 885, 892, 895, 902, 916, 925, 964, 973, 1017, 1045, 1052, 1070, 1077, 10831089, 1107; 9 RT 1204, 1217, 1240, 1273, 1278, 1330, 1338, 1354, 1361, 1366, 1370, 1390.)

Moreover, here it is critical that defense counsel used less than half (eight out of twenty [10 RT 1426]) of the peremptory challenges available to him before accepting the jury panel. This fact is a strong indication that the jurors were fair, and the defense was satisfied with the jury. (*People v. Dennis* (1998) 17 Cal.4th 468, 524; *People v. Daniels* (1991) 52 Cal.3d 815, 853-854.)

In sum, a review of the record in light of the relevant factors discussed above demonstrates that the trial court properly denied the motion for change

of venue. As this Court noted in *People v. Weaver* (2001) 26 Cal.4th 876, at page 908,

> [J]urors need not be wholly ignorant of the facts of a case. It is sufficient if the jurors can, as here, assure the court they can set aside their prior impressions and render a decision based solely on the evidence presented in court.

II.

THE TRIAL COURT CORRECTLY ADMITTED THE INITIAL PORTION OF APPELLANT'S STATEMENT TO LAW ENFORCEMENT, THEN SUPPRESSED THE REMAINDER AS INVOLUNTARY

Appellant contends that the trial court erred in partially denying his motion to suppress his statements to law enforcement. (AOB 60-104.) On March 13, 1996, the trial court ruled that the April 30-May 3, 1995, interrogation of appellant became involuntary and thus appellant's statements were inadmissible and unavailable for impeachment after Page 44 of Exhibit 1(b) [or Volume 3 (3 of 4) ACT at 732]. (E RT (3/13/1996) 17.) The court's ruling, which admitted the initial portion of appellant's statement, then suppressed the remainder as involuntary, is supported by the record and controlling United States Supreme Court precedent.

A. The Facts

1. Evidence Presented At Hearing On Motion To Suppress Evidence

In his section 1538.5 motion to suppress evidence filed on January 5, 1996, appellant contended that his Fourth Amendment rights were violated when he was interrogated from April 30 through May 3, 1995. (1 CT 47-57.) He argued that his statements were involuntary and taken in violation of *Miranda v. Arizona, supra*, 384 U.S. at page 436. (D RT (1/19/1996) 2.) He

also claimed that although he invoked his right to counsel numerous times, law enforcement officials disregarded his request and continued the interrogation. (1 CT 48.) He asserted that not only should his statements be suppressed, but those of witness Mychael Jackson as well, as the product of the illegal interrogation. (*Ibid.*)

On January 16, 1996, the prosecution filed an opposition. (1 CT 58.) On January 17, 1996, the parties agreed that in considering the section 1538.5 motion, the trial court should review the entire transcript of appellant's statement contained in Exhibit 33 of the preliminary hearing transcript, as well as the entire preliminary hearing.[18/] (D RT (1/17/1996) 1-3.

The prosecution presented the following evidence at the January 19, 1996, suppression hearing. While investigating this case, Kings County Sheriff's Lieutenant Mark Bingaman received a lead from appellant's sister. (D RT (1/19/1996) 7.) She informed law enforcement that she believed appellant was capable of abducting Maria, since appellant had repeatedly molested her, he lived in the Lemoore area, and he was familiar with Poso Creek. (D RT (1/19/1996) 8.) In addition, appellant had confessed to his sister that he could never be married for fear that he would molest his own children. (D RT (1/19/1996) 9.)

Bingaman subsequently learned that appellant had rented adult videos from a store in the same shopping complex as the Food King close in time to Maria's abduction. (D RT (1/19/1996) 9-10.) Law enforcement conducted a search of appellant's mini storage unit. (D RT (1/19/1996) 13.) The search uncovered hundreds of pornographic films and sexually oriented magazines. (*Ibid.*) Mike Prodan, a behavioral scientist with the Department of Justice,

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18. The court re-numbered the transcript of appellant's statement as Exhibits 1A-1P for purposes of the suppression hearing. (D RT (1/17/1996) 2.)

reviewed the materials found in appellant's storage locker. After doing so, he presented his opinion to law enforcement that appellant had an abnormal sexual interest in young children. (D RT (1/19/1996) 14.)

Bingaman ascertained that appellant was employed by the U.S. Navy and was at sea en route to Singapore on the United States Abraham Lincoln. (D RT (1/19/1996) 14-15.) The Sheriff's Department contacted NCIS Agent Cacciaroni and requested that she conduct an initial interview with appellant. (D RT (1/19/1996) 15-16.)

Bingaman spoke to Cacciaroni after she had finished interviewing appellant. She advised him that appellant's actions had been highly suspicious, and he had acted as if he had a great deal to hide. (D RT (1/19/1996) 16.) Cacciaroni informed Bingaman about appellant's unusual emotional reactions to Maria's disappearance. (D RT (1/19/1996) 17.) As a result of this information, Bingaman began to focus on appellant as a primary suspect in the case, and he decided to assemble a team to interview appellant. (D RT (1/19/1996) 17, 48, 50.)

On April 30, 1995, a task force composed of Bingaman, Lemoore Police Commander Kim Morrell, United States Marshall Bruce Ackerman and NCIS agent Mike Devine traveled to the navy ship where appellant was stationed. They arrived on the ship at approximately 7:00 p.m. (D RT (1/19/1996) 20.) Bingaman met appellant between 9:30 and 10:00 p.m. that evening in the personal living quarters of Gunny Sergeant Norman Bates on the lower deck of the ship. (D RT (1/19/1996) 20-21.) The small living quarters contained a bed, desk and personal items belonging to the sergeant, and had space for only two or three people. (D RT (1/19/1996) 21.) Ackerman and Devine were assigned the task of conducting the primary interviews with appellant, while Bingaman and Morrell monitored the interview by television from a room approximately 20 feet away. (D RT (1/19/1996) 22.) Bingaman had difficulty hearing much

of what took place during the interview, since there was lots of background noise. (*Ibid.*)

Appellant was escorted by a couple of marine officers to the interview. (D RT (1/19/1996) 23.) The parties stipulated that Exhibits 1-A through 1-P were accurate transcripts of a series of interviews with appellant that took place between April 30 and March 3, 1995. (D RT (1/19/1996) 26.) On page 13 of the initial interview (Exhibit 1A), Bingaman recited appellant's *Miranda* rights to him, and appellant advised that he understood his rights.[19] (D RT (1/19/1996) The following colloquy then took place:

> BINGAMAN: Gene let, let me just go over this real quick. You do have the right to remain silent. Okay? Anything you say, can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you, while you're questioned and if you cannot afford to hire a lawyer one will be appointed to represent you and that's free of charge, Gene at no cost to you if you wish one Gene Do you understand what I just read to you?
>
> MCCURDY: Yeah.
>
> BINGAMAN: And explained to you, what I'd like to do and what Bruce would like to do is I know you've talked with Carol but we'd like to go through it and through that we might be able to discover, we may be able to take your mind, to, to, to something come out that can help us, in value as I pursue my other interviews. I got to leave here in just a couple minutes, but I think we can work through this and I think you're really going to help us Gene. And I, I ask for your cooperation tonight and please work with us.
>
> MCCURDY: They always tell you to get a lawyer. You know, I don't know why.

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19. During the first 13 pages of the initial interview, Bingaman and Ackerman asked appellant background questions relating to where appellant was born, where he grew up, where he attended boot camp, how many years he had been in the Navy and where he had been stationed, what his job duties had been in the Navy, what appellant liked to do for fun, the composition of appellant's family, and whether appellant had had any past girlfriends. (3 (3 of 4) Aug. CT 633-645.)

ACKERMAN: Well.

MCCURDY: You know.

ACKERMAN: We can't advise you okay.

MCCURDY: Right.

ACKERMAN: But uh, what we're concerned with is getting your help because we genuinely think you can help us.

MCCURDY: When I found out she was found in Bakersfield that made me feel like a suspect right there.

ACKERMAN: Why do you think that?

MCCURDY: Because I was going to Bakersfield every weekend. Uh, you know I was in the area when she was taken and I would know the area in Bakersfield uh, . . .

(3 (3 of 4) Aug. CT 645-646.)

Special Deputy United States Marshal Bruce Ackerman explained that appellant's interview began at approximately 9:00 p.m. and continued, with several breaks, until 4:00 a.m. the next morning.[20/] (D RT (1/19/1996) 59, 206.) Approximately two hours into the videotape, appellant stated, "I want a lawyer." (D RT (1/19/1996) 65.) The conversation took place after Ackerman and Devine started questioning appellant about pornographic magazines found in appellant's storage locker:

ACKERMAN: I know this is extremely difficult for you, but if you want to deal with this issue and get it past you.

MCCURDY: Yeah but I don't want you all to (INAUDIBLE). Yeah, well, I don't know.

ACKERMAN: I understand. The behavior doesn't stop just because you wish it to stop.

MCCURDY: I know that.

ACKERMAN: Have you wanted it to stop?

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20. The prosecution played a videotape of Ackerman's interview of appellant for the court. (D RT (1/19/1996) 64-65.)

MCCURDY: Sure. I wanted to get back into normal relationships.

ACKERMAN: You still got some baggage, other baggage to get out, about you, and early experiences.

DEVINE: Come on.

ACKERMAN: Even if you tell me, you think because honesty needs to be you to you.

MCCURDY: Well Uh, uh.

DEVINE: You know Gene one thing that I uh, I found a, a lot of people that had these kind of magazines or something may of had something happened in their lives maybe early on that set them or had an influence on them. Anything ever happen to you, maybe when you were younger?

MCCURDY: I can't say. I want a lawyer.

(PAUSE)

MCCURDY: I don't know if you guys got any other suspects or what.

DEVINE: We're talking all, we're talking to all kinds of people.

MCCURDY: I know it. I feel like I'm your main suspect.

DEVINE: Well ever since we've been on the ship. We've been talking to all kinds of people. I mean when Carol called you, of course she got a great deal of information, you know. You may have been able to because of past experiences.

MCCURDY: I didn't feel like a suspect then.

(3 (3of 4) Aug. CT 706-707.)

When appellant stated he wanted an attorney, Ackerman closed the file folder that he was holding and moved his chair back in preparation for standing up. (D RT (1/19/1996) 65.) Ackerman was ready to terminate the interview and leave the room. However, when appellant remarked approximately twenty seconds later, "I don't know if you guys got any other suspects or not," Ackerman interpreted appellant's comment as signifying that appellant wanted

to continued the interview."[21] (D RT (1/19/1996) 66.)

Ackerman subsequently asked appellant questions about his childhood and his sexual experiences as a child. The following conversation took place:

ACKERMAN: Okay. Do you understand that you weren't a bad person, because of that?

MCCURDY: Right, I know it, and I've forgiven him.

ACKERMAN: But then you acted out that's the term.

MCCURDY: Yeah well, acted out on a, uh, in what way?

ACKERMAN: With your sisters and your brother.

MCCURDY: It was mutual.

ACKERMAN: Okay.

MCCURDY: It was.

ACKERMAN: I understand.

MCCURDY: I understand the way I'm picturing it, is you've talked to my sister and she had a hard time with it. And I let her think the way she was thinking that wasn't easy but, that's her.

ACKERMAN: In what way?

MCCURDY: She was the aggressor.

ACKERMAN: Okay, from the first time?

MCCURDY: Um, no. It was uh, I can't really say she was the aggressor we'd only do it when she wanted to.

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21. A page or so after appellant asked for an attorney, then resumed the conversation with Ackerman, the following dialogue took place:

ACKERMAN: Obviously this is a very emotional, very difficult thing for you to deal with.
MCCURDY: Yeah, oh boy. (PAUSE) Uh, I don't know what to do.
ACKERMAN: I understand.
MCCURDY: (PAUSE) you know.
ACKERMAN: It's up to you.
MCCURDY: I wanna help you guys, I want you guys to find him, but I don't want to incriminate myself.

(3 (3 of 4) Aug.CT 709.)

ACKERMAN: Okay I understand.

MCCURDY: If I wouldn't wake her up, I never forced her to do anything.

ACKERMAN: Okay I understand. What about with your brother?

MCCURDY: No, it was uh, it's uh, hard.

ACKERMAN: I understand, believe me I understand.

MCCURDY: That chair.

ACKERMAN: Sure, I'm sorry (PAUSE)

MCCURDY: I can't

ACKERMAN: I understand.

MCCURDY: I can't talk no more.

ACKERMAN: Okay, Do you want some more water?

MCCURDY: No, why did I have to rent a video that day?

(3 (3 of 4) Aug.CT 716-717.)

Shortly afterwards, Devine joined the interview and began to ask appellant about his childhood. In response to questioning, appellant indicated that his first sexual experience was at the age of six or seven. (3 (3 of 4) Aug.CT 732.) When Devine asked appellant if the sexual experience involved someone doing something to appellant, appellant answered, "I don't know. I'd rather not talk about it." (*Ibid.*) Devine proceeded to ask appellant if his early sexual experiences had had an effect on appellant. At that point, Ackerman re-entered the room. (3 (3 of 4) Aug.CT 733.) Devine asked, "Was it a positive experience, negative, didn't really matter?" Appellant replied, "I'd rather not talk about it, ah." (3 (3 of 4) Aug.CT 734.)[22/]

The interview continued on for a few more pages of transcript. Ackerman then confronted appellant with a handwritten note Ackerman

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22. The trial court suppressed appellant's statements from this point on, finding that they were involuntary and taken in violation of appellant's *Miranda* rights and right to counsel. (E RT (3/13/1996) 12-14.)

claimed was found in appellant's storage locker. (3 (3 of 4) Aug.CT 740.)

ACKERMAN: So when I find something like this, I, I feel it's fairly significant that it's indicative of somebody that it has a real struggle goin on, somebody's trying to deal with something and it's a battle they're obviously not resolving. I mean it's (INAUDIBLE) boom, and it talks about in your soul. So there's real (INAUDIBLE) heavy addictions. You feel it? You see anything you under. . . You understand what I'm saying and do you see some of that in you?

MCCURDY: Yeah, I think so.

ACKERMAN: Do you know where I found this?

MCCURDY: Where?

ACKERMAN: In that little box.

MCCURDY: No you did not.

ACKERMAN: Gene I have no reason to lie.

MCCURDY: You did not.

ACKERMAN: Okay, this. . .

MCCURDY: That was not in my belongings.

ACKERMAN: This was in your belongings.

MCCURDY: Okay. Take my handwriting.

ACKERMAN: No problem. I, I have no reason to lie to you about this Gene, okay? This was in your belongings. This was found in your belongings, in your storage shed, in your belongings. Okay.

MCCURDY: I want a lawyer, enough said.

ACKERMAN: Okay, I'm not gonna. . .

MCCURDY: Well, I don't, I don't wanna see that.

ACKERMAN: See what?

MCCURDY: A, A, what I think your [sic] gonna show me.

ACKERMAN: What do you think we're going to show you?

MCCURDY: Show me pictures of her body and I seen a picture of grass and so. . .

ACKERMAN: I'm not going to ask you any questions, Gene. I'm going show you something, just show him that.

MCCURDY: I want a lawyer.

MCCURDY: I want a lawyer.

DEVINE: You want some water Gene?

(3 (3 of 4) Aug.CT 740-742.)

At that point, Ackerman, as well as Devine, both exited the room and left appellant alone. (D RT (1/19/1996) 73, 78.) Ackerman and Devine advised Bingaman that appellant had requested an attorney. (D RT (1/19/1996) 83.) Bingaman determined to find out whether there were any attorneys on the ship, and to get a clarification from appellant that he did want an attorney. (D RT (1/19/1996) 85.) Approximately 21 minutes after Ackerman terminated the interview, Bingaman entered the room and asked appellant, "You want to talk to me or do you want a lawyer?" (D RT (1/19/1996) 86-87.) When appellant responded that he wanted to talk to Bingaman, Bingaman interpreted appellant's statement to mean that he was waiving his right to a lawyer. (D RT (1/19/1996) 87.) Bingaman maintained that if appellant had requested a lawyer, Bingaman would have made every effort to obtain one for him. (D RT (1/19/1996) 88.) The conversation took place as follows:

BINGAMAN: Gene. Gene.

MCCURDY: Huh?

BINGAMAN: Will you wake up for me, please?

MCCURDY: Sure.

BINGAMAN: Gene, you remember talking to me in the beginning?

MCCURDY: Sure, Um-huh.

