S061026

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S OPENING BRIEF

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

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

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INTRODUCTION

In March, 1995, appellant was an officer in the United States Navy, in which he had served for 17 years. He had advanced in rank during his time in the military, and, at the time of his arrest, was a supervisor on a Navy ship. There is no evidence that appellant had ever been arrested or convicted of any crime prior to his arrest in the instant case.

Appellant's trial took place against a backdrop of hysteria in the community, flowing from the fact that three little girls (Angelica Ramirez, Tracy Conrad, and the victim in this case, Maria Piceno) had been abducted and murdered in the Central Valley within a relatively short span of time. Appellant was demonstrably innocent of the crimes against Ramirez and Conrad, but the negative publicity in his case and the paranoia pervading the community colored his entire trial.

Appellant came to the attention of law enforcement authorities when his sister contacted them to report her suspicion that appellant was involved

in the offenses against Maria. Her suspicion apparently was based on nothing more than: appellant, who was only two years older than she was, had engaged in incestuous conduct with her from the time he was about five years old until he was about nineteen years old; appellant lived near Lemoore, California, where Maria was abducted; and appellant had lived near, and was familiar with, the area where Maria's body was found. There is little, if anything, in the record to suggest that appellant would ever have been connected to this case had his sister not contacted the authorities.

The prosecutor's case was weak, comprised largely of unconnected, ambiguous bits of circumstantial evidence and the testimony of several witnesses of questionable reliability. For instance, the prosecution's claim that appellant was the perpetrator rested largely on the suspect credibility of Mychael Jackson. Jackson's testimony was not only unreliable, but also constituted inadmissible fruit of the illegal interrogation and arrest of appellant.

The essential weakness of the prosecution case, however, was cloaked by the admission of extremely inflammatory yet wholly irrelevant evidence regarding appellant's incestuous conduct, his *lawful* rental of adult videotapes featuring *adult* females, and his possession of adult magazines, none of which featured prepubescent children. This evidence could only have undercut completely the jury's ability to fairly and properly evaluate the evidence that was actually relevant to the charges. It is likely that, because of the trial court's admission of evidence relating to appellant's adult materials and incestuous conduct, the jurors convicted him for who he was or what he had done in the past, even if the prosecution had failed to establish his guilt of the charged offenses.

Moreover, the trial court's errors (including its admission of

Jackson's testimony and of the evidence regarding appellant's incestuous conduct and adult materials) made it more likely that the jury would accept the prosecution's version of the case despite critical weaknesses in its evidence. Conversely, those same errors made it more likely that the jury would discount appellant's defense: that, in light of numerous similarities between the crimes against Angelica and those against Maria, whoever killed Angelica (a crime of which appellant was demonstrably innocent) likely committed the offenses against Maria as well.

The penalty phase was also tainted by numerous substantial errors. For instance, the trial court excluded critical evidence proffered in support of a "lingering doubt" argument. In addition, in its closing argument, the prosecution improperly suggested that the role of the jury was to be "tough on crime" and to avenge Maria's death.

In sum, appellant's trial was entirely shrouded in a quilt made up of substantial, interrelated errors which unfairly hid the essential weakness of the prosecution case.

STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code § 1239.)[1]

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[1] All statutory references are to the Penal Code unless otherwise indicated.

STATEMENT OF THE CASE

On October 18, 1996, the prosecution filed a four-count information against appellant. (Clerk's Transcript [hereafter "CT"], Vol. 1, pp. 6-7.)[2] Count 1 alleged that appellant committed the March 27, 1995, murder of Maria Piceno (§ 187, subd. (a)); as to Count 1, the information further alleged that the murder was committed while appellant engaged in the commission and attempted commission of kidnaping (§ 190.2, subd. (a)(17)(B)). Count 2 alleged that on March 27, 1995, appellant kidnaped Maria Piceno. (§ 207, subd. (a).) Count 3 alleged that on March 27, 1995, appellant did willfully, unlawfully, and knowingly possess and control matter depicting a person under 18 years personally engaging in and simulating sexual conduct as defined in Penal Code section 311.4, subdivision (d). (§ 311.11, subd. (a).) Count 4 alleged that on March 27, 1995, appellant knowingly duplicated a film or videotape in which a person under 18 years engaged in an act of sexual conduct. (§ 311.3.)

On October 19, 1995, appellant was arraigned on the information; he pleaded not guilty to all charges and denied the special circumstance allegation. (1 CT 12.)

On December 4, 1995, the trial court denied appellant's motion to strike Count 2 and the kidnap-murder special circumstance allegation. (1 CT 44.)

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[2] The Clerk's Transcript is hereinafter referred to as "CT," the Augmented Clerk's Transcript as "Aug. CT," the Second Augmented Clerk's Transcript as "2nd Aug. CT," the Second Supplemental Augmented Clerk's Transcript as "2nd Supp. Aug. CT," and the Reporter's Transcript as "RT." Except where otherwise indicated, appellant cites to the record on appeal in the following manner: "[volume] CT [or RT] [page number]." (Cal. Rules of Court, rule 14, subd. (a)(1)(C).)

On March 13, 1996, following a hearing, the trial court granted in part and denied in part appellant's motion to suppress statements obtained during his custodial interrogation. (1 CT 74-80.)

On April 15, 1996, the trial court found that Counts 3 and 4 had not been properly joined and granted appellant's motion to sever them from Counts 1 and 2. (E RT (Apr. 26, 1996, proceedings) 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 kidnaping Maria Piceno for the purpose of committing an act in violation of section 288. (1 CT 137, 148, 156.)

On April 29, 1996, appellant filed a motion for change of venue. (1 CT 158-215.) The prosecution filed a motion in opposition on May 2, 1996. (1 CT 257-263.) On May 7, 1996, the trial court denied appellant's motion for a change of venue. (1 CT 269.)

Jury selection began on January 6, 1997. (2 CT 509-510.) That same day, the prosecution filed an amended information. (2 CT 513-514.) As amended, Count 2 alleged a March 27, 1995, violation of section 207, subdivision (b), and Count 3 alleged a March 27, 1995, violation of section 207, subdivision (a). (See 12 CT 3415-3416.)

