IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

# RESPONDENT'S SUPPLEMENTAL BRIEF



BILL LOCKYER
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

STAN CROSS
Acting Senior Assistant Attorney General

PATRICK J. WHALEN
Deputy Attorney General

CATHERINE G. TENNANT
Deputy Attorney General
State Bar No. 179182

1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 323-6307
Fax: (916) 324-2960
Email: Catherine.Tennant@doj.ca.gov

Attorneys for Petitioner and Respondent

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## ARGUMENT

## XVII.

## PROBABLE CAUSE SUPPORTED APPELLANT'S ARREST, AND THE TRIAL COURT PROPERLY ADMITTED MYCHAEL JACKSON'S TESTIMONY

In appellant's supplemental opening brief, he reiterates his earlier contention (see AOB 62, 104) that the trial court erred in failing to suppress Mychael Jackson's testimony. He contends that there was insufficient probable cause to justify his arrest, and Jackson's testimony was the "fruit" of his unlawful arrest. (ASOB at 1.)[1/] These contentions lack merit. As Kings County Superior Court Judge Peter M. Schultz concluded following the hearing on appellant's Penal Code[2/] section 1538.5 motion, probable cause supported appellant's arrest, and Jackson's testimony was properly admitted at trial.

### A. Background

After appellant was questioned on April 30, 1995, aboard the naval

1. "ASOB" refers to Appellant's Supplemental Opening Brief.

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

cruiser by United States Marshall Bruce Ackerman, Naval Criminal Investigative Service (NCIS) Agent Mike Devine, and Kings County Sheriff's Lieutenant Mark Bingaman, Bingaman handcuffed appellant and advised him that he was under arrest for Maria's murder. (D RT (1/19/1996) 163-164, 173, 181-187, 198.) Devine subsequently informed appellant that Bingaman lacked the authority to arrest him, and appellant was not under arrest. (*Id.* at pp. 207-209, 221-222, 235-236.) Appellant was detained pursuant to a confinement order issued by the ship's captain. (*Id.* at pp. 231-234.) He was transported from the ship to Atasugi Naval Air Station, then to Yokota Air Base. From there, he was flown to Travis Air Force Base in California, then transported to Kings County. (*Id.* at p. 234.)

On May 3, 1995, Lemoore Police Officer Patrick Jerrold submitted a declaration[3/] in support of the issuance of a warrant for appellant's arrest, and Kings County Municipal Judge Maciel signed the arrest warrant. (A CT 4-6, 16; 2 Aug. CT 316.)

On January 6, 1996, appellant filed a section 1538.5 motion to suppress evidence, in which he argued that the testimony of prosecution witness Mychael Jackson was the fruit of law enforcement's illegal interrogation of him and his unlawful arrest. (1 CT 47-57.) The prosecution filed an opposition and contended that law enforcement had probable cause to arrest appellant. (1 CT 58-61.)

At the hearing on the suppression motion, the parties agreed that appellant had been arrested without a warrant. (D RT (1/19, 1996) 3.) The prosecution presented Lieutenant Bingaman's testimony to establish that

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3. Officer Jerrold's declaration indicated that Jerrold had reviewed each of the written reports and statements lodged with the court in connection with the case; that these materials were attached to the declaration and incorporated by reference; and that they provided reasonable cause to believe appellant committed offenses against the People of the State of California. (A CT 4-5.)

probable cause for appellant's arrest existed prior to law enforcement's questioning of appellant on April 30, 1995. Bingaman explained that he had received a lead from appellant's sister. (*Id.* at p. 7.) She had reported that she believed appellant was capable of abducting Maria, since he had repeatedly molested the sister, lived in the Lemoore area, and was familiar with Poso Creek. (*Id.* at p. 8.) In addition, she relayed that appellant had confessed to her that he could never be married for fear that he would molest his own children. (*Id.* at p. 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. (*Id.* at p. 13.) The search uncovered hundreds of pornographic films and sexually oriented magazines. (*Ibid.*) Mike Prodan, a behavioral scientist with the Department of Justice, 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.)