BINGAMAN: Gene, why don't you have a seat. I want to talk to you here for a second before we end this interview. I'm gonna tell you where we're at here. Mr. Ackerman and Dr. Devine, you hear who I am, Gene. Can you look at me when I talk to you? Okay. I'm the task force leader in this homicide. They have told me that you want an attorney.

MCCURDY: Right.

BINGAMAN: Okay. What attorney would you like? Who could I call?

MCCURDY: Hell if I know.

BINGAMAN: Huh?

MCCURDY: I don't know any attorneys. I've never been in this kind of situation before.

BINGAMAN: Well, I'm here to. . .

MCCURDY: But, he showed me a piece of paper and he says he found it in, in my uh, storage shed.

BINGAMAN: Ah-huh.

MCCURDY: And he's lying.

BINGAMAN: He's lying?

MCCURDY: Yeah.

BINGAMAN: Now, now. . .

MCCURDY: So, therefore uh, I'm not saying anything else.

BINGAMAN: Okay and you don't have to. If, if you want an attorney...

MCCURDY: No.

BINGAMAN: Um, now, see I've never been in the military uh, is there attorneys on ship that you want? Is there. . .

MCCURDY: No.

((3 (3 of 4) Aug.CT 742-743.)

Bingaman asserted that he was only attempting to go over what appellant had requested for clarification purposes. (D RT (1/19/1996) 96.) Bingaman then asked appellant, "What do you want me to do, Gene?" (D RT (1/19/1996) 97.) Bingaman indicated that this question was aimed at asking appellant what kind of an attorney he wanted. (*Ibid.*) Appellant replied that he did not know what he wanted. (*Ibid.*) At this point, Bingaman continued the investigation, and he and appellant spoke for quite a while. (D RT (1/19/1996) 101; (3 (3 of 4) Aug.CT 745.)

At another point during the interview, Bingaman started questioning appellant about whether he had rented a room at the Vineyard Inn in Lemoore on March 27, 1995. (3 (3 of 4) Aug.CT 780.) Appellant asked to see an attorney. (*Ibid.*) Bingaman replied, "Well, here we go again." (D RT (1/19/1996) 107.) Appellant then commented, "Yeah, I don't even know where Vineyard Inn is." Bingaman informed appellant, "If you want to see your lawyer, then I'm done talking to you." (*Ibid.*) Bingaman asked appellant, "Do you want me to talk to you?" Appellant answered, "Yes, explain yourself." (*Ibid*; see 3 (3 of 4) Aug.CT 780.)

Shortly thereafter, Bingaman cautioned appellant, "You've got to give me an answer on that [referring to the Vineyard Inn] or I'm going to have to make some hard decisions whether I'm taking you back to the States." (D RT (1/19/1996) 108; 3 (3 of 4) Aug.CT. 781.) Appellant denied that he made any reservations at the Vineyard Inn. (3 (3 of 4) Aug.CT 781.)

At another time in the interview, Bingaman informed appellant that he was going to be taking appellant's hair and blood. (D RT (1/19/1996) 138-139.) Appellant mentioned the issue of an attorney as follows:

> BINGAMAN: If you didn't do it, we've got somebody very close to you that's making you look bad pal.
>
> MCCURDY: Which means I do need a lawyer.
>
> BINGAMAN: Which means you do need a lawyer? Is that a question? I haven't charged yet.
>
> MCCURDY: That's a question.

(3 (3 of 4) Aug.CT 791.)

Bingaman explained that he did not interpret appellant's comments as a request for counsel. Bingaman stated:

> I think that's about the third episode with attorney, and the reason why is when I asked and the way he said it to me on that evening in question, I asked him, "Is that a question?" And I believe the response is–"Yes."

(D RT (1/19/1996) 140.) Bingaman further explained:

> . . . I did not attempt to derail his efforts to get an attorney. I asked that question as an investigator probing for the truth, and felt at this stage of the investigation he had asked, which I figured–or I figured I concluded was an opinion for my advice whether he needed an attorney, and I felt I was not under obligation nor was it within my latitude to comment in this area to continue on with the investigation. But to prevent him from getting an attorney, if I'm answering it correctly, no, that was not my intention. That's always up to your client.

(D RT (1/19/1996) 151-152.) Bingaman subsequently brought in the other investigators to talk to appellant. (D RT (1/19/1996) 153.)

Bingaman maintained that during the six-hour plus interview of appellant, appellant was given numerous breaks in which he could have sodas, water or food and use the restroom. (D RT (1/19/1996) 155-156.) Appellant also took several smoking breaks. (D RT (1/19/1996) 157.)

At one point during the interview, appellant stated, "I definitely need some sleep." (D RT (1/19/1996) 161.) Bingaman explained that he was winding down the interview by that time. (D RT (1/19/1996) 162.) Bingaman subsequently placed appellant under arrest for murder. (*Ibid.*)

Bingaman admitted challenging appellant to take a polygraph, but denied making any promises to appellant based on the polygraph. (D RT (1/19/1996) 164.) Although appellant was already under arrest for murder, Bingaman felt that the polygraph would be useful to the investigation and would be helpful to appellant if appellant were to pass the polygraph. (D RT (1/19/1996) 178-179.)

Ackerman denied being in the room at the time of appellant's arrest. He supplied handcuffs to Bingaman after appellant was arrested. (D RT (1/19/1996) 206-208.) Ackerman indicated that appellant wore the handcuffs for only a couple of minutes. (D RT (1/19/1996) 208-209.) When Ackerman walked appellant into the hallway for a drink of water, Devine informed appellant that there was no possible way that Bingaman could arrest him. Devine informed appellant that he was not technically under arrest, but was still

in custody. (D RT (1/19/1996) 209, 236.)

The initial shipboard interview ended around 4:00 a.m. Ackerman and the others on the task force team collected their belongings and ate in the officers' mess hall. They then awaited transport off the ship and back to Japan. (D RT (1/19/1996) 211.) Ackerman recalled that the plane off the ship left at about 7:00 a.m. Appellant was on the flight with the others. The flight took approximately two hours for them to arrive at a naval station at Atasugi, Japan. (D RT (1/19/1996) 211-212.) At the naval station, appellant was moved to a facility where he was able to get sleep, food and a shower. (D RT (1/19/1996) 212.) The day after arriving at the base, the task force again met up with appellant in the late morning. (*Ibid.*)

Michael Devine is a special agent with the Naval Criminal Investigative Service. (D RT (1/19/1996) 230.) He maintained a log of when appellant was given food during the interview process on May 1, 2 and 3. (D RT (1/19/1996) 231.) Devine explained that when he and the task force originally arrived on the ship, they briefed the commanding officer of the ship and asked for permission to conduct a search of appellant's spaces. (D RT (1/19/1996) 233.) Devine obtained a confinement order which allowed him to transport appellant to the Atasugi Naval Air Station, then to the Yokota Air Base. From there, appellant was flown to Travis Air Force Base, where he was transferred to the custody of NCIS agents from Lemoore. (D RT (1/19/1996) 234.)

United States Air Force Special Agent Harold D. Fuller, Jr. became acquainted with appellant on May 2, 1995, at the Yokota Air Base in Japan when Fuller was asked to conduct a polygraph on appellant. (D RT (1/19/1996) 110.) Fuller's interview with appellant took place on May 2 and 3. Prior to interviewing him, Fuller read appellant his *Miranda* rights, and appellant waived them. (D RT (1/19/1996) 111-112.) Fuller's interview of appellant was recorded without Fuller's knowledge. (D RT (1/19/1996) 112.)

Fuller identified Exhibit 4 as the "Statement of Consent to Polygraph Examination," and Exhibit 5 as the interview log, which lists the time *Miranda* rights were read and any breaks throughout the interview. (D RT (1/19/1996) 114.)

On May 2, Fuller conducted a pre-polygraph interview with appellant that lasted from 10:50 a.m. to 12:10. They then took a ten-minute break. After the break, appellant took a 20-minute polygraph examination. After the polygraph, at 1:15 p.m., Fuller restarted the interview with appellant, and the interview lasted until 7:50 p.m., with numerous breaks throughout. (D RT (1/19/1996) 123-124.) During that time period, at about 3:25 p.m., Fuller gave appellant a second polygraph. He then interviewed appellant again after that polygraph. (D RT (1/19/1996) 124-125.) At 5:00 p.m., Ackerman and Devine entered the room and interviewed appellant, while Fuller left and watched from the observation room. (D RT (1/19/1996) 127.)

After the first polygraph, but before the second, appellant stated, "I'm finished talking." He paused, then said, "It's time to get a lawyer." (D RT (1/19/1996) 120, 125.) Fuller explained,

> I did not hear the part about "get a lawyer." I . . . felt he was getting a little agitated at me, and I felt I heard him say or make reference to the fact he didn't want to talk to me. That's why I suggested, "How about if I let you talk to one of the other guys?"

(D RT (1/19/1996) 120.) Fuller noted that if he had heard appellant's request for a lawyer, he would have stopped the interview immediately in accordance with Air Force policy and let appellant have an attorney. (D RT (1/19/1996) 125.)

On the second day, Fuller initiated an interview with appellant for about 50 minutes, then Ackerman joined in the interview. (D RT (1/19/1996) 128.) The interview on the second day lasted from 11:30 a.m. to 5:20 p.m in a soundproof room with an observation room attached to it. (D RT (1/19/1996)

129, 240.)[23/]

On January 23, 1996, counsel presented argument. Defense counsel contended that after appellant's statement was suppressed as involuntary, there would have been insufficient evidence to support an arrest warrant. (D RT (1/23/1996) 251.) Counsel thus contended that Mychael Jackson's statement should be suppressed, since it was the fruit of the unlawful arrest. (D RT (1/23/1996) 252.) Counsel further argued that Lieutenant Bingaman used illegal tactics to coerce appellant into taking the polygraph examination. (D RT (1/23/1996) 253.)

The prosecutor asserted that any violations of *Miranda* that took place during the interviews did not result in any incriminating statements by appellant. (D RT (1/23/1996) 254.) He also noted that many portions of appellant's interview were clearly voluntary and proper under *Miranda*. (D RT (1/23/1996) 256.) He concluded by arguing that probable cause for appellant's arrest existed prior to the interviews at issue. Thus, Mychael Jackson's identification of appellant was not fruit of the poisonous tree. (D RT (1/23/1996) 258.)

2. The Trial Court's Ruling

On March 13, 1996, the trial court read its lengthy ruling into the record. (E RT (3/13/1996) 1.) The court outlined the issues as 1) whether a *Miranda* violation occurred during the interrogation of appellant; 2) whether all or part of appellant's statement was involuntary; 3) if portions of appellant's statements were found to be involuntary and in violation of *Miranda*, whether any

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23. Following the presentation of witnesses, the parties discussed the organization of transcripts relating to appellant's interviews as follows: 1A through 1D are the transcripts of the entire April 30, interview (the videotape being approximately six hours and 10 minutes long); 1E through 1I are the transcripts of the May 2 and 3 interviews. (D RT (1/19/1996) 245.)

subsequent statements might be untainted; and 4) if portions were involuntary, whether that should lead to the suppression of Mychael Jackson's testimony. (E RT (3/13/1996) 1-2.)

The court ruled on these issues as follows:

> First, I note that the interview in question here appears to have gotten off to an improper start right from the beginning.
>
> It is uncontested that the defendant was the person upon whom suspicion had focused; that he was in custody at the beginning of the questioning. That's represented in Exhibit 1(a) and he was nevertheless questioned without the benefit of *Miranda* for 11 pages of transcript.
>
> Nevertheless, those initial statements were not involuntary and under Oregon versus Elstad, 470 U.S. 298 considering the circumstances of this case, the subsequent *Miranda* admonition appearing at page 13 of Exhibit 1(a), especially in light of the non-incriminatory nature of the initial questioning was sufficient to render post *Miranda* statements admissible, at least until subsequent unlawful interrogation may have occurred.
>
> The initially challenged portion of defendant's statement is at page 13 of Exhibit 1(a) where after *Miranda* admonition the defendant's acknowledgment of his understanding of his rights, the defendant says, quote, "They always tell you to get a lawyer. You know, I don't know why" unquote. That appears at page 14 of Exhibit 1(a).
>
> The government agent Ackerman responds, quote, "We can't advise you, okay." Unquote. The defendant then goes on to converse about the subject of the Piceno kidnapping and murder.
>
> The defendant's statement referred to was not a request for counsel. The governing law stated by our state supreme court in People versus Crittenden, 9 Cal.4th 83 at pages 129 to 130 and by the United States supreme court in Davis versus United States, 129 Lawyer's Edition Second 362, defendant's statement that quote "They always tell you to get a lawyer" unquote, did not amount to an invocation of his *Miranda* rights.
>
> Agent Ackerman's response, "We can't advise you" clearly conveyed a willingness to abide by a request for counsel were such a request made, and the defendant's subsequent conversation constitutes an implied waiver of those rights.

(E RT (3/13/1996) 2-3.)

The trial court noted that the next critical point in the interrogation occurred at page 19 of Exhibit 1(a) on tape 2, where appellant is asked if something happened earlier in his life that might have influenced him regarding his desire to possess certain magazines. (E RT (3/13/1996) 3.) The court indicated:

> He clearly asserts his right to counsel at that point by saying quote, "I can't say, I want a lawyer." The uncontroverted evidence indicates that at this point, the questions and, indeed, all conversations stopped.
>
> Investigator Ackerman gathered his belongings preparatory to leaving the room at which point the defendant reinitiates the conversation by stating quote, "I don't know if you guys got any other suspects or what." Unquote.

(E RT (3/13/1996) 4.) The court found the following factors to be relevant as to whether appellant voluntarily reinitiated conversation with Ackerman after invoking his right to counsel.

> One, the improper preliminary questioning had yielded no inculpatory information.
>
> Two, the defendant had recently been advised of his *Miranda* rights in a period of approximately one hour and 45 minutes earlier based on the Court's listening to the tapes.
>
> Three, the defendant had waived those rights by conduct.
>
> Four, no badgering, hectoring or verbal intimidation tactics had been engaged in to that point, no improper inducements or implied promises of leniency had yet been made.
>
> Five, the defendant, although initially given to believe he was merely being interviewed as a potential witness, knew by then that he was a suspect, reference Exhibit 1(a), the second page 9.
>
> Six, the defendant had just seen that he had the power to terminate the . . . questioning by simply requesting a lawyer.
>
> Seven, the defendant reinitiated conversation as the investigator was preparing to leave by asking about whether there were other suspects in the case and stating that he felt he was the investigator's main suspect.

(E RT (3/13/1996) 6-7.)

The court found that after a brief discussion of the subject of suspects in the case, appellant remarked, "Yeah, oh boy. Uh, I don't know what to do." (E RT (3/13/1996) 7, quoting the second page of 21 of Exhibit 1(a).) Ackerman responded, "It's up to you." The court found that appellant then replied, "I want to help you guys. I want you guys to find him, but I don't want to incriminate myself." (*Ibid.*) Ackerman stated, "You want this–" (in reference to the killing) "–to stop." Ackerman informed appellant that it would not stop just by appellant wishing it would. (*Ibid.*) The court noted that appellant then went on to discuss his pornographic magazines and videos. (E RT (3/13/1996) 7-8.)

The court ruled,

> Under the totality of the circumstances, I infer that at that point, the defendant knew his *Miranda* rights, he knew he had the right to have assistance of counsel, he knew he had the power to terminate questioning.
>
> To this point in the interrogation his right to terminate questioning had been scrupulously honored as required by *Miranda*.
>
> He knew that Investigator Ackerman was acknowledging that defendant was in control of whether or not the conversation would continue and that defendant resolved his feelings of ambivalence and voluntarily decided to waive those rights and continue the conversation.

(E RT (3/13/1996) 8.)

The trial court found, however that when appellant was interrogated by Devine at page 44 of Exhibit 1(a), appellant invoked his right to remain silent about his early childhood experiences:

> Devine ignores the defendant's desire to remain silent [and] repeatedly persists in questioning the defendant about that particular subject despite defendant's repeated statements that he does not want to talk about that.
>
> Now, it is clear that a defendant's indication of unwillingness to talk about a particular subject under well-established case law does not necessarily indicate a desire that all questioning cease, and if the suspect's words indicate a desire not to be questioned about a discrete

subject and the police officer abides by that request and turns the interrogation to other areas, subsequent statements will generally be admissible.

Such was not the case here, however. Rather, Investigator Devine persisted in questioning about the exact matter about which defendant was indicating a desire to remain silent.

Under those circumstances, the defendant 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 People's case in chief.

(E RT (3/13/1996) 9.)

The court noted that Devine's repeated disregard for appellant's right to terminate questioning was pertinent to the voluntariness of his continued interrogation. (E RT (3/13/1996) 9-10.)