The jury was sworn to try the case on January 21, 1997. That same day, the trial court issued its final rulings as to most of the motions in limine filed by the parties. The guilt phase of appellant's trial also began on January 21, 1997. (12 CT 3377-3379.)

On January 31, 1997, the jury returned verdicts of guilty as to Counts

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

1 through 3, and found the kidnaping special circumstance to be true. (12 CT 3412-3413.)

The penalty phase took place on February 11, 1997, and the jury began penalty deliberations that same day. (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 appellant's motion for modification of the death verdict and sentenced appellant to death on Count 1; pursuant to section 654, the trial court suspended imposition of the sentences for Counts 2 and 3. (13 CT 3700-3703; E RT (Apr. 22, 1997, proceedings) 25-30.)

This appeal is automatic.

STATEMENT OF FACTS

A. Guilt Phase Evidence Admitted Without Objection

The victim, eight-year-old Maria Piceno, lived with her mother and siblings in Lemoore, California. (10 RT 1505-1506.) Maria disappeared from a Lemoore shopping center on Monday, March 27, 1995, and was found dead on April 9, 1995. (10 RT 1584, 1587; 11 RT 1735, 1799; 12 RT 1877; 22 RT 2510, 2564.) Her body was found partially buried in sand in Poso Creek, Kern County, about a quarter mile from Highway 99. (10 RT 1584, 1589-1590.)

On March 27, 1995, Maria arrived home from school just before 3:00 p.m. and told her mother, Arcelia Ferrel, that she was hungry. (10 RT 1507, 1523.) Ferrel gave Maria three one-dollar bills and allowed her to walk alone to the Food King supermarket, located in a shopping center at the intersection of Bush Street and 19th Avenue in Lemoore, less than two blocks from their apartment. (10 RT 1508-1510, 1523-1524; 13 RT 2164.)

Maria left the apartment shortly after 3:00 p.m. (10 RT 1509.)

Maria purchased a can of tuna from Edna Lowrey, a cashier at Food King, at 3:18 p.m. (10 RT 1530-1532, 1537, 1540.) After paying Lowrey, Maria walked out of the store. (10 RT 1532.)

At approximately 3:43 p.m., Eric Douglas and his girlfriend, Amy Fann, walked to the Food King. (10 RT 1556-1557, 1568.) While Douglas was shopping, he saw Maria in one of the aisles. Maria was alone. (10 RT 1559-1561.) After spending approximately ten to fifteen minutes in the store, Douglas and Fann walked to the 99 Cent Store, located in the same shopping center. There, Douglas again saw Maria. (10 RT 1562-1563, 1570.) When Douglas left the 99 Cent Store at a few minutes after 4:00 p.m., Maria was still alone inside the store. (10 RT 1563-1564.)

Sometime after Maria had left her apartment, Ferrel and her other daughter, Lucero, walked to the Food King to look for Maria. (10 RT 1510-1511, 1524.) They searched inside the store, and Ferrel asked two store employees, including Lowrey, if they had seen her. (10 RT 1512-1514, 1524, 1546.) According to Lowrey, she spoke to Ferrel shortly after 4:00 p.m. (10 RT 1539, 1546.) After about 15 minutes, Ferrel left the store and continued to look for Maria. (10 RT 1514-1515, 1526-1527.)

At 3:28 p.m., appellant rented three videotapes from Video World III, a video store located in the same shopping center as the Food King. (10 RT 1572, 1576-1577; 14 RT 2399.) At 3:34 p.m., he rented three more videotapes from Lee TV, another video store in Lemoore. (12 RT 2101, 2103-2108, 2110.) Lee TV was located approximately half a mile from Video World III, and it took approximately 2 to 2½ minutes to drive from one store to the other. (13 RT 2166, 2177-2180.)

At approximately 4:10 p.m., appellant rented another three

videotapes at Video Zone (12 RT 2112-2115), located approximately 4½ minutes by car from Lee TV (15 RT 2642-2643, 2645-2646). According to Jana Watson, a Video Zone employee, the clock on the store register may have been fast at that time, perhaps by as much as ten minutes. (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. (11 RT 1684, 1696-1698, 1736, 1738, 1762, 1789, 1796, 1799.) About 40 minutes later, Lazaro went upstairs to use the bathroom and repeatedly heard a faint noise which sounded like a child whimpering. (11 RT 1699, 1737, 1740, 1765-1771, 1776, 1799.) She believed it came from within appellant's apartment, that shared a common wall with Smith's apartment. (11 RT 1684-1685, 1700, 1714, 1769, 1772, 1780, 1783.) When Lazaro returned to the kitchen, she asked whether there was a child next door because she thought she had heard a child sobbing. (11 RT 1699, 1737, 1740, 1778.) Smith said something like, "No, and he's not even home." (11 RT 1778.) Nevertheless, Lazaro was not alarmed. (11 RT 1778, 1780.) After speaking with Smith, she did not think about it further.[4] Smith did not

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[4] Lazaro claimed that, although she had been aware that appellant was the prime suspect around the time he was interrogated aboard the ship, she did not tell the police what she knew until she spoke to them in October, 1996, after her daughter said it was okay to do so. (11 RT 1772-1773, 1775-1776.) Her daughter had reconciled with her husband and therefore had not wanted Lazaro to contact the police. Lazaro – who worked as a clerk at a courthouse in Tulare County and sometimes did volunteer work on behalf of children, including as a court-appointed advocate charged with inspecting the homes of abused children (11 RT 1774, 1781-1782) – believed there was enough evidence that her testimony was unnecessary, and she did not wish to jeopardize her daughter's marriage. (11 RT 1773-1775.)

check to see whether appellant was home. (11 RT 1778, 1780, 1782-1785, 1799.)