After these events occurred, Bingaman ascertained that appellant was employed by the United States 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 Carole Cacciaroni and requested that she conduct an initial interview with appellant. (*Id.* at pp. 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 viewed appellant as the primary suspect in the case. He

assembled a team to interview appellant on the naval cruiser. (D RT (1/19/1996) 17, 48, 50.)

Bingaman maintained that he had probable cause to arrest appellant for Maria's murder prior to traveling to the Sea of Japan to interview him on April 30, 1995. He responded to questions from defense counsel on this issue as follows:

> Q [Defense counsel]. You did not have probable cause to arrest him [appellant], did not intend to arrest him, is that correct, before Cacciaroni?
>
> A. I stated it was my belief leading up to Cacciaroni, even though there was overwhelming information coming in, would I make an arrest, probably not at that point, no.
>
> Q. . . . What did you learn in Carole Cacciaroni's interview . . . about the defendant's interview with her that indicated to you that my client was involved in a criminal action–might be involved in Maria's kidnaping?
>
> A. You mean my impression? What did I learn?
>
> Q. Yes.

(D RT (1/19/1996) 47-48.)

Bingaman replied:

> A. I'm just kind of rephrasing. Everything I had going with Carole and then Carole stating that this man is crying, he's got his face in his hands, he is crying uncontrollably, he wants . . . to know if he's going to be taken off the ship and arrested for the murder of this little girl in Lemoore. Carole said this is so unnatural. This man was a supervisor on the ship, to come into her office and his immediate–the question is: "Do you know what your [sic] here for?" The common response aboard ship was "What did one of my men do now?" But in this case this client says, "It's the little girl in Lemoore," and just a series of things that were dissected to the point that we focused conclusively on Mr. McCurdy at this point and dropped our other leads.
>
> Q. Now, at this point you felt that you had probable cause to arrest Gene McCurdy for the murder and kidnapping of Maria Piceno?

A. I felt at that point, as I was being instructed to head to Japan, that we certainly had enough– the consideration to make an arrest was always there, but I didn't even feel free that we could even talk to this individual without even advising him of his rights because he was the suspect in the killing of this little girl at that point based on the totality.

Q. I understand that he was a suspect. I understand that–

A. I'm not trying to dodge your question. Do I feel I had enough probable cause to believe, as it continued and when I got to Japan and as the whole thing progresses, I felt we had more than enough to effect his arrest.

Q. All right, and my question simply is: Before you got to Japan, did you feel you had probable cause to arrest–in other words, maybe I can—maybe we can do some hypotheticals. If my client had not said a word to you in Japan, refused to speak to you at all, do you feel that you would have had the legal authority, assuming jurisdiction wasn't a problem, but did you feel you had enough legal probable cause to arrest my client for the kidnaping and murder of Maria Piceno?

A. Yes, that is my feeling.

(D RT (1/19/1996) 47-50.)

Following the suppression hearing, the trial court held that sufficient evidence existed to arrest appellant prior to the April 30, 1995, interrogation. (E RT (3/13/1996) 18.) The court ruled:

. . . [W]ith regard to the issue of whether the illegality in obtaining the statement of the defendant requires the suppression of . . . witness Mychael Jackson, it does not.

The defense theory appears to be that without subsequent admissions, there would have been insufficient evidence to arrest the defendant, and since his arrest led to his picture being broadcast by news media, the testimony of an alleged eyewitness must be suppressed.

First, even absent that portion of the defendant's statement taken after his *Miranda* rights are violated, it appears to the court that there was sufficient evidence known to the police to arrest the defendant.

There was evidence [of] . . . the corpus of the crime of motive on behalf of the defendant with opportunity, the defendant's presence at the area of the scene, and finally, strong evidence of an unnatural consciousness of guilt displayed at the Cacciaroni interview.