Having invoked his right to silence as to a particular subject matter and having had that right ignored at the third Page 4 of Exhibit 1(a) the defendant then explicitly invokes his right to counsel.

Rather than having that right scrupulously honored as required by our supreme court in the *Miranda* decision, the defendant is then told to think about it and that the investigator would be back shortly.

The defendant is then left alone during which period he appears to lie down on the floor and either sleep or rest for a period of time after which sheriff's lieutenant reenters and engages the defendant in conversation.

The circumstances are persuasive that that was done for the purpose of getting the defendant to reconsider his request for counsel and to remain silent.

This reinitiation of questioning by the government was violative of the defendant's *Miranda* rights under the rule articulated in Oregon versus Bradshaw, 462 U.S. 1039 at 1044, and all subsequent statements are inadmissible in the People's case in chief.

(E RT (3/13/1996) 10.)

The court also determined that all subsequent statements made by appellant were involuntary and could not be used for purposes of impeachment. (E RT (3/13/1996) 11-17.) In particular, the court noted:

In this case, a substantial number of tactics which were implied have individually resulted in findings of involuntary statements and these tactics were used to keep the defendant talking and to get him to say what the interrogator's [sic] wanted.

His interrogation continued despite his request for counsel. Defendant did not initiate the continued interrogation as set forth in Exhibit 1(b) at page 1 and page 43, Exhibit 1(f) at page 7.

He repeatedly tried to invoke his right to remain silent and his requests were ignored, examples being Exhibit 1(b) page 28, Exhibit 1(c) page 15, Exhibit 1(f) page 7.

The defendant made a partial invocation of his right to remain silent regarding his sexual experiences as a boy, which is the matter I referred to earlier at Exhibit 1(a) Page 44 and his requests were ignored and he was subject to continued questioning about that particular subject.

The defendant was told that the investigators were not interested in putting him behind bars or in punishment, but rather wanted to help him. He was told that prison might not be the answer.

He asks at Exhibit 1(c) page 19 how far his statements will go and is told by Mr. Ackerman they were certainly not going to be telling anybody. They were not going to go up and go on the PA, and we're not going to the press.

In that regard, however, it must be noted that Exhibit 1(c) page 26, Ackerman does say that if the matter went to court Ackerman would be a witness and testify to the truth as he knows it.

In Exhibit 12(d) page 8, the sheriff's lieutenant is trying to get the defendant to agree to take a polygraph and the defendant expresses reservations at which point he's told quote, "I'm giving you that shot tonight, Gene. I'm going to give you that shot. I want to treat you like a gentleman. I don't want to . . . handcuff you like an animal and march you out of here. I want to come to grips with this tonight and I want to talk again about it tomorrow, and I probably want to talk to you again about it the next day, and if you want to sit there and piously tell me, "I didn't do it," when you don't know my case and why I traveled halfway around the world. I have the authority to arrest you right now."

Defendant states, "Uh-huh," and is then told, "And I will do it. I will take you back to Kings County, but I didn't want it to go down this way because all I want to do is stop whatever is making you tick in there, and you need some professional help."

> Defendant is then told he's under arrest because he won't confess, but that if he passes a polygraph with flying colors his naval career won't be hurt.
>
> Now, this portion of the interrogation constitutes a clear improper threat and inducement to prolong the interrogation and to get the defendant to take the polygraph.

(E RT (3/13/1996) 12-14.)

The court concluded that under the totality of the circumstances, appellant was subjected to

> . . . prolonged repetitive, high pressured questioning interspersed with numerous instances of purposeful disregard of his requests for counsel and requests to remain silent, and also interspersed with both implicit and explicit threats of immediate arrest for non-cooperation and implied promises of leniency for cooperation.

(E RT (3/13/1996) 14-15.)

The court determined that appellant's responses became involuntary at Exhibit 1(b), Page 44. (E RT (3/13/1996) 15.) The court first noted that by that point appellant had attempted to invoke his right to remain silent about his childhood experiences, and his efforts had been disregarded. (*Ibid.*) Second, the court found that by that time, appellant had clearly invoked his right to counsel for all purposes "only to have the police reinitiate the interrogation. (E RT (3/13/1996) 15-16.)

> Three, he's been told nobody is going to harm you, blame a murder on you, or much less try and ruin your career, reference Exhibit 1(b) page 11.
>
> He's been told that the police have sufficient evidence to arrest him and return him to the United States for murder, reference Exhibit 1(b) Page 22 but that the investigator is not interested in locking the defendant up or punishing him, that Ackerman and Devine are there to look beyond guilty and to help the defendant, reference pages 22 and 23 of Exhibit 1(b); and finally at Exhibit 1(b) Page 43 and 44 when the defendant says, "Okay, here we go again. I want to see a lawyer."

Investigator responds, "Oh, you want to see a lawyer." The defendant responds "Yeah, I don't even know where the Vineyard Inn is."

This is followed by the investigator telling the defendant, quote, "Your name is on reservations at the Vineyard Inn in Lemoore on the day that that little girl is taken" and the following should be emphasized, **"and you've got to give me an answer on that or I'm going to have to make some hard decisions whether I'm taking you back to the United States."**

A clear implication of this is that if the defendant follows through with his tentative request for counsel and stops the interrogation he will be there and then arrested for murder and taken back to the United States, but that if he keeps talking he may avoid that consequence.

This is an implied threat which under well-established constitutional principles renders subsequent questioning involuntary, and there appears to be nothing in subsequent interrogation procedures which serves to interrupt or attenuate the effect of this threat. To the contrary, as outlined earlier, further impermissible interrogation techniques follow.

(E RT (3/13/1996) 16-17, emphasis in original.)

Finally, the court found that the inadmissible portion of appellant's interrogation did not require suppression of Mychael Jackson's statement. (E RT (3/13/1996) 17.) Rather, the court held that sufficient evidence existed to arrest appellant prior to the interrogation, including evidence of motive, opportunity, and consciousness of guilt. (E RT (3/13/1996) 18.)

In addition, the court asserted that "an arguably illegal arrest of the defendant will not insulate him from identification." (E RT (3/13/1996) 18.)

The evidence presented to the Court does not indicate that Jackson's viewing of the defendant's likeness on television or in other media was akin to an improperly suggested government sponsored photo identification.

Beyond arresting the defendant and bringing him back for the Court proceedings, the government had no part in Jackson's identification of him.

Further, even if the defendant's face were a suppressible fruit of an illegal arrest under the analysis set forth by the United States Supreme

> Court in United States versus Accolino, 435 U.S. 268, Mr. Jackson's voluntary act of coming forward as a witness based on a non-governmental party's news broadcast is not sufficiently related to the alleged governmental illegality to justify suppression of Jackson's testimony.

(E RT (3/13/1996) 18-19; 1 CT 91.)

B. Discussion

The privilege against self-incrimination provided by the Fifth Amendment of the federal Constitution is protected in inherently coercive circumstances by the requirement that a suspect not be subjected to custodial interrogation unless he knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and, if indigent, to appointed counsel. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) The United States Supreme Court further held in *Miranda* that if the suspect indicates that he or she does not wish to speak to the officer or wants to have counsel present at questioning, the officer must end the interrogation. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 444.)

In *Edwards v. Arizona* (1981) 451 U.S. 477, the high court held that if the suspect invokes the right to counsel, the officer may not resume questioning on another occasion until counsel is present, unless the suspect voluntarily initiates further contact. (*Id.* at p. 482, 383-485; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 55; see also *People v. Storm* (2002) 28 Cal.4th 1007, 1021; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238.) If, in violation of this rule, interrogation continues of an in-custody suspect who has asserted the right to remain silent or asked for, but has not been provided with counsel, the suspect's responses are presumptively involuntary and therefore inadmissible as substantive evidence at trial. (*People v. Sapp* (2003) 31 Cal.4th 240, 266; see also *People v. Davis* (2005) 36 Cal.4th 510, 551-552.)

Such exclusion is not required, however, when the suspect personally initiates further "communication, exchanges, or conversations" with the authorities. (*Sapp*, at p. 266.)

In *People v. Clark* (1993) 5 Cal.4th 950, at page 985, this Court pointed out:

> Clearly, not all conversation between an officer and a suspect constitutes interrogation. The police may speak to a suspect in custody as long as the speech would not reasonably be construed as calling for an incriminating response.

(See also *People v. Haley* (2004) 34 Cal.4th 283, 301.)

In assessing appellant's claim that his initial statements made when interrogated on the ship were improperly admitted, this Court must examine the uncontradicted facts surrounding the statements to determine whether the People met their burden of proving voluntariness by a preponderance of the evidence. (*People v. Hogan* (1982) 31 Cal.3d 815, 835; *People v. Markham* (1989) 49 Cal.3d 63, 71; see also *People v. Neal* (2003) 31 Cal.4th 63, 80.) With respect to conflicting testimony, it is the trial court which exercises its power to judge credibility of witnesses, resolve conflicts in the testimony, weigh evidence, and draw factual inferences. (*People v. Superior Court (Keithley)* (1975) 13 Cal.3d 406, 410.) On appeal, all presumptions favor the trial court's exercise of the aforementioned power, and the lower court's factual findings must be upheld if supported by substantial evidence. (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 359; *People v. Box* (2000) 23 Cal.4th 1153, 1194; *People v. Leyba* (1981) 29 Cal.3d 591, 596-598.)

While this Court must undertake an independent review of the record to determine whether the right to remain silent was invoked, it also gives "great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence. (*People v. Jennings* (1988) 46 Cal.3d 963, 979; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Substantial evidence

supports the trial court's factual findings and ruling that appellant's initial statements to Ackerman were voluntarily obtained.

Although Bingaman did not advise appellant of his *Miranda* rights until page 13 of the initial interview, prior to the advisement, Bingaman and Ackerman solely asked appellant background questions that were not designed to illicit an incriminating response. For instance, they asked appellant where he was born, where he grew up, where he attended boot camp, how many years he had been in the Navy and where he had been stationed, what his job duties had been in the Navy, what appellant like to do for fun, how many people were in appellant's family, and whether appellant had had any past girlfriends. (3 (3 of 4) Aug. CT 633-645.) The trial court correctly found that none of these questions were likely to elicit an incriminating response, and appellant did not make any incriminating statements. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 993 [Interrogation consists of express questioning, or words or actions on the part of the police that "'are reasonably likely to elicit an incriminating response from the suspect,'" quoting *Rhode Island v. Innis* (1980) 446 U.S. 291, 301.)

After Bingaman recited appellant's *Miranda* rights to him, appellant advised that he understood his rights. (D RT (1/19/1996) 27.) The trial court correctly found that appellant's subsequent remark, "They always tell you you need to get a lawyer. You know, I don't know why," did not constitute invocation of the right to counsel. (E RT (3/13/1996).) The court's ruling is supported by *Davis v. United States* (1994) 512 U.S. 452. There, the Court held that a suspect's request for counsel must be unambiguous to be effective. The test to determine if a request for counsel is ambiguous is whether a reasonable police officer, given the circumstances, would understand that the defendant is invoking his right to counsel. (*Id.* at p. 459; *People v. Crittenden* (1994) 9 Cal.4th 83, 130.) If the statement does not meet the requisite level of

clarity, the officer is not required to stop the questioning. (*Davis*, *supra*, 512 U.S. at p. 459; see also *People v. Clark*, *supra*, 5 Cal.4th at pp. 990-991 [the statement, "What can an attorney do for me'" was found not to be an invocation of the right to counsel]; *Crittenden*, *supra*, 9 Cal.4th at p. 124 [the statement, "Did you say I could have a lawyer?" was merely a question, not an unequivocal invocation of defendant's right to counsel].) Here, appellant's offhand comment about what others said about hiring an attorney was not an unambiguous request for an attorney. The trial court also properly observed that Ackerman's response that he could not advise appellant, conveyed a willingness to respect appellant's wishes if he chose to ask for an attorney. (E RT (3/13/1996) 2-3.)

Following this comment, Ackerman proceeded to interview appellant about what he had been doing on March 27, 1995, and what appellant had observed in the Food King parking lot on that day. (3 (3 of 4) ACT 646-690.) Ackerman was joined by Devine. (3 (3 of 4) ACT 646-690.) Ackerman then explained to appellant that he was attempting to profile the individual who abducted Maria. He showed appellant one of the magazines found in appellant's storage locker, and appellant commented that he realized he was a suspect. (3 (3 of 4) ACT 695-697.) Appellant admitted that he had purchased the magazines found in his storage locker. (3 (3 of 4) ACT 705.) Devine then commented:

> DEVINE: You know Gene one thing that I uh, I found a, a lot of people that had these kind of magazines or something may of had something happened in their lives maybe early on that set them or had an influence on them. Anything ever happen to you, maybe when you were younger?
>
> MCCURDY: I can't say. I want a lawyer.
>
> (PAUSE)
>
> MCCURDY: I don't know if you guys got any other suspects or what.

(3 (3 of 4) ACT 707.)

The trial court correctly found that appellant clearly asserted his right to counsel. The court also observed that after appellant invoked, all questions and conversation stopped. (E RT (3/13/1996) 4.) As set forth above, Ackerman explained that he closed his file folder and moved his chair back to get ready to stand up. (D RT (1/19/1996) 65.) Ackerman was ready to terminate the interview and leave the room. However, after approximately 20 seconds had passed, appellant initiated conversation by stating, "I don't know if you guys got any other suspects or not." (D RT (1/19/1996) 66; 3 (3 of 4) ACT 707.)

The trial court ascertained that appellant was well aware of his *Miranda* rights, and he knew he had the power to terminate questioning. The court also determined that appellant voluntarily decided to waive those rights and continue the conversation. (E RT (3/13/1996) 8.) The court's ruling is supported by well established case law.

If an accused asserts his right to an attorney during the interrogation, he may not be subjected "to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona*, *supra*, 451 U.S. at pp. 484-485.) An accused initiates further communication, exchanges, or conversations of the requisite nature when he speaks words or engages in conduct that can "fairly be said to represent a desire" on his part "to open up a more generalized discussion relating directly or indirectly to the investigation." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 642.)

If the accused initiates a conversation with the police after invoking his right to counsel, the police may continue the interrogation if the events indicate a knowing and voluntary waiver of *Miranda* rights. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044-1046 (plu. on. of Rehnquist, J.).) "[Any evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show

that the defendant did not voluntarily waive his privilege." (*Miranda*, *supra*, at p. 476.)

> ... [I]nvoluntariness requires coercive activity on the part of the state or its agents; and such activity must be, as it were, the "proximate cause" of the statement in question, and not merely a cause in fact.

(*People v. Mickey* (1991) 54 Cal.3d 612, 647.) In determining voluntariness–whether of a *Miranda* waiver, reinitiation of communication, or the subsequent statements themselves–the reviewing court considers the totality of the circumstances, including the details of the encounter and the characteristics of the accused (age, experience, education, background, and intelligence). (*People v. Neal, supra,* 31 Cal.4th at pp. 80, 83-84.) "'Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the "totality of [the] circumstances."'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 814.)

The trial court conducted a thorough review of the record and made several explicit findings regarding whether appellant voluntarily reinitiated the interview after invoking his right to counsel. In particular, the court found that appellant had recently been advised of his *Miranda* rights an hour and 45 minutes earlier, and he had waived his rights. The court found that up to that point no one had badgered or verbally intimated appellant, nor had anyone made any improper inducements. The court also noted that by that time in the interview, appellant clearly knew that he was a suspect in Maria's death. Significantly, the court found appellant was well aware of his ability to end the interview because he had seen Ackerman's reaction after he invoked his right to counsel. (E RT (3/13/1996) 6-7.) The court additionally observed that shortly after reinitiating conversation with Ackerman, appellant stated, "I want to help you guys. I want you guys to find him, but I don't want to incriminate myself." (E RT (3/13/1996) 7.) After this, appellant discussed his possession of pornographic magazines and videos with the investigators. (E RT

(3/13/1996) 7-8.) The trial court's finding that, under the totality of the circumstances, appellant voluntarily reinitiated the interview is well supported by the record and proper under *Edwards* and *Bradshaw*.