Appellant visited Smith at her apartment the following night. (11 RT 1688-1689, 1717, 1728-1732.) He did not appear to be nervous or anxious. (11 RT 1719.) Later, while they were watching television, a bulletin interrupted the program to report that Maria was missing. Appellant sat up and shifted uncomfortably. (11 RT 1688-1690, 1717, 1720.) Sounding angry, he said he hated when bulletins interrupted his show. Smith laughed and said he was acting kind of sadistic. Appellant also laughed, then went outside to smoke a cigarette. He was fine when he returned. (11 RT 1691; 14 RT 2429-2431.)[5]

A day or two later, Smith was at work at a fast food restaurant when appellant stopped at the drive-through window where she was stationed. Referring to fliers which had been posted around the restaurant to publicize Maria's disappearance, Smith started to say she felt bad that Maria was missing. Appellant abruptly and hostilely interrupted her and asked what time she was getting off work. (11 RT 1692-1694.) His reaction struck her as odd, because he usually listened to whatever she said. (11 RT 1694-1695.) After that incident, Smith never spoke with appellant about Maria and did not see him much. (11 RT 1695.) She was busy, but was also trying to avoid him; she believed he was trying to avoid her as well. (11 RT

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[5] Smith repeatedly testified that appellant's visit took place on Tuesday, March 28, 1995, and that she thought she and appellant had watched *Melrose Place*. (11 RT 1689, 1717, 1720.) She conceded, however, that *Melrose Place* aired on Monday nights and that she did not know what day in March, 1995, she and appellant had watched it. (11 RT 1745.) She added that they watched it after the night her mother heard the sobbing. (11 RT 1747.)

1695-1696.)[6]

Photographs of appellant taken during a March 26, 1995, ATM transaction showed that he had a mustache on that date. (12 RT 2042-2046; see also 16 RT 2762, 2848.) However, sometime at the end of March, Smith noticed that appellant had shaved off his mustache. (11 RT 1700-1701; 14 RT 2428.) That too struck her as odd because he had previously said he had a baby face and would not shave off his mustache. (11 RT 1701-1702.) Roy Blanton and Claude Hudson, both of whom served in appellant's Navy squadron, also noticed that appellant shaved his mustache around that time. (13 RT 2196-2200, 2213, 2215.) Kellie Carrion, a former friend and roommate of appellant, testified that she did not recall ever seeing appellant without a mustache. (13 RT 2292.)

Sometime around April 5 or 6, 1995, appellant moved out of his

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[6] 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, or about her encounter with appellant at work. (11 RT 1711-1713, 1721-1722, 1739; 14 RT 2429.) Smith acknowledged that she did not tell the police that her mother had heard a girl sobbing in appellant's apartment until September, 1996. (11 RT 1725-1727, 1737, 1739-1742.) Smith acknowledged that she had given various accounts as to the date of the incident: she initially told the detectives that she did not know when her mother reported the sobbing; later she stated that she and her mother had been unable to pinpoint the date; at another point, she told the police that the incident had taken place on March 29, 1995; and, at trial, she testified that it had occurred on March 27, 1995. (11 RT 1742-1744, 1746, 1751.) Smith testified that she had not remembered those incidents because she had not believed them to be important. (11 RT 1712, 1724, 1737-1740, 1742.) She had also been concerned that disclosure of the fact she once had had sex with appellant, while separated from her husband, would jeopardize her subsequent reconciliation with her husband. (11 RT 1683-1688, 1714, 1717-1718, 1741.)

apartment because he was set to leave approximately April 10 on a six-month detachment, or cruise, with his Navy squadron. (13 RT 2197-2199, 2210.) Blanton noticed that appellant seemed agitated and frustrated, attributing his demeanor to pre-cruise jitters. (13 RT 2206, 2210-2211, 2216.) According to Blanton, appellant generally was very quiet and calm. He was not a nervous person, though he was at times temperamental. (13 RT 2206-2210.)

On another occasion, a rainy day approximately a week before they shipped out, Blanton was supposed to clean the floor of a hangar at Naval Air Station (NAS) Lemoore. Appellant complained that the floor looked "like shit." When Blanton protested that it would be pointless to clean the floor when people would continue to dirty it, appellant responded, "Just get your ass out there and clean it up, do your job." This struck Blanton as unusual because appellant usually allowed those he supervised to do their jobs however they wanted to. (13 RT 2211-2212.) Appellant continued to appear agitated and frustrated after they left on the cruise, and his attitude toward Blanton worsened. The change in his mood seemed drastic. (13 RT 2213-2215.)

On April 10, 1995, Kern County Deputy Sheriff Ronald Taylor searched the area where Maria's body had been found the previous day, and determined that someone could have gained access to the creek from a number of places. (11 RT 1671, 1667-1672.) Taylor concluded that the body may have been dropped into the creek some distance downstream from the bridge. (11 RT 1667, 1672-1675.) The perpetrator also could have gained access to the creek by exiting Highway 99 and driving onto an access road which ended approximately 100 yards from the creek. (11 RT 1676.) The access roads allowed one to drive directly to the weir, a dam-

like structure in the creek. (11 RT 1667, 1672-1675; 13 RT 2300-2307.)

That same day, Dr. George Bolduc, a forensic pathologist employed by the Kern County Sheriff/Coroner's Office, performed the post-mortem examination of Maria Piceno. (13 RT 2125-2130.) When he first observed her body, she was fully clothed, except that her left shoe and left sock were missing. (13 RT 2130, 2152-2153.)

Dr. Bolduc observed a bruise on the front portion of her right shoulder, but he could not determine whether it had been inflicted prior to or after death. (13 RT 2139-2140.) He also observed hemorrhage to the tissue, including muscle along her spine, in the middle of her back. The injuries were caused by blunt force, but would not have caused death. (13 RT 2147-2149.)

Dr. Bolduc saw no evidence that she had been strangled, shot or stabbed, or that her skull had been fractured. (13 RT 2133-2139, 2146-2148.) Because he had ruled out other causes of death, Dr. Bolduc concluded that Maria died due to suffocation. He testified that if there had been a complete blockage of her airways, she likely would have died within three to five minutes; if the airways were not completely blocked, it may have taken longer for her to die. (13 RT 2150.)