Secondly, even assuming that the arrest were unlawful, the holdings of the majority of the United States Supreme Court in United States versus Crews, 445 U.S. 463 and of the California Supreme Court in People versus Teresinki, 30 Cal.3d, 822 indicate that a defendant's face cannot be suppressible fruit of an illegal arrest.

If Mr. Jackson can make an in-court identification of the defendant committing acts witnessed by Jackson, an arguably illegal arrest of the defendant will not insulate him from identification.

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 suggestive 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[4/] [sic], 435 U.S. 268, Mr. Jackson's voluntary act of coming forward as a witness based on a nongovernmental party's news broadcast is not sufficiently related to the alleged governmental illegality to justify suppression of Jackson's testimony.

The defense motion to suppress Mr. Jackson's testimony is therefore denied. . . .

(E RT (3/13/1996) 18-20.)

At appellant's preliminary hearing, Mychael Jackson identified appellant as the man he had seen talking with Maria in the Food King parking lot on the afternoon of March 27, 1995. (B RT (10/2/1995) 201-202.) At trial, Jackson provided specific details about appellant's appearance and the truck he was driving on March 27, 1995. (See 12 RT 1901-1902, 1904, 1907-1908, 1914, 917-1922, 1978-1979, 1982, 1984-1987.) Jackson indicated that he immediately noticed appellant because he thought it was strange for an older

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4. The case the trial court was referring to is *United States v. Ceccolini* (1978) 435 U.S. 268.

Caucasian male to be with a young Hispanic girl. (12 RT 1893, 1900.) Importantly, Jackson's testimony placed Maria inside appellant's truck that afternoon. (12 RT 1904, 1907-1908, 1914, 1979.)

**B. Discussion**

In *United States v. Crews* (1980) 445 U.S. 463, at pages 471-473, the United States Supreme Court held that the in-court identification of the defendant by the victim did not have to be suppressed as fruit of defendant's unlawful arrest where the robbery victim's presence in the courtroom was not the product of any police misconduct and where the illegal arrest did not infect her ability to give accurate identification testimony. In *Crews*, the defendant was illegally arrested and transported to the police station so a photograph could be taken of him. The photograph was subsequently shown to the victim, who identified the defendant as the perpetrator in the robbery. At trial, the victim once more identified the defendant as her assailant, and defendant was convicted of armed robbery. (*Id.* at pp. 463, 466-467.)

The Supreme Court rejected the claim that the robbery victim's in-court identification should be suppressed simply because of defendant's unlawful arrest which led the police to obtain his photograph. The Court explained:

> In this case, the robbery victim's presence in the courtroom at respondent's trial was surely not the product of any police misconduct. She had notified the authorities immediately after the attack and had given them a full description of her assailant. The very next day, she went to the police station to view photographs of possible suspects, and she voluntarily assisted the police in their investigation at all times. Thus this is not a case in which the witness' identity was discovered or her cooperation secured only as a result of an unlawful search or arrest of the accused. Here the victim's identity was known long before there was any official misconduct, and her presence in court is thus not traceable to any Fourth Amendment violation.

(*Crews, supra*, 445 U.S. at pp. 471-472.)

The Court further noted:

> Nor did the illegal arrest infect the victim's ability to give accurate identification testimony. Based upon her observations at the time of the robbery, the victim constructed a mental image of her assailant. At trial, she retrieved this mnemonic representation, compared it to the figure of the defendant, and positively identified him as the robber. No part of this process was affected by respondent's illegal arrest. In the language of the "time-worn metaphor" of the poisonous tree, *Harrison v. United States*, 392 U.S. 219, 222, 88 S.Ct. 2008, 2010, 20 L.Ed.2d 1047 (1968), the toxin in this case was injected only after the evidentiary bud had blossomed; the fruit served at trial was not poisoned.

(*Id.* at p. 472.)

Similar to *Crews*, here Jackson's in-court identification of appellant at the preliminary hearing occurred independently of appellant's arrest. At trial, Jackson explained that he recognized appellant from seeing his picture on television. Jackson subsequently contacted law enforcement and informed them about what he had witnessed on the day of Maria's abduction. (12 RT 1924-1928, 1939-1940, 2014.) Under *Crews*, Jackson's in-court identification of appellant at the preliminary hearing was not connected in any way to appellant's arrest. On this basis, Jackson's testimony was properly admitted at trial.