The court suppressed all of appellant's statements following the point where Devine started asking him about his early sexual experiences, and appellant repeatedly indicated he did not want to talk about it. When Devine asked appellant if the sexual experience involved someone doing something to appellant, appellant answered, "I don't know. I'd rather not talk about it." (3 (3 of 4) Aug.CT 732.) The court found that Devine ignored appellant's desire to not discuss these matters and persistently questioned appellant. The trial court ruled:

> Under those circumstances, the defendant'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 (3/13/1996) 9.) The court further determined that appellant's responses became involuntary at this point. (E R (3/13/1996) 15.) It noted that shortly after this part of the interrogation, appellant clearly invoked his right to counsel for all purposes, "only to have the police reinitiate the interrogation." (E RT (3/13/1996) 15-16.) Accordingly, the court suppressed *all* portions of the interview conducted after page 44 for *all* purposes. This included suppression of statements appellant made to Bingaman and statements he made in the following days to Fuller and Ackerman. Respondent maintains that the court's suppression ruling is proper under pertinent constitutional case law and supported by the record.

Finally, the court correctly ruled that the involuntary portion of appellant's interrogation did not require suppression of Mychael Jackson's statement. (See E RT (3/13/1996) 17-18.) The court specifically found that absent the statements obtained in violation of *Miranda*, the police had sufficient

evidence to arrest appellant. (*Ibid.*) The court's ruling is supported by Bingaman's testimony at the suppression hearing, which established that the police had probable cause for appellant's arrest prior to his interview on the ship. This probable cause resulted from appellant's presence in the same vicinity and at the same time as the crime, materials found in his storage locker indicating that he had a sexual interest in minors, and Donna's opinion that appellant was capable of committing the crime because he had repeatedly molested her, and he was familiar with the area where Maria's body was found.

Accordingly, the record establishes that the trial court properly suppressed the majority of appellant's statement, but admitted the initial portion, which was voluntary under the totality of the circumstances.

III.

THE TRIAL COURT PROPERLY ADMITTED RELEVANT EVIDENCE OF APPELLANT'S MOTIVE, INTENT AND PROPENSITY TO COMMIT SEX CRIMES UNDER EVIDENCE CODE SECTIONS 1101 AND 1108

Appellant contends that the trial court erred in admitting evidence of his incestuous conduct with his sister and his possession of adult-oriented material under Evidence Code sections 1101 and 1108. (AOB 105-178.) To the contrary, the court properly allowed this evidence, since it was particularly relevant to show appellant's motive, intent and propensity to commit sex crimes.

A. The Facts

In his trial brief, appellant moved in limine pursuant to Evidence Code sections 352 and 1101, subdivision (a), to exclude Donna's testimony, as well as evidence that certain magazines were found in appellant's storage shed, and appellant had rented multiple adult movies on March 27, 1995. (1 CT 298-

299.)

In response, the prosecutor moved to introduce Donna's testimony that appellant had molested her, and that appellant had admitted to Donna that he was fearful he might molest his own children. (2 CT 308-309.) The prosecutor sought to introduce "the titles of twenty nine of the magazines which indicate the defendant has an interest in young girls as well as testimony the magazines contain photos of young girls engaged in sexual activity." (2 CT 309-310, 337.) The prosecutor also sought to introduce evidence that appellant rented 9 pornographic videos on March 27, 1995. (2 CT 310.)

On December 23, 1996, the trial court heard the motions in limine. (RT (12/23/1996) 1-60.)

On December 27, 1996, appellant filed the proposed stipulation:

> The defendant, Gene McCurdy, denies that he is in any way responsible for the abduction or death of Maria Piceno. In order to focus the evidence on this important issue both the defendant and the prosecution have stipulated that if Maria Piceno was abducted by anyone, such abduction was for the purpose of committing an act defined in Penal Code Section 288 as charged in the Information. Thus, if you find beyond a reasonable doubt that the defendant abducted Maria Piceno, you must assume that he did so for the purpose of committing an act defined in Penal Code Section 288.

(2 CT 504.) The prosecution objected to the stipulation on the grounds that it did not address the issue of motive, and it would preclude a coherent presentation of the evidence. (2 CT 507-508.)

On January 21, 1997, the trial court made the following evidentiary rulings. The court found that under Evidence Code section 1108, appellant's prior unlawful sexual acts with Donna were admissible to show his propensity to molest and that he possessed a motive to commit the crimes in question. (10 RT 1439.) The court further noted:

> Under Evidence Code Section 352, the probative value of this evidence must be balanced against any undue prejudice and tendency to confuse issues. Remoteness of the prior crimes and the fact that the

> defendant was himself a minor when most of the prior crimes would have occurred, being only two years older than his sister, are factors for the Court to consider.
>
> However, this evidence, in connection with other evidence offered by the People and discussed later in these rulings, is probative to show that the defendant has had a lifelong sexual interest in pubescent and prepubescent girls, evidence I find highly relevant to the issue of motive in this case.
>
> I conclude that [under] Evidence Code Section 352 the probative value of the other crimes evidence of Jane Doe outweighs any undue prejudice, tendency to confuse the issues, or undue consumption of time.

(10 RT 1439-1441.)

The trial also found that appellant's statement to his sister that he never married or had children because he was afraid he would molest them, was relevant and admissible under Evidence Code section 1101, subdivision (b), as proof of appellant's motive. (10 RT 1441.) The court observed:

> . . . [T]he evidence of Mr. McCurdy's sexual preoccupation with and attraction to young girls . . . , which common experience tells us is held by a minority proportion of the male population, is probative of motive . . . not shared by a large majority of the population. And when coupled with evidence of the defendant's presence at the time and location of the victim's disappearance becomes highly probative, not only of motive but of identity.

(10 RT 1443.)

The court further held that evidence appellant had rented multiple pornographic videotapes on March 27, 1995, was relevant to show his state of mind at the time of the abduction. (10 RT 1444-1445.) The court determined that the probative value of such evidence outweighed any prejudice, confusion of the issues or undue consumption of time. (*Ibid.*)

At an Evidence Code section 402 hearing conducted on January 22, 1997, the trial court heard the following testimony from Bruce Ackerman regarding certain magazines found in appellant's storage locker. (11 RT 1836.) Ackerman is a consultant for state, federal and local law enforcement in the area

of child pornography, and he has investigated multiple persons who have a sexual interest in minor children. (11 RT 1837.) He has also qualified as an expert in state, federal and military courts in these areas. (11 RT 1854.)

Ackerman indicated that there were 34 magazines contained in People's Exhibit 30. He described the magazines as having titles such as "School Girl," "Teenage Sperm," "School Girls Open Up," "Maximum Perversion," "Teeners from Holland," "Weekend Teenage Special," and "Seventeen." (11 RT 1838.) Ackerman explained that the magazines displayed a number of color photographs depicting individuals, both male and female, engaging in a variety of sexual activity, including oral copulation, anal sex, fisting, vaginal intercourse, urination, and other sexual activity. (11 RT 1839.) The magazines also referred to "teenage" or "young" persons. (*Ibid.*) Ackerman described a number of the females in the magazines as appearing to be quite young. (11 RT 1840.) Several also had their hair in pigtails, had shaved genitalia, or had photographs taken of them with teddy bears. (11 RT 1840, 1844.) Ackerman had seen similar magazines on a number of occasions when conducting searches of individuals with an expressed sexual interest in minor children. (11 RT 1838.) He explained that often these types of magazines were the only ones available to an individual who had an interest in prepubescent children. (11 RT 1847, 12 RT 1867.)

Ackerman advised that appellant had admitting collecting the magazines because he had a sexual interest in that area. (11 RT 1840-1841.) When Ackerman asked appellant if he knew the age of the models in the magazines, appellant replied that he did not know whether they were 18 years old or younger, but they looked younger to appellant. (12 RT 1871.)

At the close of the hearing, the prosecutor requested that Ackerman be permitted to describe the titles and photographs contained in the group of magazines marked as People's Exhibit 30. He also requested that Ackerman

be permitted to testify that such materials are commonly possessed by persons having a sexual interest in minor children. (12 RT 1871.)

Appellant objected to Ackerman's testimony and the introduction of the magazine titles, and requested that the entire line of inquiry by excluded. (12 RT 1873-1874.)

At the close of the hearing, the court found that appellant's interest in young girls was relevant to motive and admissible subject to the court's weighing under Evidence Code section 352. It explained:

> . . . The photos which Mr. Ackerman has identified as being photos of the most extreme examples of particularly young girls in these materials that he has reviewed, as noted by counsel, all show primary and secondary sexual characteristics and development that, though perhaps not those of an adult, are significantly more developed than that of a prepubescent child.
>
> On the other hand, factors such as shaved genitalia, presence of teddy bears, and the photos of the naked young women, their hair arranged in pigtails, text referring to school girls and teenagers, combined with the witness's expertise and his testimony that these are the types of materials which in his experience he has found to interest admitted pedophiles, these things taken together, provide substantial probative value, in my opinion.
>
> There is a potential for prejudice, which Mr. Lee has touched upon. I have, perhaps, more faith and believe in the ability of jurors to sort out the relevant from the irrelevant or improper purposes of such evidence in this particular case. I doubt, given the nature of our present society, with what people are exposed to on a daily basis on the television and in the cinema and in magazines and in ads and in billboards, things of that nature, that photographs of unclothed females and sexually suggestive, provocative, or even explicitly. . . sexual positions are so shocking that they would interfere with the ability of the jurors to consider the evidence for the relevant and proffered purpose.
>
> I don't find a substantial likelihood that there would be any undue confusion of issues or undue consumption of time, and find that the probative value outweighs those factors as well as any undue prejudice. And the proffered testimony will be permitted.

(12 RT 1874-1875.)

B. Discussion

1. Standard Of Review

A trial court's determination of the admissibility of evidence of uncharged offenses is reviewed for an abuse of discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1149 ("*Carter*"); *People v. Kipp* (1998) 18 Cal.4th 349, 369 ("*Kipp*").) Evidence Code section 1101, subdivision (a), prohibits "admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 ("*Falsetta*"); *People v. Ewoldt* (1994) 7 Cal.4th 380, 393 ("*Ewoldt.*").)

Section 1101, subdivision (b), clarifies, however, that this rule "does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition." (*Ewoldt*, *supra*, 7 Cal.4th at p. 393; see *Falsetta*, *supra*, 21 Cal.4th at p. 914 ["the rule against admitting evidence of the defendant's other bad acts to prove his present conduct was subject to far-ranging exceptions," citing § 1101, subd. (b)].)

> "[E]vidence of uncharged crimes is admissible to prove, among other things, the identity of the perpetrator of the charged crimes, the existence of a common design or plan, or the intent with which the perpetrator acted in the commission of the charged crimes. [Citation.] Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent. [Citation.]"

(*Carter*, *supra*, 36 Cal.4th at p. 1147.)

This Court in *People v. Roldan* (2005) 35 Cal.4th 646, at page 705 ("*Roldan*"), pointed out,

> As Evidence Code section 1101, subdivision (b) recognizes, that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present

> crime. Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact, and the existence vel non of some other rule requiring exclusion.

Roldan further noted that when a defendant pleads not guilty, he or she places all issues in dispute. Thus the perpetrator's identity, intent and motive are all material facts. (*Roldan*, at pp. 705-706; accord, *People v. Beyea* (1974) 38 Cal.App.3d 176, 195.) The probative value of the evidence of uncharged crimes "must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352; *Kipp*, *supra*, 18 Cal.4th at p. 371; *Carter*, *supra*, 36 Cal.4th at p. 1149.)

In 1995, the Legislature enacted Evidence Code section 1108, authorizing in sexual offense cases the admission of evidence of the defendant's other sexual offenses to prove his or her propensity to commit the charged sex offense. "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

> Available legislative history indicates section 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility. In this regard, section 1108 implicitly abrogates prior decisions of this court indicating that "propensity" evidence is per se unduly prejudicial to the defense.

(*Falsetta*, *supra*, 21 Cal.4th at p. 911; see *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506 ["'In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101.' [Citation.]")

2. Kidnapping For The Purpose Of Committing An Act Defined In Section 288 Constitutes A Sexual Offense Under Section 1108

Appellant first contends that Evidence Code section 1108 was inapplicable to his case, since "neither the incest evidence nor the charged offenses constituted 'sexual offenses' within the meaning of Evidence Code section 1108." (AOB 121.) He argues that he was not charged with a violation of section 288 or any other offense listed in Evidence Code section 1108, but rather kidnapping for the purpose of committing an act defined in section 288. (AOB 121-122.) Appellant waived this argument by failing to raise it in the trial court. (*People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1015.) In any event, his contention lacks merit.

Evidence Code section 1108 describes as a sexual offense a crime that involves any conduct proscribed by a list of California Penal Code sections dealing with a wide range of sex and sex related offenses. Section 1108, subdivision (d)(1)(F), makes the attempt or conspiracy to engage in conduct described in subdivision (d)(1)(A), which includes committing a lewd or lascivious act on a child in violation of section 288, a sexual offense.

An attempt occurs when there is a specific intent to commit a crime and a direct but ineffectual act done towards its commission. (§ 21a.) The act required must be more than mere preparation. It must show that the perpetrator is putting his or her plan into action. That act need not, however, be the last proximate or ultimate step toward commission of the crime. (*Kipp, supra*, 18 Cal.4th at p. 376.) In *People v. Rupp* (1953) 41 Cal.2d 371, at page 382, the court pointed out that an assault with an intent to commit a crime is necessarily an attempt to commit the underlying crime. It concluded that an assault with the intent to commit rape is merely an aggravated form of attempted rape. (*Ibid.*; see also, *People v. Holt* (1997) 15 Cal.4th 619, 674.)

Under this same rationale, kidnapping for the purpose of committing an act defined in section 288 is also a sexual offense within the meaning of section 1108. Kidnapping for the purpose of committing a section 288 offense requires that the defendant commit the kidnapping with the specific intent to commit a section 288 offense. This requirement is derived from the statutory definition of the offense, which provides:

> Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

(§ 207, subd. (b); see *People v. Jones* (1997) 58 Cal.App.4th 693, 717 [a person could not kidnap and carry away his victim to commit rape if the intent to rape was not formed until after the kidnapping].) Therefore, a kidnapping for the purpose of committing a section 288 offense is not a mere act of preparation. Rather, it demonstrates that the perpetrator is putting his plan into action and is necessarily an attempt to commit a section 288 offense. Accordingly, kidnapping for the purpose of committing an act defined in section 288 is a sexual offense within the meaning of section 1108. (See also *People v. Pierce* (2002) 104 Cal.App.4th 893, 898-899 [assault with intent to commit rape is a sexual offense under section 1108, subdivision (d)(1)].) Appellant's various sexual molestations of Donna would constitute violations of section 288, which is listed as a qualifying offense under Evidence Code section 1108.

3. The Trial Court's Evidentiary Rulings Were Proper

Before admitting propensity evidence of a prior sex offense under Evidence Code section 1108, the trial court "must engage in a careful weighing process under [Evidence Code] section 352." (*Falsetta, supra*, 21 Cal.4th at p. 917.) "'It must consider factors including relevance, similarity to the charged offense, the certainty of commission, remoteness, and the likelihood of

distracting or inflaming the jury.'" (*People v. Pierce*, *supra*, 104 Cal.App.4th at p. 900, citing *Falsetta*, *supra*, 21 Cal.4th at p. 917.) Here, the record demonstrates that the trial court carefully balanced the probative value of the proposed propensity evidence against its prejudicial effect.

As set forth above, the trial court determined that appellant's history of molesting his sister, coupled with his statement that he feared he might molest his own children and his possession of pornographic materials depicting young woman made up to look like young girls, were highly relevant under Evidence Code section 1108 to show his motive for abducting Maria. (10 RT 1439.) These materials together demonstrated that, unlike the majority of the population, appellant had a sexual preoccupation with young girls. His conduct of molesting his sister over a 12-year time span also showed that he had a propensity to molest, which was consistent with the charge that he kidnapped Maria for the purpose of violating section 288.

In conducting its analysis, the court specifically considered the fact that appellant was a minor when most of the prior crimes would have occurred and the molestations occurred 15 to 30 years ago. However, it concluded that the substantial probative value of Donna's testimony outweighed the remoteness of the conduct and any undue prejudice to appellant. (10 RT 1439-1441.) The court also found that the introduction of such evidence would not confuse the issues or result in an undue consumption of time. (10 RT 1439-1441.)

The court's rulings were proper. Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) In *People v. Soto* (1998) 64 Cal.App.4th 966, at page 991, the appellate court upheld the admission of evidence that appellant had molested his niece and his sister years previously as being properly admitted under Evidence Code section 1108. The court found that although the prior molests occurred many years before the present

crimes and did not involve similar conduct, they were nevertheless properly admitted under section 1108. (*Ibid.*) The *Soto* Court noted that the previous uncharged 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.) Like *Soto*, here evidence that appellant molested his sister was relevant to establish appellant's intent, motive and propensity to commit sex crimes, but it was also significant to rebut his defense that he had been falsely accused of the present charges.