Dr. Bolduc also found that Maria's hymen was absent. Although the absence of her hymen was consistent with molestation, it was not indicative of the same, as it may have been absent prior to her death, or may have opened due to decomposition of her body. Dr. Bolduc found no other evidence suggesting that she had been molested. (13 RT 2140-2144, 2153.) In addition, Rodney Andrus, the Assistant Laboratory Director at the Department of Justice Laboratory in Fresno, California, testified that no useful DNA evidence, such as spermatozoa, was found in connection with

Maria's homicide. (14 RT 2411-2412.)

Based on the temperature of Poso Creek and the level of decomposition of Maria's body, Dr. Bolduc concluded that the body could have been in the water for two weeks. (13 RT 2151-2152.)

On April 11, 1995, Carole Cacciaroni, a special agent with the Naval Criminal Investigative Service (NCIS), left on the same six-month detachment as appellant. (10 RT 1601-1602; 11 RT 1650.) Shortly thereafter, she received a request, from either the NCIS in Lemoore or the Lemoore Police Department, to question appellant, who was on board the same ship. Prior to questioning him, Cacciaroni did not speak to anyone from Kings County, and was given very little detail about the matter. (10 RT 1603; 11 RT 1652.)

On April 18, 1995, Cacciaroni telephoned appellant. She identified herself and asked that he see her in her office in regards to an investigation. (10 RT 1603-1605; 11 RT 1651, 1653.) He asked what the investigation was about, but she did not give him any details. (10 RT 1604, 1607; 11 RT 1652.) A short time later, appellant reported to her office, where Cacciaroni and her partner interviewed him for about two hours. (10 RT 1603, 1605-1606; 11 RT 1624.)

At the start of the interview, Cacciaroni asked whether appellant knew why she had called him to her office, and he replied that he thought it concerned the girl who was missing in Lemoore. (10 RT 1606-1607; 11 RT 1653.) He may have used the word "abducted." (10 RT 1606.) When Cacciaroni asked how appellant knew that, he replied that he was at a video store in the shopping center that the girl had walked to, and may have been there at the time she was taken. (10 RT 1607; 11 RT 1653-1654.) At that point, Cacciaroni may have told him that she was assisting the Lemoore

NCIS or the Lemoore Police Department. (11 RT 1653, 1659-1660.)

Appellant stated he had been living alone in an apartment in Hanford until April 6, when he moved into the barracks at NAS Lemoore. (10 RT 1608-1609.) He visited his parents, who lived in Bakersfield, almost every weekend. He left on Fridays and returned on Sundays. (10 RT 1612; 11 RT 1617-1618, 1657.) He also informed her that he owned a 1988 black and silver Chevy S-10 pickup truck, with license plates from the State of Washington. (10 RT 1611.)

Appellant told her that, since learning of the girl's disappearance, he had been trying to remember whether he had seen anything peculiar while at the video store. (10 RT 1607.) He said that he did not remember seeing anything. (10 RT 1607; 11 RT 1654.) He had not notified the Lemoore Police Department that he had been in the area that day because he was leaving for the six-month detachment. (10 RT 1608.) He suggested several times that if he were hypnotized, he might remember additional details. (10 RT 1608; 11 RT 1623.)

Appellant initially said that he had first heard of the abduction the day after it happened, but subsequently said that it may have been two or three days later. (11 RT 1619.) He also said that he had seen an account of the abduction on a television program, *America's Most Wanted*. (11 RT 1623, 1655.) The program reported that authorities initially suspected that Maria's father had abducted her, but they later learned that he was in prison. (11 RT 1623-1624, 1655-1656.) Appellant recounted the girl's description from the show, and the fact that she had walked to the store from a residential area. (11 RT 1656.)

Appellant said Maria had been abducted from a grocery store on Bush Street. He had been at a video store in the same shopping center on

the day she was discovered missing. He was there that afternoon, but did not know the exact time. He said he rented three pornographic tapes. (11 RT 1619.)

When Cacciaroni asked whether he had heard what had happened to the girl, appellant said no. He asked whether she had been found, and Cacciaroni said yes. He asked, "Was she dead?" After a pause, he added, "I presume." (11 RT 1620.) Cacciaroni nodded her head, and appellant became very upset. He put his head in his hands and started to cry. (11 RT 1621, 1655.) He explained that he was crying because he had recently quit smoking and was under stress. He asked quietly, almost mumbling, whether she had been molested. He had not been speaking quietly before that. According to Cacciaroni, he was visibly shaken. (11 RT 1621-1622.)[7]

When Cacciaroni asked appellant what he thought should happen to the person who did it, he replied, "You don't want to know." She repeated the question, and he responded the same way. (11 RT 1622.) Appellant said that it should be "an eye for an eye," and suggested that California should have laws similar to, or even stronger than, those in the state of Washington. During that conversation, appellant also said he did not know whether he was blocking out anything. (11 RT 1623.)

Later that afternoon, appellant encountered Cacciaroni in a ship passageway and said he needed to talk to her. They went to her office, where he showed her a map he had drawn depicting the area around the

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[7] Appellant said he had contracted pneumonia in January, 1995, and was just getting over it when he went on leave in March, 1995. (10 RT 1612; 11 RT 1655.) However, Cacciaroni did not see him sweat profusely, appear feverish, or exhibit muscle tremors during her interviews. (11 RT 1660-1661.)

video store. (11 RT 1624-1625.) He said he had seen a couple of boys outside the video store, and that they had complimented his cap or tee-shirt. He also told her that he had moved out of his apartment and into the naval air station barracks on April 6, 1995. (11 RT 1626.) He again referred to the *America's Most Wanted* program, which he had seen at his parents' house on April 1, 1995. (11 RT 1627.) After the interview ended, he said he would return to talk to her again. (11 RT 1628.)

The following day, Claude Hudson, appellant, and several other individuals were in the ship's fan room.[8] Hudson mentioned that Maria's body had been found, and may have mentioned that she had been located in a river. Appellant, who was about to leave the room, began shaking his head and raising his hands to about shoulder level. (13 RT 2202-2203.) He said something like, "I'm tired, I'm sick of this," and hurried out of the room. (13 RT 2204.) He did not return to the fan room that day, which Hudson thought was unusual. (13 RT 2205.)