In addition, in *United States v. Ceccolini, supra*, 435 U.S. at pages 279-280, the Court found that the degree of attenuation between a police officer's illegal search of an envelope at defendant's flower store and the store clerk's testimony as to defendant's activities was sufficient to dissipate the connection between the illegality and the clerk's testimony so as to render the clerk's testimony admissible at trial. The Court noted that the clerk's trial testimony was given of her own free will. It also pointed out that a substantial period of time had elapsed between the time of the illegal search and law enforcement's initial contact with the clerk. Significant time had also passed between law enforcement's contact with the clerk and her trial testimony. (*Id.* at p. 279.)

The Supreme Court held that the Court of Appeal erred in suppressing the clerk's testimony. (*Id.* at p. 280.)

Likewise, in this case Jackson's identification of appellant while watching television was sufficiently attenuated from any police misconduct. Indeed, the government had no part in Jackson's identification of appellant, which resulted after Jackson viewing footage of appellant placed on television by the media. Under *Ceccolini*, the trial court also properly admitted Jackson's testimony as being sufficiently attenuated from any governmental misconduct.

Finally, respondent submits that ample probable cause supported appellant's arrest prior to any illegal interrogation conducted by law enforcement. Probable cause to arrest exists when the facts known to the arresting officer at the time of the arrest would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime. (§ 836; *People v. Price* (1991) 1 Cal.4th 324, 410; *Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844; *People v. Privett* (1961) 55 Cal.2d 698, 701.) The federal standard is the same. (*Orin v. Barclay* (9th Cir. 2001) 272 F.3d 1207, 1218 [probable cause exists if, at the time of arrest, the facts and circumstances known to the officer were sufficient to warrant a prudent person to believe the suspect had violated a criminal law].) Under state and federal law, probable cause is a question of law and subject to de novo appellate review where, as here, the facts are undisputed. (*Hamilton v. City of San Diego, supra,* 217 Cal.App.3d at p. 844; *Saucier v. Katz* (2001) 533 U.S. 194.)

Although the proof required to support probable cause is less than proof beyond a reasonable doubt, less than a preponderance of the evidence, and less than a prima facie showing, a mere hunch is not enough. (*People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783; *People v. Martin* (1973) 9 Cal.3d 687, 692.) The arresting officer must be able to point to specific facts justifying his

suspicion that an offense has been committed and that defendant committed it. (See *People v. Martin,* at p. 692.) A finding of probable cause is not limited to evidence that would be admissible at trial on the issue of guilt. The test is not whether the evidence upon which the officer acts in making the arrest is sufficient to convict, "but only whether the person should stand trial." (*People v. Ingle* (1960) 53 Cal.2d 407, 412-413.) The prosecution has the burden of establishing reasonable cause for an arrest. (*People v. Haven* (1963) 59 Cal.2d 713, 717; *Tompkins v. Superior Court* (1963) 59 Cal.2d 65, 67.)

Lieutenant Bingaman's testimony at the suppression hearing establishes that probable cause existed to arrest appellant for Maria's kidnapping and murder prior to law enforcement's questioning of appellant on April 30, 1995. Bingaman had evidence that appellant had the opportunity to commit the crimes as a result of his presence at the shopping center from which Maria was abducted at or near the same time she was abducted. The subsequent search of appellant's storage locker revealed that he had a large collection of pornographic materials. Particularly probative were appellant's collection of magazines containing juvenile girls made up to look like younger children. (D RT (1/19/1996) 13.) After reviewing these materials, behavioral scientist Mike Prodan gave his opinion to law enforcement that appellant had an abnormal sexual interest in young children. (*Ibid.*)

The tip Bingaman received from appellant's sister also showed that appellant had the propensity to molest, and appellant had molested in the past. Appellant's sister had informed law enforcement that appellant had repeatedly molested her, and he was fearful that if he ever had children, he would also molest them. In addition, Bingaman's sister had indicated that appellant lived near the area where Maria was abducted, and he was familiar with the Poso Creek area where Maria's body was found. (D RT (1/19, 1996) 7-9.)