Appellant contends that under *People v. Harris* (1998) 60 Cal.App.4th 727, evidence that he molested his sister was too dissimilar to the instant charges. (AOB 126-127.) In *Harris*, a jury convicted defendant, a mental health nurse, of several nonviolent sexual offenses involving two patients. Defendant's defense was that one victim consented to the sexual activity, and the other victim hallucinated the claimed sexual encounters. The trial court admitted evidence of a prior violent sexual offense that resulted in defendant's conviction for burglary with the infliction of great bodily injury. On appeal, the court reversed and excluded the section 1108 evidence:

> The charged crimes involving a breach of trust and the "taking advantage" of two emotionally and physically vulnerable women are of a significantly different nature and quality than the violent and perverse attack on a stranger that was described to the jury. The version that the jury heard, while not as gruesome as the actual incident, was an incomplete and distorted description of an event that did not actually occur. As disturbing as the actual incident was, it was at least coherent, while on the other hand, the crime testified to by the officers must have caused a great deal of speculation as to the true nature of the crime. The inflammatory and speculative nature of the evidence weighs sharply in favor of exclusion.

(*Harris*, *supra*, 60 Cal.App.4th at p. 738.)

In contrast to the propensity evidence in *Harris*, the nature of Donna's testimony was not particularly inflammatory or prejudicial. (See *People v. Garceau* (1993) 6 Cal.4th 140, 178 ["Prejudice" does not mean harm because, generally speaking, most evidence offered against a party is harmful to the party's case. Rather, "undue prejudice" means the evidence invites a response from the jury that borders on the irrational].) Donna's account of appellant's molestation of her was straightforward and to the point. She described appellant becoming interested in fondling her vagina when the two siblings were young children. (11 RT 1806-1807.) She indicated that appellant's acts of fondling her vagina progressed to where he would take off his underwear and take off Donna's underwear, then get on top of Donna in her bed and act as if he was having sex with her. (11 RT 1808.) Donna indicated that when appellant began to have erections he would ask if he could penetrate her. She always refused, but explained that appellant would also occasionally try to fondle her breasts and kiss her. (11 RT 1810-1812.) Donna described one instance when appellant persuaded her to perform oral sex on him, and she briefly complied. (11 RT 1819.) She described the last incident of molestation as occurring when she was 15 years old, and appellant was 17. When appellant tried to have sex with her, she threatened that she would tell her boyfriend about it, and appellant left her alone. (11 RT 1823.)

Unlike *Harris*, where the prior sex crime evidence was "inflammatory to the extreme" (*Harris*, *supra*, 60 Cal.App.4th at p. 738), Donna's testimony was not unduly prejudicial compared to charges that appellant had kidnapped a small child for the purpose of molesting her, then murdered her. Donna's testimony did not provoke a strong emotional response. Her account painted an accurate picture of appellant's unusual sexual interests. Appellant's abnormal behavior in this regard was corroborated by his uncommon behavior in viewing multiple pornographic videos on a nightly basis, and collecting

magazines that depicted nude females who had been made up to look like young girls.

The trial court also properly instructed the jury pursuant to CALJIC No. 2.50, that evidence of other crimes may not be considered "to prove that defendant is person of bad character or that he has a disposition to commit crimes." (16 RT 2672.) The court further instructed the jury that such evidence was admissible only for the limited purpose of showing the intent or motive for the crimes charged, and the jury could not consider such evidence for any other purpose. (16 RT 2672-2675, 2706-2707.)

Appellant contends that the conduct with his sister was too remote in time. (AOB 127-128.) However, 30-year-old crimes were not too remote to preclude admission in *People v. Branch* (2001) 91 Cal.App.4th 274, 285; see also *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [evidence concerning molestations of another victim that allegedly occurred 18 to 25 years prior to charged incidents was not unduly prejudicial; that same evidence was admissible to show common scheme or plan]; *People v. Burns* (1987) 189 Cal.App.3d 734.)

The trial court also correctly determined that appellant's statement to Donna that he never married or had children because he was afraid he would molest them, was relevant and admissible under Evidence Code section 1101, subdivision (b), as proof of his motive to kidnap Maria for the purpose of molesting her. (10 RT 1441.) Indeed, in this statement appellant confessed to having an abnormal sexual interest in children–a trait that was highly relevant to the instant charges. This statement was also properly admitted as an admission by a party opponent pursuant to Evidence Code section 1220.

Finally, the trial court properly admitted the magazines contained in Exhibit 30, Ackerman's testimony regarding their significance, and evidence that appellant had rented multiple adult videotapes on March 27, 1995.

Appellant contends that the trial court improperly relied on *People v. Clark* (1992) 3 Cal.4th 41, in admitting evidence of appellant's possession of pornographic videos and magazines depicting women made up to look substantially younger. (AOB 152-153; see 12 RT 1874-1875.) This contention is groundless. In *Clark*, the trial court exercised its discretion under Evidence Code section 352 and weighed the probative value of certain evidence against its prejudicial impact. (See *Clark*, *supra*, 3 Cal.4th at p. 129 [Only a few pages of pornographic works were admitted at trial. Defendant objected on section 352 and relevance grounds; however, the picture depicting the decapitation/oral copulation was probative of defendant's interest in that matter. In admitting only a few pictures, the court acted to avoid undue prejudice to defendant].)

Similarly, here the court found that the magazine photographs described by Ackerman and his testimony that he had found such materials in the possession of individuals with a sexual interest in children, were relevant to the instant charges against appellant and provided evidence of appellant's motive and intent. The court expressly weighed the probative value of these items against the potential for prejudice to appellant. It concluded that there was not a substantial likelihood that there would be any undue prejudice to appellant, undue confusion of issues or undue consumption of time. Rather, the court found that the probative value of the photographs in the magazines and Ackerman's testimony as to their significance, outweighed any undue prejudice. (12 RT 1874-1875.)

In *People v. Memro* (1995) 11 Cal.4th 786, at page 864, this Court found that the probative value of photographs of young boys and pornographic magazines containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult outweighed their prejudicial effect in a prosecution for first degree murder on a felony-murder theory. This Court also found that such evidence showed an intent to molest a

young boy:

> Defendant's intent to violate section 288 was put at issue when he pleaded not guilty to the crimes charged. [Citations omitted.] Although not all were sexually explicit in the abstract, the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. (See *People v. Bales* (1961) 189 Cal.App.2d 694, 701 [11 Cal.Rptr. 639] [photograph of molestation victim in the nude admissible to show "lewd intent."].) The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with Carter.

(*Id.* at p. 865.)

Like *Memro*, appellant's history of molesting Donna, his statement admitting his fear of molesting his own children, his obsession with watching pornographic videos, and his collection of magazines depicting nude females who had been made up to look like young girls–together provided a compelling argument that appellant possessed the intent and motive to kidnap Maria for the purpose of molesting her. The trial court correctly concluded that the high probative value and relevance of these circumstances outweighed any undue prejudice to appellant under Evidence Code section 352. Accordingly, the court properly admitted the evidence under Evidence Code section 1101 and 1108, and appellant's contentions should be rejected.

IV.

THE COURT PROPERLY INSTRUCTED THE JURY WITH CALJIC NOS. 2.50 AND 2.50.1.

Appellant argues that CALJIC Nos. 2.50 and 2.50.1 permitted the jury to find him guilty of first degree murder, kidnapping and kidnapping for the purpose of violating section 288, and to find true the kidnapping-murder special circumstance allegation by a preponderance of the evidence. (AOB 179-189.) He thus argues that the instructions resulted in structural error and require

reversal. These contentions are groundless.

Appellant failed to preserve this argument for appeal by failing to object to CALJIC Nos. 2.50 and 2.50.1 in the trial court. (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 139-140; *People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.)

In any event, the court's instructions were proper. The court instructed the jurors with CALJIC No. 2.50 (1994 rev.), 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 and may not be considered by you to prove that the defendant is a person of bad character or that he 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 a charged crime, or a motive for the commission of a charged crime. [¶] 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're not permitted to consider this evidence for any other purpose.

(12 CT 3447-3448; 16 RT 2706-2707.)

The court followed this instruction with CALJIC No. 2.50.1:

> Within the meaning of the preceding instruction, such other crime or crimes purportedly committed by a defendant must be proved by a preponderance of the evidence. You must not consider such evidence for any purpose unless you're satisfied that the defendant committed such other crime or crimes. [¶] The prosecution has the burden of proving these facts by a preponderance of the evidence.

(12 CT 3449; 16 RT 2707.) The court defined the preponderance of the evidence standard by giving CALJIC No. 2.50.2. (12 CT 3450; 16 RT 2707-2708.)

This Court rejected similar contentions as those raised here by appellant in both *People v. Medina* (1995) 11 Cal.4th 694, and *People v. Carpenter* (1997) 15 Cal.4th 312. The issue presented in *Medina* was whether CALJIC No. 2.50.1 was erroneous and conflicted with CALJIC No. 2.01 (the sufficiency

of circumstantial evidence to prove the necessary specific intent or mental state). (*Medina*, *supra*, at p. 763.) This Court held that a preponderance of evidence standard has long been applied when determining the truth of evidence of other crimes as circumstantial evidence of intent or motive. It noted that evidence of other crimes are mere "'evidentiary facts'" that need not be proven beyond a reasonable doubt as long as the jury is convinced beyond a reasonable doubt of the truth of the "'ultimate fact'" of the defendant's knowledge or intent. (*Id.*, citing *People v. Lisenba* (1939) 14 Cal.2d 403, 430-431.) This Court found no compelling reason to reconsider this rule. (*Medina*, *supra*, at p. 764.)

The defendant in *Carpenter* contended it was error to have admitted evidence of three uncharged murders and one rape. (*Carpenter*, *supra*, 15 Cal.4th at pp. 378, 380.) This evidence was found probative on the questions of intent, deliberation and premeditation. (*Id.* at p. 378.) The defendant argued that an instruction which advises the jury that uncharged crimes need only be proven by a preponderance of the evidence (CALJIC No. 2.50.1), together with an instruction that such evidence could be considered on the matter of defendant's state of mind (CALJIC No. 2.50), combined to reduce the prosecution's burden of proof as to the defendant's mental state below that of reasonable doubt. (*Carpenter*, *supra*, at pp. 380-383.) This Court rejected the argument, finding the instruction on reasonable doubt (CALJIC No. 2.90) and on the sufficiency of circumstantial evidence to prove the necessary specific intent or mental state (CALJIC No. 2.01) made clear that the beyond a reasonable doubt standard applied to the finding of the intent element of the crime. (*Carpenter*, *supra*, at p. 383.)

Like *Carpenter*, CALJIC Nos. 2.90[24/] and 2.01[25/] were also given here.

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24. CALJIC No. 2.90 provides, in pertinent part, that "[a] defendant in a criminal action is presumed to be innocent until the contrary is proved, and in

(16 RT 2700-2701, 2711-2712.) Under the rationale of *Medina* and *Carpenter*, when CALJIC Nos. 2.50 and 2.50.1 are viewed in context with CALJIC Nos. 2.90 and 2.01, it is not reasonably likely that the jury found the necessary elements of the charged offense true on a standard less than beyond a reasonable doubt. (*Medina, supra*, 11 Cal.4th at pp. 763-764; *Carpenter, supra*, 15 Cal.4th at p. 383; see *Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 [a jury instruction is reviewed under a standard that asks whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution].)

Appellant relies on *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, and *People v. Orellano* (2000) 79 Cal.App.4th 179, to support his contention that CALJIC Nos. 2.50 and 2.50.1 resulted in structural error. In *Gibson*, a three-judge panel upheld a grant of habeas corpus and held that a pre-1999 version of CALJIC No. 2.50.01 and related instructions on the use of section 1108 evidence resulted in structural error by allowing conviction based on other offenses which were proved only by a preponderance of the evidence. The *Gibson* jury was instructed with the pre-1999 version of CALJIC No. 2.50.01,

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case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt. . . ."

25. CALJIC No. 2.01 provides:

> A finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion. [¶] Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt. . . .

as follows:

> 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.

(*Gibson, supra*, at p. 822.) They were also instructed with CALJIC No. 2.50.1, which set forth the preponderance of the evidence standard of proof for evidence of previous sexual offenses.

The Ninth Circuit found that CALJIC No. 2.50.1, read together with the pre-1999 version of CALJIC No. 2.50.01, permitted an impermissible inference in the burden of proof required to convict the defendant:

> The jury was never told how, or if, the two standards of proof set forth in the instructions should be harmonized. Rather, it received only a general instruction regarding circumstantial evidence, which required proof beyond a reasonable doubt, and a specific, independent instruction relating to previous sexual abuse and domestic violence, which required only proof by a preponderance of the evidence.

(*Id.* at p. 823.) The *Gibson* Court concluded that the interplay of the pre-1999 2.50.01 and 2.50.1 "allowed the jury to find that Gibson committed the uncharged sexual offenses by a preponderance of the evidence and thus to infer that he had committed the charged acts based upon facts found not beyond a reasonable doubt, but by a preponderance of the evidence." (*Id.* at p. 822.)

People v. Orellano, supra, 79 Cal.App.4th at page 186, similarly held that CALJIC Nos. 2.50.01 (pre-1999), 2.50.1, and 2.50.2, impermissibly allowed the jury to find, by a preponderance of evidence, that because defendant had a disposition to commit the prior crimes, he committed the charged offense.

The instant case is distinguishable on the facts from both *Gibson* and *Orellano*. Here, the jury was not instructed with the pre-1999 version of CALJIC No. 2.50.01, which this Court found to be constitutionally infirm in

People v. Falsetta, supra, 21 Cal.4th at page 924 (while approving the revised version).[26] In addition, the jury in *Gibson* was not instructed with CALJIC No. 2.50, as were the jurors in this case. This instruction informed the jurors that the 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.)

Unlike the instant case, in *Orellano*, the jurors were not instructed with CALJIC No. 2.01. Rather, "[t]he jurors were specifically told they could infer appellant's disposition, and his guilt of the current charges, from his commission of the prior crimes, shown by a mere preponderance of evidence." (*Orellano, supra*, 79 Cal.App.4th at p. 186.) Here the addition of CALJIC No. 2.01 meant that the jurors could not rely on any such inference to find appellant guilty unless the underlying facts were proved beyond a reasonable doubt.

Accordingly, *Gibson* and *Orellano* involved much different circumstances from the case at bar. Under the controlling authority of this Court's decisions in *Medina* and *Carpenter*, appellant's contention that CALJIC Nos. 2.50 and 2.50.1 combined to reduce the prosecutor's burden of proof, must be rejected.

V.

SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION OF KIDNAPPING FOR THE PURPOSE OF COMMITTING A SECTION 288 OFFENSE

Appellant argues that the evidence was insufficient to support his conviction of kidnapping for the purpose of committing a section 288 offense, and the prosecutor improperly relied on this conviction at the penalty phase.

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26. In the 1999 revision to CALJIC No. 2.50.01, jurors are told that although they may infer from the defendant's commission of prior sex crimes that he did commit the charged crimes, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes.

(AOB 190-196.) In particular, he claims there was no evidence that he engaged in or attempted to engage in any lewd or lascivious act with Maria. He notes that her body was found fully clothed, and Dr. Bolduc found no evidence that she was molested. (AOB 191-193.) These arguments lack merit. Substantial evidence indicated that appellant had the motive, means, and intent to kidnap Maria for the purpose of molesting her.

In determining whether a conviction is supported by substantial evidence, the reviewing court must presume in support of the judgment the existence of every fact the jury could reasonably infer from the evidence to determine whether there is substantial evidence upon which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.) This Court observed in *People v. Jones* (1990) 51 Cal.3d 294, 314:

> Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]

A judgment will not be reversed for insufficiency unless "upon no hypothesis whatever" is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Appellant was convicted of violating section 207, subdivision (b), which states:

> Every person, who for the purpose of committing any act defined in Section 288, hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any child under the age of 14 years to go out of this country, state, or county, or into another part of the same county, is guilty of kidnapping.

In pertinent part, section 288, subdivision (a), provides:

> Any person who willfully and lewdly commits any lewd . . . act . . . upon or with the body, or any part . . . thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony. . . .

As with any other element of the crime, the trier of fact may properly consider circumstantial evidence in determining the question of intent. (*People v. Colantuono* (1994) 7 Cal.4th 206, 221, fn. 12.) *People v. Cole* (1985) 165 Cal.App.3d 41, 48, noted that the element of specific intent is a question of fact which must be proved like any other fact, and must usually be inferred from circumstantial evidence.