After leaving the fan room, appellant returned to Cacciaroni's office, upset. She asked what was going on, and appellant responded, "I'm very disturbed." His eyes were very red and teary. (11 RT 1628.) Appellant sat down and appeared to be very nervous. His fists were so tightly clenched that his knuckles were white. As he sat, his hands and head shook, and it seemed that whenever he turned to look at her his entire body jerked. Also, whenever he turned his head towards her, he did so in a jerky motion. (11 RT 1629, 1640.)

Appellant explained that he been in his work station when another

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[8] According to Hudson, the incident took place in May, 1995, which was inconsistent with the testimony of Cacciaroni and Ackerman. (13 RT 2200-2201.)

officer mentioned that he had read a newspaper article which reported that police had found Maria's body in Bakersfield. Appellant felt sick to his stomach and immediately left the work station. (11 RT 1630.) He said he was feeling paranoid and that everyone was pointing fingers at him, and again said he felt sick to his stomach. He also said that the Lemoore Police Department may have seen him in Bakersfield. (11 RT 1631, 1657.)

Appellant said, "Maybe I shouldn't say anything more." Then he said he did not know whether he should get a lawyer. When Cacciaroni asked why he thought that, appellant was crying. He was rocking in his chair. Also, he repeatedly raised his hands to his head and dropped them back to his lap. (11 RT 1632-1633.) Appellant responded that he had been at the video store near where the girl was taken and had also been in Bakersfield. (11 RT 1634.)

Appellant asked if he was a suspect. Cacciaroni replied that she could understand why he might think so, since he had been in both areas. She added that she was speaking to him to see whether he had seen anything. Nevertheless, he remained very upset. (11 RT 1634, 1657.) Again he mentioned the possibility of being hypnotized, but said he did not know whether he should do that. He explained he was reluctant to be hypnotized because if he had seen anything, he had done nothing to help Maria. (11 RT 1635, 1657-1658.) Cacciaroni told him not to beat himself up about it because he would not have known if she was being harmed. (11 RT 1635, 1658.) She also asked if he was blocking something. He said he did not know and continued sobbing. (11 RT 1635.)

Throughout the interview, appellant's voice, arms and hands shook. He sobbed for nearly the entire interview. (11 RT 1635-1636.) He again said he felt paranoid. He also commented, "I don't know, maybe I

shouldn't say anything more." (11 RT 1637.)

Appellant then asked whether he would be handcuffed and taken to Hawaii. (11 RT 1637, 1657.) Cacciaroni believed he had thought of this possibility because, a week or two earlier, another sailor had been placed in handcuffs and flown to Hawaii in connection with a rape/murder; the arrest was common knowledge aboard the ship. (11 RT 1638, 1650-1651.) When she joked that appellant just wanted to go to Hawaii, he responded, not that way. He 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." (11 RT 1639.) His voice was still quiet and shaky. She asked if he was okay, and he said no. He was still very emotional and crying. (11 RT 1640.)

About 20 minutes into the interview, appellant regained his composure. He left her office several minutes later. (11 RT 1641, 1658.)

Later that afternoon, appellant returned to Cacciaroni's office. (11 RT 1642.) He seemed much more relaxed and remained cooperative. (11 RT 1643, 1659.) Appellant explained that he had remembered a few more details about the day he rented the videotapes. He drew additional details on the map. (11 RT 1644-1645.) He explained that he had heard Maria had been walking alone from that area. (11 RT 1644.) He commented, "You should never let them out of your sight." (11 RT 1645.)

On April 21, 1995, Cacciaroni again saw appellant in one of the ship's passageways. He said he was not coming to see her, but was checking on some of his guys. He asked whether she had heard anything, and she said she had not. (11 RT 1646, 1659.) He seemed more serious and less friendly than he had been, and he did not appear to be receptive to talking to her. (11 RT 1647, 1659.)

On October 11, 1995, six months after the homicide, officials

searched Poso Creek. During the search, they found a shower curtain (Exhibit 4A) buried in the sand, upstream from where Maria's body had been found. (13 RT 2313-2315, 2327-2333.)[9] Specifically, the shower curtain was found 785 feet west of the weir and approximately 12 feet north of the south edge of the creek; Maria's body had been located approximately 2253 feet west of the weir and approximately 62 feet north of the south edge of the creek. (15 RT 2638-2641.) That is, her body was found approximately 490 yards from where the shower curtain was recovered.

Lisa Kuehne, appellant's friend, testified that Exhibit 4A looked like a shower curtain she had left in his apartment in November, 1990, but she could not testify that it was in fact the same one. (13 RT 2246, 2251-2252, 2256-2257, 2259-2261, 2263-2264, 2275, 2278.)[10] Although Kuehne had been in his bathroom on at least one occasion (13 RT 2269), she never saw appellant use the shower curtain after she gave it to him (13 RT 2279). Kellie Carrion, who had been appellant's roommate in 1991, testified that Exhibit 4A looked like the shower curtain that Kuehne had once owned and that hung in the bathroom she (Carrion) shared with appellant. However, although Carrion told detectives that the shower curtain and hooks in their bathroom matched Exhibit 4A, she later recalled that their shower curtain was vinyl, not cloth. (13 RT 2226-2227, 2284-2291, 2294, 2296, 2299.)

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[9] On May 4, 1995, members of the Kings County Sheriff's Office searched Poso Creek for potential evidence, but they did not find the shower curtain at that time. (14 RT 2363-2368.)

[10] Kuehne acknowledged, however, that she had told investigators she was certain that the shower curtain they showed her was the one she had given appellant. (13 RT 2272-2274.)

Lisa Teays, who had been in the bathroom shared by Kuehne and appellant three or four times, testified that Exhibit 4A appeared to be the shower curtain from their bathroom, although she was not absolutely certain. (13 RT 2228, 2233-2235, 2237-2238, 2240.)

All three witnesses testified that appellant's shower curtain was peach-colored and had ruffles on the top, and that it had been attached to burnt orange hooks. (13 RT 2229-2230, 2251-2252, 2264, 2285.) All three witnesses testified that Exhibit 4A was also peach-colored, though faded. (13 RT 2234, 2237, 2260, 2286, 2296-2297.)