Most telling, however, was information Bingaman had received from

Agent Carole Cacciaroni prior to the April 30, 1995, questioning. As noted in respondent's brief (see RB at 101), 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.)

Cacciaroni relayed the above information to Bingaman prior to the April 30, 1995, interview of appellant. (D RT (1/19/1996) 16-17.) Appellant's bizarre behavior when interviewed by Carole Cacciaroni demonstrated his unique connection to the crimes. Based on these facts and circumstances, Judge Schultz properly determined that law enforcement had probable cause to arrest appellant prior to the April 30, 1995, interrogation. (E RT (3/13/1996) 18-19.) (See *People v. Robertson* (1966) 240 Cal.App.2d 99, 104 [Probable cause to arrest defendant as a person wanted for murder in Los Angeles was adequately supported by evidence showing he bore a striking resemblance to the picture on the police bulletin; was in Los Angeles at the time the murder was committed; could not supply positive identification; and, after having consented to the

search of his premises by an officer, whom he knew was trying to establish his connection with a murder charge, withdrew his consent when the officer located a particular bag, thus affording the inference that its contents might connect him with the murder].) Indeed, appellant's highly unusual emotional reaction to Cacciaroni's questioning of him provided proof of his guilt that tied in with the other facts known to Bingaman. These together provided probable cause for appellant's arrest for Maria's murder and kidnapping.

Accordingly, as set forth in respondent's brief (RB 78-79), the trial 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 correctly found that absent the statements obtained in violation of *Miranda*, the police had sufficient evidence to arrest appellant. (*Ibid.*) Thus, Jackson's testimony was not "fruit" of the poisonous tree, and appellant's judgment should be affirmed.

## CONCLUSION

For these reasons, respondent requests that the judgment be affirmed.

Dated: September 5, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

Mary Jo Graves
Chief Assistant Attorney General

STAN CROSS
Acting Senior Assistant Attorney General

PATRICK J. WHALEN
Deputy Attorney General

CATHERINE G. TENNANT
Deputy Attorney General

Attorneys for Petitioner and Respondent

CGT:sra
SA1997XS0003
30159636.wpd

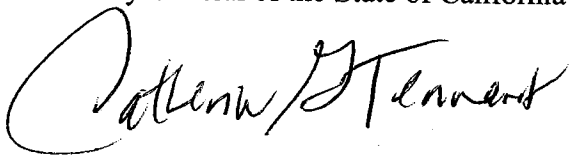
## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S SUPPLEMENTAL BRIEF** uses a 13 point Times New Roman font and contains 3847 words.

Dated: September 5, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



CATHERINE G. TENNANT
Deputy Attorney General

Attorneys for Petitioner and Respondent

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Gene Estel 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 and 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 September 5, 2006, I served the attached **RESPONDENT'S SUPPLEMENTAL 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, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

**Gary Garcia**
**Deputy State Public Defender**
**221 Main Street, 10th Floor**
**San Francisco, CA 94105**
Attorneys for Appellant, (2 copies)

**Honorable peter M. Schultz**
**Kings County Superior Court**
**1426 South Drive**
**Hanford, CA 93230**

**California Appellate Project**
**101 Second St., Ste. 600**
**San Francisco, CA 94105-3672**

**John Patrick Moore**
**1107 "R" Street**
**Fresno, CA 93721**

**Patrick Hart**
**P.O. Box 714**
**Three Rivers, CA 93271**

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

**Shane Burns**
**Larry Crouch**
**Kings Co. Deputy District Attorneys**
**1400 W. Lacey Blvd.**
**Hanford, CA 93230**

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 September 5, 2006, at Sacramento, California.

_____
Declarant

30160331.wpd