In addition, in *People v. Craig* (1994) 25 Cal.App.4th 1593, the court observed that the specific intent required for a section 288 offense may be shown by a defendant's statement of his intent and by the circumstances surrounding the commission of the act. Courts have also held that the specific intent element of a section 288 offense need not be unambiguously sexual, but need only be reasonably deducible from the evidence that the defendant had the necessary sexual motivation. For example, in *People v. Thompson* (1988) 206 Cal.App.3d 459, the defendant repeatedly appeared in a car near a 12-year-old girl on a bicycle. At one point, he turned around to look at her. (*Id.* at pp. 461-462.) At another, he looked back at her, "shook his right hand, and moved his mouth as if whispering or pursing his lips." (*Id.* at p. 461.) According to the defendant, he kept stopping and making U-turns because he was trying "to determine the source of a strange noise coming from the engine. . . ." (*Id.* at p. 462.) However, he admitted noticing the girl and making one U-turn to look at her legs. (*Ibid.*)

The appellate court held that there was sufficient evidence of the required sexual motivation. (*People v. Thompson*, *supra*, 206 Cal.App.3d at pp. 466- 467.) It deemed the defendant's sexual intent "established" by his prior conviction for oral copulation with a minor, his admission that he had

been "admiring" the girl's legs, and the evidence of his hand and facial gestures, which could have been found to be "sexual in nature or sexually motivated." (*Id.* at p. 466, fn. 3.)

Similarly, in *In re Sheridan* (1964) 230 Cal.App.2d 365, several codefendants offered four girls a ride. After the girls accepted, the codefendants took them in the wrong direction and refused to let them get out of the car. (*Id.* at pp. 370-371.) When the girls indicated that they were 15 and 16 years old, the codefendants remarked that "they could get into trouble for this, mentioning that they had been in jail for that before." (*Id.* at p. 371.) Eventually, the girls escaped. (*Ibid.*) The appellate court found that these facts constituted sufficient evidence of child molestation, including the required sexual intent. (*Id.* at p. 372.)

In the case at bar, the following facts and circumstances provided substantial evidence to support appellant's conviction for kidnapping for the purpose of committing a section 288 offense. Twenty-two days after Maria had been abducted–on April 18, 1995, Carole Cacciaroni asked to speak to appellant while the two were on a naval cruise in the Sea of Japan. Without being told anything about the reason for the interview, appellant immediately surmised that Cacciaroni wanted to ask him about "the girl who was abducted in Lemoore." (10 RT 1606-1607.) Appellant subsequently put his hands in his head and started crying when Cacciaroni informed him that Maria had been found dead. (10 RT 1620-1621.) The next day, appellant entered Cacciaroni's office and told her he was very disturbed. (10 RT 1628.) He was visibly upset, his eyes were read and teary, and his fists were tightly clenched. When he turned to look at Cacciaroni, his whole body would jerk. (10 RT 1629.) Appellant explained that he felt sick after learning that Maria's body had been found in Bakersfield. (10 RT 1630.) Appellant admitting feeling paranoid because he thought everyone was pointing fingers at him. (10 RT 1631.) He

started crying and rocking in his chair, and he confessed to Cacciaroni that he did not know if he should get an attorney. (10 RT 1632.)

Appellant's bizarre behavior when interviewed by Carole Cacciaroni highlighted his unique and intimate connection to the case. Indeed, appellant's extreme emotional reactions to the abduction of an eight-year-old girl who he did not know, were completely out of the ordinary. However, when coupled with testimony from Mychael Jackson that appellant left the Food King parking lot with Maria in his truck, appellant's reactions provided strong proof of his guilt.

Jackson provided key identification evidence describing with particularity the shirt appellant was wearing at the time of the abduction, as well as appellant's sunglasses, moustache, and truck. (12 RT 1901-1902, 1917-1920, 1922, 1976-1978, 1982, 1984-1987.) Jackson saw appellant holding Maria's hand, and he believed he saw Jackson place Maria in his truck. (12 RT 1890-1893.) Jackson's account provided important eyewitness testimony that tied appellant to the crime.

Mary Lazaro's testimony that she heard a child sobbing that night further corroborated Jackson's account that he saw appellant leave the Food King parking lot with Maria in his truck. (11 RT 1684-1685.) The receipt from Video World indicating that appellant had rented three adult videos at 3:28 p.m. on March 27, 1995, confirmed that appellant had the opportunity to take Maria. (10 RT 1571-1572.) This evidence placed him at the scene of the crime at or near the time of the abduction. In addition, close friends of appellant identified a shower curtain found upstream from Maria's body, as belonging to appellant. (13 RT 2232-2235, 2251-2252, 2313-2315.) The curtain would have provided the means for appellant to transport Maria's body to the location where it was dumped.

As discussed in Argument III, appellant's admissions that he rented nine adult movies on the date of the abduction and he returned 12 different adult videos that same day, provided compelling evidence of his motive and intent to kidnap Maria in order to commit a section 288 offense. (14 RT 2462-2467.) Significantly, the fact that appellant appeared to have a fixation with adult videos was also probative of his intent to commit a lewd and lascivious act with Maria. (See *People v. Bales* (1961) 189 Cal.App.2d 694, 701 [photograph of molestation victim in the nude admissible to show "lewd intent"].) Donna's testimony that he had unrelentingly molested her for 12 years, and appellant's acknowledgment that he feared he might molest his own children, also demonstrated an intent to molest Maria. These facts showed that appellant had struggled with deviant sexual desires his entire life. There was also evidence in this case that appellant possessed 30 magazines containing titles such as "Teenager," and "Teenage Sperm," and depicting teenage females, often made up to look like young girls, in sexually explicit poses. (See 12 RT 2074.) These materials further established appellant's sexual interest in young girls. Indeed, U.S. Marshall Bruce Ackerman indicated that such magazines were similar to magazines Ackerman had found while conducting a search of an individual who had an express sexual interest in minor children.[27] (12 RT 2074-2075.) From all of this evidence, the jury could reasonably infer that appellant had a sexual attraction to young girls.

Accordingly, the above facts and circumstances provided substantial evidence that appellant kidnapped Maria for the purpose of committing a section 288 offense. The jury properly convicted appellant of violating section

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27. Defense counsel conceded during closing argument that Maria was most likely taken for sexual purposes. (16 RT 2777.) Although not binding on the legal issue of sufficiency of evidence, trial counsel's concession certainly sheds light on the reasonableness of the determination that appellant's intent in kidnapping Maria was sexual in nature.

207, subdivision (b), and the prosecutor's use of this conviction at the penalty phase was appropriate.

VI.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON FIRST DEGREE FELONY MURDER

Appellant contends that the trial court erred in instructing the jury on first degree murder and first degree felony murder because the information only charged one count of murder in violation of section 187, subdivision (a), "with malice aforethought." (AOB 197-204; see 1 CT 6.) He argues that both the statutory reference to section 187, subdivision (a), and the description of the crime in the information, charged him exclusively with second degree malice murder, but not first degree murder. He thus contends that under *People v. Dillon* (1983) 34 Cal.3d 441, the court lacked jurisdiction to try him for first degree murder. (AOB 200-201.) Appellant waived this argument by failing to object below to the court's instructions on first degree murder and first degree felony murder. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.) In any event, his contention lacks merit.

Count 1 of the information alleged that

> On or about March 27, 1995, in the County of Kings, State of California, the said defendant did commit a FELONY, namely: violation of Section 187(a) of the Penal code of the State of California, in that the said defendant(s) did willfully, unlawfully, and with malice aforethought murder Maria Piceno, a human being.

(1 CT 6.) At trial, the court instructed the jury on first degree murder, first degree felony murder, and second degree murder pursuant to CALJIC Nos. 8.10, 8.11, 8.21 and 8.30. (12 CT 3464-3467, 16 RT 2714-2716.)

Appellant's argument rests upon the premise that felony murder and premeditated murder are separate crimes, and *Dillon* implicitly overruled *People v. Witt* (1915) 170 Cal. 104, where this Court held that a defendant may be

convicted of felony murder even though the information charged only murder with malice. However, this Court, as well as multiple appellate courts, have rejected appellant's argument. (See *People v. Hughes* (2002) 27 Cal.4th 287; *People v. Wilkins* (1994) 26 Cal.App.4th 1089, 1097; *People v. Johnson* (1991) 233 Cal.App.3d 425, 453-457; *People v. Scott* (1991) 229 Cal.App.3d 707, 712-718; *People v. Watkins* (1987) 195 Cal.App.3d 258, 264-268.)

This Court also rejected appellant's argument that felony murder and murder with malice are separate offenses in *People v. Carpenter, supra*, 15 Cal.4th at pages 394-395, where it held that it is unnecessary for jurors to agree unanimously on a theory of first degree murder. (Accord, *People v. Guerra* (1985) 40 Cal.3d 377, 386.) Subsequent to *People v. Dillon, supra,* 34 Cal.3d 441, this Court reaffirmed the rule of *People v. Witt, supra,* 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely, in *People v. Diaz* (1992) 3 Cal.4th 495, 557. There, this Court implicitly rejected the argument that felony murder and murder with malice are separate crimes that must be pleaded separately. (Accord, *People v. Gallego* (1990) 52 Cal.3d 115, 188.)

This Court noted in *Diaz, supra,* 3 Cal.4th 495, at page 557, that "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing or at the indictment proceedings." Similarly, in the present case, the preliminary hearing testimony made clear the prosecution's intent to establish that appellant committing the killing during the course of a kidnapping. In addition, the information charged appellant with kidnapping and murder, and the evidence at trial alerted appellant to the felony-murder theory. Even now, appellant does not explain in what manner he might have been prejudiced by the absence of separate first degree murder and felony-murder charges.

Accordingly, appellant received constitutionally adequate notice of the prosecution's felony-murder theory, and his contention must be rejected. (*Diaz, supra,* 3 Cal.4th 495, 557; *Gallego, supra,* 52 Cal.3d 115, 188-189.)

VII.

THIS COURT HAS EXPRESSLY UPHELD THE STANDARD CALJIC JURY INSTRUCTIONS WHICH APPELLANT CLAIMS UNDERMINED OR DILUTED THE REQUIREMENT THAT HE BE PROVEN GUILTY BEYOND A REASONABLE DOUBT

Appellant contends that numerous standard CALJIC jury instructions–1.00, 2.01, 2.21.2, 2.22, 2.27, 2.51, and 8.83.1–violated his rights to due process and a reliable death penalty determination by undermining the requirement that the prosecution prove guilt by proof beyond a reasonable doubt. (AOB 205-220.) By not objecting to any of these instructions below, appellant has waived these contentions on appeal. In addition, to the extent that appellant argues that these instructions were too general or incomplete, his claims are not cognizable on appeal, since he was obligated to request clarification of these instructions on appeal, and he failed to do so. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503 [a party must request a clarifying instruction in order to argue on appeal that an instruction correct in law was too general or incomplete].)

In any event, this Court has rejected the identical contentions raised by appellant, and appellant has not demonstrated any need for this Court to revisit its prior holdings. In *People v. Crew* (2003) 31 Cal.4th 822, 847-848, and *People v. Nakahara* (2003) 30 Cal.4th 705, 713-715, this Court rejected identical challenges to CALJIC Nos. 1.00 (respective duties of judge and jury), 2.01 (sufficiency of circumstantial evidence generally), 2.21.2 (witness willfully false), 2.22 (weighing conflicting testimony), 2.51 (motive) and 8.83.1 (special

circumstances–sufficiency of circumstantial evidence to prove required mental state). Contrary to appellant's contention (AOB 218), this Court did not uphold the instructions solely on the basis that they were "saved" by giving CALJIC No. 2.90 but, instead, determined that there was no reasonable likelihood the jury misapplied the instructions in a way that would affect the burden of proof. (*People v. Crew, supra*, at pp. 847-848 [upholding CALJIC Nos. 1.00, 2.01, 2.02, 2.21.2, 2.22, 2.51, 2.52, 8.20 and 8.83.1; *People v. Nakahara, supra*, at pp. 713-715 [upholding CALJIC Nos. 1.00, 2.01, 2.02, 2.21.2, 2.22, 2.51, 8.20 and 8.83.1; see also *People v. Guerra* (2006) 37 Cal.4th 1067, 40 Cal.Rptr.3d 118, 179-180 [no error in former CALJIC 2.51]; *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [addressing CALJIC Nos. 2.22 and 2.51]; *People v. Prieto* (2003) 30 Cal.4th 226, 254 [no reasonable juror would consider CALJIC 2.51 an instruction or standard of proof instruction distinct from the reasonable doubt standard set forth in CALJIC 2.90]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions].)

As to CALJIC No. 2.27, appellant contends that it "was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts." (AOB 216.) While appellant cites *People v. Turner* (1990) 50 Cal.3d 668, 697, for his observation that CALJIC No. 2.27 could be "improved" to "have a more neutral effect as between prosecution and defense," appellant fails to acknowledge that *Turner* held that CALJIC No. 2.27 does not mislead the jury when given with other instructions on the burden of proof. (*Ibid.*) *Turner* held: "We cannot imagine that the generalized reference to 'proof' of 'facts' in CALJIC No. 2.27 would be construed by a reasonable jury to undermine" the "much-stressed" principles regarding the burden of proof. (*Ibid.*) *Turner* was reaffirmed by this Court in *People v. Montiel* (1993) 5 Cal.4th 877, 941. *Turner* is thus dispositive, and appellant

fails to demonstrate that it was incorrectly decided.

In sum, appellant cannot demonstrate that the jury was improperly instructed regarding the presumption of innocence and the meaning of reasonable doubt or that this Court should revisit its prior decisions upholding the challenged instructions. Therefore, his contentions must be rejected.

VIII.

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL

Appellant contends that the court violated his constitutional rights by denying his motion for a new trial and excluding from the penalty phase newly discovered evidence that Donald Bales had confessed to abducting and killing Maria. (AOB 221-253.) To the contrary, the trial court properly denied the motion for a new trial and excluded this evidence from the penalty phase. The court found that Bales's admissions were involuntary. Thus his statement did not qualify as a declaration against penal interest, but constituted inadmissible hearsay.

A. The Facts

Three days after the jury returned its verdicts in the guilt phase, on February 3, 1997, the parties met in the court's chambers, and prosecutor Larry Crouch put the following information on the record:

> . . . On February 1, 1997, the Kings County Sheriff's Office received notice that the murder of Angelica Ramirez may have been solved. The murder suspect, Donald Eugene Bales, confessed as the lone assailant responsible for the child's death. The Kings County Sheriff's office went to interrogate him regarding our case.
>
> Prior to the interrogation Bales had implicated another individual, identified as Eddie Urias of Bakersfield, as being responsible for the Ramirez homicide and made vague references to the Maria [P.] homicide.

> Suspect eventually confessed to the Ramirez case, recanting his story that his associate had any involvement in either of the homicides, and when pressed by the Tulare County Sheriff's Office detectives the suspect immediately recanted his statement, denying any involvement in the Maria [P.] homicide.
>
> He has been interviewed by the Kings County Sheriff's Office and has, according to them, denied any involvement in the [instant] homicide. And there is a taped statement, and it will be available in approximately two hours.

(18A RT 2948-2949.)

Based on this new information, defense counsel requested a two-day continuance of the penalty phase, and the court granted the request. (18A RT 2963-2954.)

On February 4, 1997, the court entered a protective order that any information provided to the parties by the Tulare County District Attorney's Office regarding Bales's confession remain confidential. (20 RT 2981.) The parties then discussed that on January 31, 1997, officers took Bales to the scene where Angelica Ramirez's body had been found. Bales made incriminating statements about being there while somebody else committed the rape and murder of Angelica Ramirez. The next day Bales was interrogated on videotape and he "sometimes admitted that he was the perpetrator and sometimes recanted that he was the perpetrator." (20 RT 2985.) Defense counsel explained:

> Ultimately, and it's about a one-hour tape, I think, . . . he confessed that he was the perpetrator of the murder of Angelica Ramirez.
>
> He said he had borrowed a vehicle, gone to the swap meet, talked to Angelica Ramirez there, asked her if she wanted to go for a ride. She said no. He grabbed her by the arm and forced her in his car, drove to the scene where her body was discovered, which is apparently not a dense city population scene, removed her from the car, removed her clothing from below the waist, raped her, and strangled her to death and left her body in the water over there near Pixley.
>
> He said that the reason was that he has basically suffered from a

sexual compulsion by, admittedly, leading questions of the detectives.

He talked about this compulsion being related to a homosexual affair he had with a man who lives in Bakersfield.