Teays and Carrion also testified that they had seen appellant interact with children. Children liked to sit on his lap and talk to him, and did not appear to be intimidated by him. (13 RT 2235-2236, 2292.)

Detective Jess Gutierrez of the Tulare County Sheriff's Department testified that he was involved in the investigation into the disappearance of Angelica Ramirez. (14 RT 2445.) Ramirez, a ten-year-old Hispanic girl from Hanford, disappeared from a swap meet in Visalia, California, on March 3, 1994. (14 RT 2446-2449.) Her body was found two days later in an irrigation ditch in Pixley, approximately 30 to 35 miles south of the swap meet, along Highway 99. (14 RT 2449, 2452-2454.) That location was approximately 45 miles or less from where Maria's body was found. (14 RT 2454.)

The cause of Ramirez's death was ruled to be ligature strangulation. (14 RT 2450, 2455.) She had a sock on each foot but was otherwise nude from the waist down. Her shirt was rolled up above her chest area. There was evidence of penetration and tearing of the vaginal area. Spermatozoa or semen was also found in her vaginal cavity. (14 RT 2451.) The rest of her clothing was never recovered, and apparently her earrings had been

removed. (14 RT 2454-2455.)

Rodney Andrus of the Department of Justice Laboratory testified that he analyzed samples of body fluids collected from both Angelica Ramirez and appellant. Andrus determined that spermatozoa found in Ramirez's vaginal canal could not have come from appellant. (14 RT 2406-2412.) Andrus also testified that no DNA evidence, including spermatozoa, was found relating to Maria's homicide. (14 RT 2411-2412.)

B. Evidence Admitted Over Defense Challenge

1. Eyewitness Testimony Of Mychael Jackson And Related Evidence

The sole witness to testify that he observed appellant with Maria was Mychael Jackson, who was convicted of a felony, i.e., workman's compensation fraud, while the instant investigation and prosecution were pending. (12 RT 1933, 1941-1942.) At appellant's trial, Jackson admitted that he had not worked since October, 1994. (12 RT 2004.) Moreover, according to the testimony of several witnesses, Jackson was not trustworthy. According to his wife, Claudeen Jackson, who had known him since she was in the eighth grade, he was an "impulsive liar." (14 RT 2370-2372, 2377.) Claudeen testified that Jackson once missed a court date and excused his failure to appear by claiming falsely that his child had died. (14 RT 2372-2373.) He claimed that he did not have any other children, but she later learned, during their marriage, that he had fathered several children by other women. (14 RT 2374.) At another point, he married another woman even though he had not yet divorced Claudeen. (14 RT 2375.) She believed that he would have helped the police only if he could get

something in return. (14 RT 2383-2384, 2386.)[11]

Robin Smith, who had had a child by Jackson seven years earlier and with whom he had lived for about two years, also considered him to be a liar. (14 RT 2387-2390, 2392.) Maria Kincaid, who had dated Jackson for three years, lived with him for several months, and had a three-year-old daughter by him, testified that Jackson had never told her the truth. (14 RT 2394-2397.) For instance, during their relationship, she learned that he was seeing someone else and had had a child by the other woman, born just two months after their daughter was born. (14 RT 2396.)

Appellant also introduced the preliminary hearing testimony of Annie Snowden, who had been married to Jackson and had lived with him for almost four years. In her opinion, Jackson was the "biggest liar you'll ever run into." He lied about everything. When she was seven months pregnant, she found out that he was having an affair with Maria Kincaid. (C RT 393-399; 14 RT 2434-2441.)[12]

According to Jackson, on the afternoon of March 27, 1995, he played basketball in Visalia, California. He claimed not to know the names of the people he played with or where they lived. (12 RT 1944, 1993-1994, 2010.) At some point, Jackson drove from Visalia to Lemoore, where he was

supposed to pick up his girlfriend's children. (12 RT 1878, 1943-1945,

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[11] Claudeen acknowledged that she had been convicted of welfare fraud. (14 RT 2372, 2381-2382.)

[12] The parties stipulated that Annie Snowden was unavailable as a witness due to illness and that her preliminary hearing testimony (C RT 393-399) could be read to the jury. (14 RT 2433.)

1995.)[13] He did not know whether the children were supposed to get out of school at 2:30 or 3:00 p.m. (12 RT 1945-1946.) He had told 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.)

At the Lemoore freeway exit, Jackson noticed that the clock in his car read 4:00 p.m.; because the clock was set ten minutes ahead, it was actually 3:50 p.m. (12 RT 1878-1880, 1948-1957, 1994-1995, 2005.) Jackson went to Curry's house, probably to use the bathroom, but realized he had forgotten the house keys. (12 RT 1880-1883, 1996, 2006.) He left and drove past the spot where Curry's children were supposed to wait but, as he expected, they were not there. (12 RT 1884, 1996, 2001-2002.) Although he did not know where they were, he did not think about going to the babysitter's house to make sure that they were there. (12 RT 1996, 2001-2002.)

Jackson then stopped at the Food King and bought orange juice. (12 RT 1884-1885, 1996, 2000-2002, 2006.) He did not get a receipt nor was one offered. (12 RT 1885, 2000.) The cashier was an African-American woman whom he had seen before. (12 RT 1998, 2000.)

According to Jackson, following the transaction, and approximately two to five minutes after he had exited the freeway, he walked out of Food King to the parking lot, and saw appellant speaking to Maria. (12 RT 1886-1887, 1895-1899, 1901, 1908, 1919, 2000, 2006.) Appellant had his arm extended and was holding her hand. (12 RT 1889-1895.) Appellant had a mustache and was wearing aviator-style sunglasses, which were attached to

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[13] Although Jackson resided with Deanna Turney, his girlfriend was Kathy Curry. At the time of appellant's trial, however, Jackson was dating Turney. (12 RT 1994.)

a band, and a dark shirt with a circular emblem; the emblem, which had writing on it, was on the left side of the shirt. (12 RT 1901-1902, 1917-1919, 1922, 1978, 1982, 1984-1987.) Because appellant was Caucasian and the girl was Hispanic, and because of the obvious age difference between them, Jackson thought something did not seem right. (12 RT 1900.) As Jackson approached, appellant turned his head quickly and continued to talk to Maria and hold her hand. (12 RT 1902.)

Jackson arrived at his car, which was parked approximately 10 to 15 feet from appellant's pickup, a two-toned Chevy S-10 pickup, gray, silver or black on the bottom, with a red stripe. (12 RT 1920-1921, 1974-1975, 1979.) As Jackson was opening the door of his car, appellant stood up. A van partially obstructed Jackson's view of appellant, but Jackson claimed he was able to see appellant through the front and rear windshields of the van. (12 RT 1903-1904, 1981.)

Appellant walked several steps to the passenger door of his truck, with his arm extended out from his side. (12 RT 1907-1908.) He opened the passenger-side door of the truck. (12 RT 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.) As appellant was walking around the truck, the truck was moving as if someone were inside the vehicle. (12 RT 1916.) After Jackson backed out of the parking space, he no longer saw Maria. (12 RT 1913-1915.) He then returned to Visalia. (12 RT 1916, 2000-2001, 2003.)

Sometime later, he was watching television, flipping from station to station, when his girlfriend, Deanna Turney, told him to stop. A news

broadcast was showing footage of appellant being escorted by the police into Hanford, and she wanted to see the story. (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.) Turney told him that appellant was being brought to jail regarding something to do with a girl in Lemoore. (12 RT 1927, 1959.) Prior to that, Jackson asserted, he had not seen any stories regarding Maria. According to Jackson, he never watched the news. He only read the sports section of the newspaper, and always threw away the rest of the newspaper. (12 RT 1927.)

The picture of appellant jogged Jackson's memory slightly. (12 RT 1959.) After the news story ended, he told Turney that he had seen appellant before, but he did not know where. (12 RT 1926, 1928-1929, 1962.) The next morning, he saw a photograph of appellant in *The Visalia Times-Delta* and again realized he had seen him before. He drew a mustache and glasses on the photograph. (12 RT 1929-1931, 1960, 1967-1968.) He became certain that he had seen appellant before, but still did not know where. (12 RT 1931, 1962.) Nevertheless, he did not read the accompanying article to figure out where he may have seen appellant. (12 RT 1960-1961.)

Jackson did not become aware of the kidnaping until about two days later. (12 RT 1961.) During that time, Jackson continued trying to figure out where he had seen appellant. He had trouble sleeping, tossing and turning until 3:00 or 4:00 a.m. each night. (12 RT 1931-1932, 1963, 1966.) At some point, he suddenly realized that he had seen appellant in the Food King parking lot on March 27, 1995. (12 RT 1931-1932, 1966.)

About two or three days after drawing on appellant's photograph, Jackson told his girlfriend where he had seen appellant, and she prodded

him to call the police. (12 RT 1933-1934, 1976-1978.) He had not called the police before because he distrusted them and had had bad experiences with the police, even prior to his worker's compensation fraud case. (12 RT 1932-1933.) Prior to contacting the police, Jackson had never seen any photographs of Maria. (12 RT 1973.)

On May 10, 1995, Rick Bradford, who was then employed by the Lemoore Police Department, interviewed Mychael Jackson twice, once by himself and once with Officer Patrick Jerrold. (12 RT 1940; 13 RT 2169, 2172-2173; 14 RT 2415-2416, 2424-2426.) The information Jackson provided to Bradford and Jerrold was generally consistent with Jackson's testimony. However, it also differed from his testimony in significant respects. Jackson told the officers that he arrived in Lemoore at 4:00 p.m. (14 RT 2417, 2422.)[14] Although he described appellant's truck as two-toned, lighter on top and darker on the bottom, he could not specifically recall what those colors were. (13 RT 2169-2170.) Jackson did not mention that the truck had a red stripe or that appellant's sunglasses were attached to a band. (13 RT 2174-2175, 2177.) Jackson did not say that there was a circular insignia on appellant's shirt; instead, Jackson said that there was writing on the shirt. (13 RT 2177.) Jackson did not mention that there was something on the back of appellant's shirt. (14 RT 2416.) Jackson also told the officers that the Food King cashier offered him a receipt but threw it away because he did not want it. (14 RT 2417-2418.)

On June 9, 1995, a search of appellant's belongings produced a pair of dark sunglasses with a band on the back, and a blue tee-shirt with a

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[14] Jackson acknowledged at trial that he first told detectives that he arrived in Lemoore at approximately 4:00 p.m., but claimed he told the detective that he set his clock 10 minutes ahead. (12 RT 1949-1952, 1956.)

yellow or gold Notre Dame logo. (13 RT 2157-2161.)

On June 17, 1995, Officer Jerrold and Commander Morrell interviewed Jackson. During the interview, Jerrold told him that they were having problems with the times he had provided. (12 RT 1949, 2011; 14 RT 2418-2419.) For instance, Jackson initially said the clock was accurate, but was confronted with information that the Food King cashier had taken a break at 4:02 p.m. Later, Jackson told them that the clock was ten minutes fast. (14 RT 2419, 2421-2423.) At trial, Jackson denied he had been informed that there was a problem with the times he provided. (12 RT 1951-1952.) He acknowledged, however, that at the preliminary hearing, he testified that he had discovered the clock was ten minutes fast when he went to his car to look at the clock following the interview with Jerrold. (12 RT 1957.)