This was the man he originally accused of committing the crime and later retracted and said he was solely responsible.

He admitted that he . . . had trouble controlling his sexual urges, and that's what happened the day that he took Angelica and raped her and killed her.

During this same interview, he was asked if he had anything to do with the killing of a little girl from Lemoore. Initially he denied it. When pressed further, he paused a long time, lowered his head, and said, yes, he killed her, and then stated he'd taken her from Lemoore, and then, but he was unable to remember just where from Lemoore he had taken her, and he was unable to remember what clothing she wore.

Parenthetically, he also misidentified the clothing of Angelica Ramirez to some extent.

A few moments later he began recanting, recanting his confession of the Lemoore abduction and killing.

(20 RT 2986-2987.)

Defense counsel further noted that the nature of law enforcement's interrogation of Bales "was possibly improper in terms of threats or promises, and . . . there tended to be some implied threats or promises made, not unlike the present case in Mr. McCurdy's interrogation." (20 RT 2988.) Counsel argued that Bales's confession to killing Maria may or may not be valid, but it constituted sufficient evidence to warrant the grant of a new trial. (20 RT 2989.) He also maintained that at the penalty phase the jury should be made aware of the "new evidence of possible innocence." (20 RT 2990.) Defense counsel requested a continuance of the penalty phase to allow him enough time to prepare to put on the new evidence. In the alternative, counsel asked the court to declare a new trial based on the newly discovered evidence. (20 RT 2993.)

The prosecutor responded to defense counsel's argument as follows:

> . . . Assuming that this is admissible and counsel could proceed on Monday, it's going to take a lengthy 402 hearing because, frankly, I think in some of Mr. Lee's reciting what was on the videotape, he's been a little vague in areas which I think are crucial why this statement isn't to be believed, and I disagree with a couple of things.
>
> The main part I disagree with is . . . I don't remember Mr. Bales saying he had taken responsibility for Angelica and recanting and then taking responsibility and then recanting.
>
> The first interview the night before when they're actually out at the location where the body was found, he's blaming another individual entirely, an Eric Urias, saying he's responsible.
>
> The next interview they start off, "Look, we've talked to people. We know you're lying about it." And he acknowledges having lied about that, and then he denies Angelica Ramirez for a significant portion of the interview, at which time they're telling him that they understood he has a mental problem, that this other person is really to blame because he lured him into this homosexual relationship which has caused him severe mental anguish, distress, and problems, that what he really needs is help . . . repeatedly telling him to explain to the jury, the judge and the system how things got out of control and happened the way they happened because otherwise he is faced as being a cold-blooded killer and he'll be facing the death penalty, and that they frankly don't view him as a cold-blooded killer.

(20 RT 2994-2996.)

The prosecutor continued:

> Finally, one of the detectives stands up and told him, "You're" quote, "mother fucking lying," as he yells at him, slams a pen onto the ground. They exchange yelling at each other, and the detective finally says, "I'm going to leave before I get fucking pissed off at you," and walked out of the room.
>
> The second detective slides in and starts telling him, "Mr. Bales, we understand you have a mental problem. Things got out of control. This is your opportunity to tell us how," and it is at this point in time that he started to acknowledge wrongdoing with Angelica Ramirez, but the denial is up until that point.
>
> When he gets up to finally having acknowledged Angelica Ramirez and they're not asking him leading questions but asking him to tell them

about the murder scene, he gets the type of ligature that was used incorrect. He gets the type of clothing she [Angelica] wore from the waist down incorrect. He gets the shoes she had on incorrect. When they finally ask him, "Tell me about the jewelry," he says "I sold it."

(20 RT 2996-2997.)

The prosecutor explained:

What I'm getting at, and those are just, there were others, but I think there's going to be a lengthy 402 motion, assuming that this is even considered relevant at that point in time, as to whether it's admissible and trustworthy.

When he gets to the point where he finally confessed to the, the Lemoore case, they ask him, "What about the Kings County girl? The Lemoore girl?" And he denies any involvement.

(20 RT 2997-2998.)

The prosecutor noted that Bales denied killing the Lemoore girl a second time. The prosecutor explained:

They then express to him that he can't get anymore time for that crime, that it won't change the facts or make any difference; nothing different can happen to him. I don't remember his head going down.

I remember even previous to this portion of the conversation he placed his hand over his face and had been simply responding predominantly in a yes or no fashion for a significant period of time prior to that.

He then says, "I killed her."

They asked him, "Where did you pick her up at?" He says, "Lemoore." They ask him, "Where in Lemoore?" He can't describe it. Can't tell them where he was; what she was wearing, and he can't describe any clothing she had on . . . , then he says, "Look, I didn't pick her up," . . . he only said that because he is scared, and he's been confused by them and he moves on from there.

And the only reason I'm pointing it out is that we would challenge the statement, obviously, before we ever thought it should go in front of a jury. I think there's a lot of inconsistent answers in the statement; a lot of indications it was a coerced statement.

(20 RT 2998-2999.) The prosecutor also noted that Bales initially accused Eric

Urias of "having done the girl from Lemoore," but in fact, Mr. Urias had an alibi for the crime and "was working in Bakersfield on March 27, 1995." (20 RT 3006.)

Defense counsel agreed:

> MR. LEE: Initially, what we can gather from the reports that accompany this, Mr. Bales' accuses Eric Urias of Angelica Ramirez and Maria Piceno.
>
> MR. BURNS: Right.
>
> MR. LEE: Ultimately, Donald Bales confesses that he alone was responsible for Angelica Ramirez and only blamed Eric out of spite.

(20 RT 3006.)

The court set the case for an Evidence Code section 402 hearing on February 10, 1997, with the jurors to be ordered back to court on February 13, 1997. (20 RT 3016.) In the meantime, the court indicated that it would review the videotapes of Bales's confession (marked as court exhibits AA, BB and CC). (20 RT 3021; 24 RT 3049.)

On February 10, 1997, the court conducted an in camera Evidence Code section 402 hearing. (24 RT 3042.) The defense called Donald Bales to the stand, and he asserted his Fifth Amendment privilege against self-incrimination. (24 RT 3051-3052.) The court found that Bales was unavailable as a witness due to exercising his privilege against self-incrimination. (24 RT 3053.) The defense subsequently called Tulare County Detective Jess Gutierrez to the stand. (24 RT 3054.) In response to questions by defense counsel, Gutierrez pointed out the portions of Bales's statement that provided accurate information regarding details surrounding the Angelica R. killing. (24 RT 3054-3072.)

Following the presentation of evidence, defense counsel sought to admit Bales's January 30, 1997, and February 1, 1997, videotaped statements. Counsel explained that on January 30, 1997, Bales stated that Eddie Urias admitted killing the Lemoore girl, and on February 1, 1997, Bales admitted

killing her. (24 RT 3077-3078.) Defense counsel contended that Bales's February 1, 1997, statement constituted a declaration against interest, and the prior interview should also be admitted to give context to Bales's ultimate statement. (24 RT 3078.)

The prosecutor argued that any statements Bales made regarding the Angelica R. killing were not relevant to the instant proceedings. (24 RT 3079.) He also maintained that Bales's admission to killing Maria was coerced in violation of his constitutional rights. (24 RT 3080-3082.) The prosecutor made an offer of proof that Department of Justice Criminalist Keith Scruggs would testify that he performed a DNA analysis of both Donald Bales and Eddie Urias, and he was able to exclude both of them from being the individual who left semen on Angelica R.'s body. (24 RT 3083.) The prosecutor also made an offer of proof that Bales has an IQ in the "mid 70's," resulting in him functioning barely above a retarded level. (24 RT 3084.) Finally, he noted that many of Bales's descriptions of particular pieces of evidence in the Angelica R. case did not match the actual evidence found in that case. (24 3084-3085.)

The court ruled on the motion for new trial and the admissibility of Bales's confession at the penalty phase as follows. It noted that to qualify as a declaration against interest under Evidence Code section 1230, the declarant must be unavailable, the declaration must have been against the declarant's interest so as to subject him to criminal liability, and the declaration must be sufficiently reliable to warrant admission despite its hearsay character. (24 RT 3096.) The court determined that Bales's extrajudicial admission in this case was not reliable. It explained:

> . . . [L]ooking at the circumstances under which the admission was made, the following matters appear noteworthy to me: Mr. Bales was informed by the detective that, quote, "We know what happened," unquote. he was told, "You got to express to us there wasn't a plan, that things possibly went wrong." He was told, "Without showing some remorsefulness they're going to look on it severely," apparently being

a reference to Court or a jury. He was told, "They want to see remorsefulness." He was told, "Without your cooperation, and we show that this was a sophisticated plan, you will see the death penalty staring you right in the face."

He was told by the detective, "I can only say so much about how the system will treat you afterwards, but what I do want to instill in your mind, I will guarantee you that you will look at the death penalty and . . . . the system is going to kill you."

He was told, "You have to convince me," referring to the detective, "that this was not planned." He was told, "If you have remorse and you don't want to be given the death penalty, by gosh, you better talk about it now."

He was called, quote, "motherfucking liar," close quote. The detective then threw down his pen and pad, called Mr. Bales, quote, "a lying motherfucker," close quote, and then cursed at him, called him, "You stupid little pervert, son-of-a-bitch, kiss my ass, you little fucking liar, I'm going to get out of here before I get fucking pissed off at you. Now, you better talk to Detective Chambers."

And at that point, first detective left and Detective Chambers sat down and played the role of the good cop, telling Mr. Bales the only way we're going to be able to help you is if you tell the truth. Bales then admits kidnapping and killing Angelica Ramirez and is then asked if he took the Lemoore girl, which I assume, as we all do here, that it was a reference to Maria [P.]. He is told by Detective Gutierrez that he can't do any more time for two crimes than one, so he might as well admit this crime also.

And although the audio quality of Bales' words at that point is poor and it's difficult to understand, he apparently admits to taking, quote, "the girl from Lemoore," close quote, and then almost immediately recants that, but continues to admit responsibility for the Tulare County crime.

Having considered the evidence and the law that I've discussed, as well as the arguments of counsel, I conclude that Mr. Bales' statement to the Tulare County detectives regarding the Lemoore kidnapping was involuntary under all applicable state and federal constitutional standards.

I so conclude, because he was assured he would be convicted of a capital crime and sentenced to death unless he showed remorse by cooperating with his interrogators and admitting responsibility. He was

curse, villified, and verbally abused. He was subjected to the good cop/bad cop routine. And as the bad cop stormed out of the interview room, Mr. Bales was told he had better talk to the good cop. Thereupon came Mr. Bales' major admissions to the Ramirez homicide. Minutes later, in the same location, with the same inquisitor doing the questioning, he was asked about the Lemoore kidnapping and told he might as well admit it because he couldn't get any more time for two killings than one. And only then did Bales make his admission to the Lemoore kidnapping, which he almost immediately thereafter retracted.

Because the admission was involuntary, it is inadmissible. Additionally, under Evidence Code section 1230, it was inadmissible because it was given under circumstances which render it inherently untrustworthy and unreliable. A reasonable person in Mr. Bales's position would likely have relied upon the detective's assurance that it was not against his penal interest to admit a second killing, having already admitted the first.

Further, whatever additional incremental social disgrace or civil liability might accompany an admission of kidnapping and killing a second little girl, when one has already admitting kidnapping, raping and killing a first, and already admitted participation in a video-taped, three-way homosexual sex spree was, under the circumstances of this case, more than overcome by coercion to confess and cooperate to avoid death, so as to have no value in assuring any modicum of trustworthiness to this statement. The admissions are, thus, inadmissible under Evidence Code section 1230 also.

The hearsay and relevance objections to Exhibits BB and GG are sustained. Accordingly, that being the only new evidence, the motion for a new guilt phase trial based on this new evidence must also be denied.

(24 RT 3102-3106.)

B. Discussion

Section 1181, subdivision 8, provides in relevant part:

When a verdict has been rendered . . . against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

.....

8. When new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. . . .

The determination of a motion for a new trial rests so completely within the trial court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. (*People v. Staten, supra,* 24 Cal.4th at p. 466; *People v. Delgado* (1993) 5 Cal.4th 312; *People v. Williams* (1988) 45 Cal.3d 1268, 1318.) In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors:

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.

(*People v. Delgado, supra,* 5 Cal.4th at p. 328, quoting *People v. Sutton* (1887) 73 Cal. 243, 247-248.)

Here, the purported new evidence was Donald Bales's confession to killing "the Lemoore girl." Appellant argues that this evidence was admissible as a declaration against Bales's penal interest. (AOB 228-231; Evid.Code, § 1230.) "Whether a statement is one against penal interest is a preliminary fact to be determined under [Evidence Code] section 405. [Citation.]" (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1678; accord, *People v. Chapman* (1975) 50 Cal.App.3d 872, 879.) On appeal, the reviewing court applies an abuse of discretion standard of review. (*People v. Brown* (2003) 31 Cal.4th 518, 536.)

Evidence Code section 1230 provides in relevant part:

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 . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true.

In *People v. Cudjo* (1993) 6 Cal.4th 585, at page 607, this Court outlined the manner by which a trial court is to determine the admissibility of a statement offered pursuant to this exception: A party who maintains that an out-of-court statement is admissible under this exception as a declaration against *penal* interest must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.] To determine whether the declaration passes the required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." [Citation.]

(Emphasis in original.) This Court further noted that "Courts applying [Evidence Code] section 1230 to determine the basic trustworthiness of a proffered declaration are . . . to 'consider all the surrounding circumstances to determine if a reasonable person in [the declarant's] position would have made the statements if they weren't true.' [Citation.]" (*Id.* at p. 618.)

In this case, the trial court properly determined that Bales was unavailable as a witness based on asserting his Fifth Amendment privilege against self incrimination. (24 RT 3053.) After viewing Bales's statements to law enforcement, the trial court subsequently determined that his confession to killing "the Lemoore girl" had been coerced by the authorities and was involuntary and therefore unreliable. (See 24 RT 3102-3106.) In making this determination, the trial court specifically pointed out multiple examples of coercive police conduct that had preceded Bales's admission to killing "the Lemoore girl." (*Ibid.*) Importantly, Bales also later retracted this confession. (See 18A RT 2948-2949.) In addition, he was unable to provide any details relating to Maria's abduction. (See 20 RT 2998-2999.) Since the court found that Bales's confession was not reliable and did not qualify as a statement

against penal interest, it constituted inadmissible hearsay. (Evid. Code, § 1200.)

The trial court's ruling that Bales's confession did not qualify as a statement against penal interest is well supported by the record. More importantly, the court's determination that Bale's confession was involuntary provided a separate constitutional basis for its exclusion. (See *Oregon v. Bradshaw, supra*, 462 U.S. at pp. 1044-1046.) Accordingly, the court properly excluded this proffered evidence from the penalty phase and properly denied the motion for new trial, since there was no "newly discovered evidence." (See *People v. Lee* (2002) 95 Cal.App.4th 772, 786-787 ["evidence which is produced by coercion is inherently unreliable and must be excluded under the due process clause"]; accord, *People v. Badgett* (1995) 10 Cal.4th 330, 347.) For these reasons, appellant's arguments to the contrary should be rejected.

IX.

THE TRIAL COURT'S INSTRUCTIONS DURING VOIR DIRE DID NOT CONSTITUTE ERROR

Appellant contends that his death sentence must be vacated because the trial court committed reversible error by providing the jury with misleading instructions regarding mitigating circumstances. In particular, he argues that the court erred in suggesting the following examples of mitigating circumstances during voir dire: (1) for 74 years, a 75-year-old defendant had lived a productive life, was a loving husband, father and grandfather, and went to work everyday; (2) a 22-year-old female defendant had committed a heroic act or had grown up in an abusive home or raised her five siblings on her own; and (3) a 33-year-old defendant suffered from mental retardation and could barely understand what was happening around him or his legal and moral duties. (AOB 255.) Appellant contends that these hypothetical examples of mitigating circumstances were so extreme that they nullified the effect of mitigating evidence on his behalf. (AOB 254-261.) Appellant waived this argument by

failing to object to the court's statements during voir dire. (*People v. Cooper* (1991) 53 Cal.3d 771, 843.) In any event, appellant's contention is groundless.

Under similar facts, in *People v. Medina*, *supra*, 11 Cal.4th at page 741, the prosecutor indicated to several ultimate jurors that mitigating evidence was the type showing the "positive factors" in defendant's life, such as being a war hero or Boy Scout leader. The prosecutor described aggravating factors as involving "negative evidence," such as a prior criminal conviction. The prosecutor further indicated that the jury's task in deciding the appropriate penalty was to weigh these positive and negative aspects. On appeal, defendant argued that the prosecutor's examples of mitigating evidence involved situations that were not present in the case, and the prosecutor's voir dire statements were incomplete and inaccurate. (*Ibid.*)

This Court found no prejudicial misconduct. Rather, this Court observed 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." (*Medina*, *supra*, 11 Cal.4th at p. 741.) Moreover, this Court emphasized that

> . . . as a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury's verdict in the case. Any such errors or misconduct "prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings, before its attention has even begun to focus upon the penalty issue confronting it."

(*Ibid.*, quoting *People v. Ghent* (1987) 43 Cal.3d 739, 770.)

Following *Medina*, in *People v. Seaton* (2001) 26 Cal.4th 598, 635-636, this Court again addressed similar facts. During voir dire, the prosecutor mentioned a hypothetical defendant with a history of many prior felony convictions as an example of an aggravating circumstance. To illustrate

mitigating evidence, the prosecutor 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. The trial court also used similar illustrations during voir dire. (*Ibid.*)

On appeal, the defendant claimed that the illustrations of aggravating evidence resembled the aggravating evidence actually presented by the prosecution in this case, whereas the illustrations of mitigating evidence were wholly unlike his mitigating evidence. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 636.) He also argued that the illustrations indoctrinated the jury to disregard his mitigating evidence. (*Ibid.*) Relying on *People v. Medina*, *supra*, 11 Cal.4th at page 741, this Court again determined the prosecutor's statements were not legally erroneous, and the defendant had the opportunity to correct or clarify the prosecutor's remarks through his own voir dire questions. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 636; see also *People v. Lucas* (1995) 12 Cal.4th 415, 482 [new penalty phase jury did not have to be impaneled merely because trial judge had indicated that defense would present evidence in mitigation, when defense ultimately chose not to do so; any prejudice to defendant was obviated by trial court's instructions that defendant was under no obligation to present any evidence in mitigation].)

Similarly, here the court did not commit any error. The various examples the court gave of mitigating circumstances were presented to the potential jurors as hypothetical situations that had no connection to the case. The court also specifically instructed the potential jurors that there were many types of mitigating circumstances that might influence the jurors to not impose the death penalty:

> Mitigating circumstances are things about the crime which might make it, even though it's obviously a very serious crime, might make it

> in some respects less serious or morally culpable than similar violations of the same law. Mitigating circumstances might be evidence pertaining to a defendant which have to do with things in the defendant's background or things that were operating upon a defendant, which, although not excuses for what happened, . . . might make it somehow more understandable or less culpable.
>
> Mitigating circumstances can be any one of a number of things, and basically, it's anything that you hear in that phase of the trial that causes you to believe that, the proper penalty would not be death. And under the law, after you've heard this evidence that's presented to you in the penalty phase, you're required to weigh the aggravating circumstances and weigh the mitigating circumstances. And if you find that the aggravating circumstances outweigh the mitigating circumstances to such a degree that you determine that death is the proper punishment, only then can you return a verdict of death as the punishment.

(3 RT 203-204.)

In addition, like *Medina* and *Seaton*, the trial court allowed appellant ample time during voir dire to educate the potential jurors on the type of mitigating evidence appellant intended to present. Finally, it is highly unlikely that any of the court's comments regarding examples of mitigating circumstances would have influenced the jury's penalty verdict at such an early stage in the proceedings. For these reasons, appellant's contention must be rejected.

X.

THE DEATH SELECTION PROCESS WAS CONSTITUTIONAL

Appellant raises multiple challenges to California's death penalty statute and the penalty phase instructions given in his case. In subpart A, he argues that the penalty phase instructions are unconstitutional because they fail to set out the appropriate burden of proof. (AOB 263-276.) In subpart B, he contends that the death penalty law and the penalty phase instructions fail to require that the jury be instructed that it may impose a death sentence only if it

is persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors. (AOB 277-282.) In subpart C, he contends that the penalty phase instructions fail to assign any burden of persuasion regarding the ultimate penalty phase determinations to be made by the jury. (AOB 282-286.) In subpart D, he argues that the penalty phase instructions violated the Sixth, Eighth and Fourteenth Amendments by failing to require juror unanimity on aggravating factors. (AOB 286-292.) In subpart E, he argues that the penalty instructions failed to inform the jury that the defendant bears no particular burden to prove mitigating factors and the jury is not required to unanimously agree on the existence of mitigation. (AOB 292-294.) Finally, in subpart F, appellant contends that the penalty jury should have been instructed that the law favors life and presumes life imprisonment without parole to be the appropriate sentence. (AOB 294-295.) All of these arguments have been previously rejected by this Court, and appellant has not provided any reasons for this Court to depart from its well-settled death penalty jurisprudence.

People v. Huggins (2006) 38 Cal.4th 175, at pages 250-251, recently noted that *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, have not altered this Court's conclusions regarding the burden of proof at the penalty phase:

> "The death penalty law is not unconstitutional for failing to impose a burden of proof–whether beyond a reasonable doubt or by a preponderance of the evidence–as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence.

(*Huggins, supra*, 38 Cal.4th at p. 251, quoting *People v. Brown* (2004) 33 Cal.4th 382, 401.)

In addition, this Court has rejected claims that California's death penalty law is unconstitutional because it does not contain a requirement that the jury

be given burden of proof or standard of proof instructions for finding aggravating and mitigating circumstances in reaching a penalty determination. Similarly, this Court has rejected arguments that the statute is unconstitutional because it does not require that all aggravating factors be proved beyond a reasonable doubt, or that such factors must outweigh factors in mitigation beyond a reasonable doubt, or that death must be found to be an appropriate penalty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 767-768.)

With respect to appellant's contention that the death penalty law is unconstitutional in failing to require juror unanimity on aggravating factors, this Court in *People v. Ochoa* (2001) 26 Cal.4th 398, at pages 452-454, noted that neither the federal nor state constitution require such juror unanimity, and *Apprendi*, *supra*, 530 U.S. at page 466, and *Ring*, *supra*, 536 U.S. at page 584, have not altered this conclusion. Moreover, this Court has consistently held that California law is not constitutionally deficient because it does not provide for a presumption in favor of life. (*People v. Avila* (2006) 38 Cal.4th 491, 615; *People v. Maury* (2003) 30 Cal.4th 342, 440.)

Respondent further notes that in this case, the court properly instructed the jurors pursuant to CALJIC No. 8.85 on the factors to be considered in determining penalty. (25 RT 3216-3217.) The court further instructed the jurors pursuant to CALJIC No. 8.88, that the weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side, but the jury was free to assign "whatever moral or sympathetic value you deem appropriate to each and all of the various factors you're permitted to consider." (25 RT 3218-2319.) The trial court cautioned the jury that in order to return a judgment of death, "each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole."

(25 RT 3219.)

Finally, defense counsel emphasized during closing argument that the jurors could return a verdict of life "under any circumstances for which you think it is warranted." (25 RT 3213.) Counsel further stated:

> . . . [I]f you vote for life instead of death, no one can hold you to blame, there is no violation of law, your oath or your conscience because this is a uniquely personal decision. And if you want to extend mercy to Anetta McCurdy, and /or you want to have better evidence and be more positive in your mind about guilt before you authorize an execution, that is your absolute right.

(25 RT 3214.)

This record confirms that the jurors were fully informed of their penalty options, and the death penalty procedure here was constitutional under both the state and federal constitutions.

XI.

CALJIC NOS. 8.85 AND 8.88 ARE CONSTITUTIONAL

In Arguments XI and XII, appellant contends that the court's instructions on the meaning of mitigating and aggravating factors and the scope of the jury's sentencing decision pursuant to CALJIC Nos. 8.85 and 8.88, rendered his death sentence unconstitutional. (AOB 297-323.) In *People v. Moon* (2005) 37 Cal.4th 1, 41-43, this Court recently reaffirmed the constitutionality of CALJIC Nos. 8.85 and 8.88, as well as California's death penalty law as set forth in section 190.3.

In *Moon*, this Court held that CALJIC No. 8.85 is not unconstitutional:

> (a) For failing to label which of the sentencing factors are aggravating and which are mitigating (*People v. Williams* (1997) 16 Cal.4th 153,

> 268-269, 66 Cal.Rptr.2d 123, 940 P.2d 710); (b) For prefacing some sentencing factors with the phrase "whether or not" and failing to inform the jury that some factors can be mitigating only (*People v. Morrison* (2004) 34 Cal.4th 698, 730, 21 Cal.Rptr.3d 682, 101 P.3d 568); (c) For failing to inform the jury that the absence of a mitigating factor cannot be considered an aggravating factor (*People v. Weaver, supra,* 26 Cal.4th at p. 993, 111 Cal.Rptr.2d 2, 29 P.3d 103; see *People v. Davenport* (1985) 41 Cal.3d 247, 288-290, 221 Cal.Rptr. 794, 710 P.2d 861); (d) For failing to delete inapplicable factors (*People v. Jones* (2003) 30 Cal.4th 1084, 1129, 135 Cal.Rptr.2d 370, 70 P.3d 359); (e) For failing to state that the list of aggravating factors is exclusive and that nonstatutory aggravating factors cannot be considered (*People v. Taylor* (2001) 26 Cal.4th 1155, 1180, 113 Cal.Rptr.2d 827, 34 P.3d 937; see *People v. Boyd* (1985) 38 Cal.3d 762, 772-776, 215 Cal.Rptr. 1, 700 P.2d 782); or (f) For using "restrictive adjectives" such as "extreme" and "substantial" (*People v. Weaver, supra,* 26 Cal.4th at p. 993, 111 Cal.Rptr.2d 2, 29 P.3d 103).

(*People v. Moon, supra,* 37 Cal.4th at pp. 41-42.) This Court rejected the argument that the aggravating and mitigating factors, as set forth in section 190.3 and CALJIC No. 8.85, are unconstitutionally vague or arbitrary or render the sentencing process constitutionally unreliable under the Eighth and Fourteenth Amendments to the United States Constitution. (*Ibid.*)

With respect to CALJIC No. 8.88, this Court declined to revisit the reasoning or holdings of its prior cases and held that CALJIC No. 8.88:

> (a) Is not unconstitutional for failing to inform the jury that if it finds the circumstances in mitigation outweigh those in aggravation, it is required to impose a sentence of life without the possibility of parole (*People v. Dennis* [*supra*] 17 Cal.4th 468, 552, 71 Cal.Rptr.2d 680, 950 P.2d 1035); (b) Is not unconstitutional for failing to inform the jury that it has discretion to return a verdict of life even in the absence of mitigating circumstances (*People v. Ray* (1996) 13 Cal.4th 313, 355, 52 Cal.Rptr.2d 296, 914 P.2d 846); (c) Is not unconstitutionally vague for using the phrase "so substantial" (*People v. Boyette, supra,* 29 Cal.4th at p. 465, 127 Cal.Rptr.2d 544, 58 P.3d 391); (d) Is not unconstitutional for failing to inform the jury that death must be the appropriate penalty, not just a warranted penalty (*People v. Boyette, supra,* 29 Cal.4th at p. 465, 127 Cal.Rptr.2d 544, 58 P.3d 391);

(e) Is not unconstitutional for failing to inform the jury that it need not be unanimous before any juror can rely on a mitigating circumstance (*People v. Coddington* [2000] 23 Cal.4th [529] 641, 97 Cal.Rptr.2d 528, 2 P.3d 1081);

(f) Is not unconstitutional for failing to require juror unanimity on aggravating circumstances (*People v. Boyette* [2002] 29 Cal.4th [381] 465, 127 Cal.Rptr.2d 544, 58 P.3d 391); (g) Is not unconstitutional for failing to require written findings on aggravating circumstances (*People v. Nakahara* [*supra*] 30 Cal.4th 705, 721, 134 Cal.Rptr.2d 223, 68 P.3d 1190; (h) Is not unconstitutional for failing to require written findings so as to facilitate "meaningful appellate review" (*People v. Williams, supra,* 16 Cal.4th at p. 276, 66 Cal.Rptr.2d 123, 940 P.2d 710);

(i) Is not unconstitutional for failing to inform the jury there is a presumption of life (*People v. Maury, supra,* 30 Cal.4th at p. 440); and

(j) Is not unconstitutional for failing to define the meaning of life without the possibility of parole (*People v. Jones* (1998) 17 Cal.4th 279, 314, 70 Cal.Rptr.2d 793, 949 P.2d 890).

(*People v. Moon*, *supra*, 37 Cal.4th at p. 43.)

This Court also found that the absence of a burden of proof, except for proof of prior criminal acts under section 190.3, factor (b), does not render the California death penalty law unconstitutional. (*People v. Moon*, *supra*, 37 Cal.4th at p. 43, citing *People v. Michaels* (2002) 28 Cal.4th 486, 541.) This Court also rejected arguments that CALJIC No. 8.88 is constitutionally flawed because it:

(k) Reduces the prosecution's burden of proof generally; (l) Directs a verdict "as to certain issues in the defendant's case"; (m) Fails to assign a burden of proof;

(n) Fails to assign to the People a beyond-a-reasonable-doubt standard of proof;

(o) Fails to allocate to the People any burden of proof; (p) Fails to inform the jury a defendant bears no burden to prove mitigating circumstances; and

(q) Fails to inform the jury neither side has any applicable burden of proof.

(*People v. Moon*, *supra*, 37 Cal.4th at p. 43-44.)

This Court also rejected the claim that CALJIC No. 8.88's failure to inform the jury who bears the burden of proof constitutes a structural error requiring reversal of the penalty verdict without inquiry into prejudice. (*People v. Moon*, *supra*, 37 Cal.4th at p. 44, citing *Arizona v. Fulminante* (1991) 499 U.S. 279.)

Under this binding precedent, appellant's challenges to CALJIC Nos. 8.85 and 8.88 should likewise be rejected.

XII.

INTERCASE PROPORTIONALITY REVIEW IS NOT CONSTITUTIONALLY REQUIRED IN CALIFORNIA

Appellant argues that the failure of California's death penalty statute to provide intercase proportionality review violates his Eighth Amendment protection against the arbitrary and capricious imposition of the death penalty. (AOB 324-327.) Appellant's point is not well taken. Intercase proportionate review is not constitutionally required in California (*Pulley v. Harris* (1984) 465 U.S. 37, 51-54; *People v. Wright* (1990) 52 Cal.3d 367), and this Court has consistently declined to undertake it (*People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Lenart* (2004) 32 Cal.4th 1107, 1131).

XIII.

APPELLANT'S DEATH SENTENCE DOES NOT VIOLATE INTERNATIONAL LAW

Appellant contends that his death sentence violates international law. (AOB 328-332.) This claim was specifically rejected in *People v. Ghent, supra,* 43 Cal.3d at pages 778-779 (discussing the 1977 death penalty statute). Moreover, the use of the death penalty in California does not violate international norms where, as here, the sentence of death is rendered in accordance with state and federal constitutional and statutory requirements. (*People v. Hillhouse, supra,* 27 Cal.4th at p. 511; see *People v. Bolden* (2002) 29 Cal.4th 515, 567.) Appellant does not provide sufficient reasoning to revisit the issue here, and thus, the claim should be rejected.

XIV.

THERE WERE NO ERRORS IN EITHER THE GUILT PHASE OR THE PENALTY PHASE THAT HAD A CUMULATIVE PREJUDICIAL EFFECT

Appellant argues that reversal is required based on the cumulative effect of error that collectively undermined the fundamental fairness of the trial and the reliability of the death judgment. (AOB 333-339.) Appellant's claim is meritless since, as explained above, there were no errors, and, to the extent there was error, appellant has failed to demonstrate prejudice. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236 ["'We have either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial. We reach the same conclusion with respect to the cumulative effect of any assumed errors'"]; *People v. Seaton, supra,* 26 Cal.4th at p. 692 ["The few minor errors, considered singly or cumulatively, were harmless"].) A defendant is entitled to a fair trial, not a perfect one. (*People v. Box, supra,* 23 Cal.4th at p. 1214.) Appellant received a fair trial.

CONCLUSION

Based on the foregoing, respondent respectfully asks this Court to affirm the judgment.

Dated: August 2, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENTS BRIEF** uses a 13 point Times New Roman font and contains 41,887 words.

Dated: August 3, 2006

Respectfully submitted,

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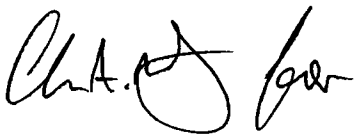

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. McCurdy** No.: **S061026**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 3, 2006, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 3, 2006, at Sacramento, California.

_____
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