Sometime after the preliminary hearing, Jackson attended a re-enactment of the abduction. (12 RT 1999, 2010.) At that time, police showed him appellant's truck, tee-shirt and sunglasses. (12 RT 2010-2013.) At trial, Jackson claimed that, at the re-enactment, he introduced himself to the cashier, who said, "I remember you." (12 RT 1999.)[15] When confronted with the fact that the Food King had no record that he had purchased orange juice on that date, Jackson claimed that he paid for the juice, but the cashier did not ring up the purchase because she was too busy

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[15] Lowrey testified that she did not recognize Mychael Jackson and did not recall selling orange juice to him. (10 RT 1550.) Deputy Sheriff James Lewis also testified that, at the re-enactment, Jackson walked toward Lowrey and identified her as the cashier he purchased orange juice from, but she said she did not remember him and could not recall whether Jackson had been in the store. According to Lewis, Lowrey did not say she remembered Jackson. (13 RT 2311.)

looking and grinning at him. (12 RT 2007-2008.)[16]

According to Jackson, two nights before he testified, he had been interviewed once again, this time by Deputy District Attorney Burns, Investigator Lewis and Investigator Bingaman. (12 RT 2015.) While they showed him a series of newspaper articles, he drew sunglasses and a mustache on one of them, and had an emotional reaction – tears and goose bumps. (12 RT 2015-2016.)[17] Jackson denied that he himself was involved in her abduction. (12 RT 2007.)

Jackson's girlfriend, Deanna Turney, corroborated Jackson's testimony regarding how he came to realize that he had seen appellant with Maria in the Food King parking lot and to contact the police. (12 RT 2019-2033.) Jackson's wife, Claudeen Jackson, testified that he told her he had seen a man pick up a girl and put her in a brown truck in the Food King parking lot. (14 RT 2369-2370, 2378-2380.) Jackson's ex-girlfriend, Kathy Curry, corroborated his testimony that he was supposed to pick up her children but failed to do so. She also testified that he told her that he had seen appellant abduct Maria. (12 RT 2034-2040.) According to Curry, Jackson was upset as he was describing the incident, troubled by the fact that he could have saved her had he realized what was happening. (12 RT 2040.)

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[16] Lowrey testified that she usually scans rather than rings up store merchandise, even when she knows the price of an item. (14 RT 2457-2460.)

[17] Over defense objection, the trial court permitted the prosecutor to elicit the testimony of Deputy Sheriff James Gregory Lewis that, on January 21, 1997, he observed Mychael Jackson draw sunglasses and a mustache on a newspaper photograph of appellant, and that Jackson appeared to have goose bumps when he did so. (13 RT 2335-2346.)

Jackson denied seeking or receiving any benefit in exchange for the information he provided. (12 RT 1942-1943.) He claimed not to know that a reward had been offered in the case. (12 RT 2004.)

According to Turney, she had never heard Jackson request any reward in exchange for the information he provided. (12 RT 2028.) Deputy Lewis testified that he had been assigned to serve as the liaison between the investigative task force, the District Attorney's office, and Jackson. The prosecution had not asked him to offer money, legal assistance or other consideration to Jackson in exchange for information, nor had Jackson asked him for help in the case. (13 RT 2309.)

2. Evidence Regarding Appellant's Rental And Possession of Adult Material

All nine of the videotapes that appellant rented on March 27, 1995, were adult in nature. At Video World III, appellant rented three unrated "adult" videotapes. (10 RT 1572, 1576-1577; 14 RT 2399.) Although a store employee, John Bush, described the videotapes as "adult" films, he explained that they were in fact unrated and could be rented by persons under the age of eighteen; true adult films, on the other hand, are rated X, and one must be eighteen years or older to rent such a film. (10 RT 1572, 1577-1578.) Shortly thereafter, appellant rented three X-rated movies at Lee TV (12 RT 2101, 2103-2108, 2110) and three pornographic movies at Video Zone (12 RT 2112-2115).

On April 20, 1995, a law enforcement officer seized a number of magazine and videos from a storage unit rented by appellant. Exhibit 30, a box of magazines, represented perhaps 35% to 40% of those seized. (12 RT 2063-2065; 13 RT 2190-2195.) Exhibit 45 was a list of the magazines contained in Exhibit 30. (12 RT 2066-2067.)

In April, 1995, Bruce Ackerman was a Special Deputy United States Marshal, employed by the Postal Inspection Service. (12 RT 2021-2072.) At the request of law enforcement officials, he examined the magazines contained in Exhibit 30. (12 RT 2073.) Ackerman testified regarding his review of the physical characteristics of the females in the magazine photographs, and about sexually explicit poses depicted therein. (12 RT 2090-2099.)[18]

Ackerman also testified that he interviewed appellant aboard the aircraft carrier. Appellant acknowledged that he had purchased the magazines. He said that he did not know whether the females pictured in the magazines were younger than 18 years of age, but thought that they appeared to be. (12 RT 2076.) He also acknowledged that he had purchased the magazines because they were sexual in nature. (12 RT 2077.)

3. Testimony of Donna Holmes

Donna Holmes testified that she was appellant's sister, and that she was younger than appellant by two years. According to Donna, appellant began fondling her when he was five years old and she was three years old. (11 RT 1804-1806.) Over the course of the next fourteen years, appellant continuously engaged in incestuous conduct with her. (11 RT 1803-1834.)

In 1991, when both Donna and appellant were visiting their parents' home, she confronted him about the molestations. (11 RT 1827.) During the confrontation, appellant said he was sorry for what had happened and asked whether she could forgive him. (11 RT 1829.) He also told her that

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[18] Ackerman's testimony is summarized in detail in Argument III.D, *infra*.

one of the reasons he never got married was that he was afraid he might molest his own children. (11 RT 1830.)[19]

According to Donna, she saw appellant interact with children, including her own. (11 RT 1832.) Appellant was always playing with the children, touching them, and talking to them. He spent more time with the children than the adults. Children were always drawn to him and appeared to be at ease when talking to him. When appellant spoke to them, his voice was very quiet and soft. (11 RT 1833.)

4. Testimony Of Bruce Ackerman Regarding Appellant's Statements Concerning The Date Of Maria's Abduction

During his shipboard interrogation of appellant, Ackerman asked appellant about what he had seen in the Food King parking lot. (12 RT 2077.) Appellant stated that he was there to rent adult videos. (12 RT 2083.) According to appellant, he had rented videos at that store on many occasions – sometimes on a daily basis – but was able to pinpoint the date of this incident by relating it to the birth of his niece and the washing out of a bridge. (12 RT 2084-2085.) Appellant also stated that he drove to Bakersfield every week via Highway 99. (12 RT 2081-2082.)

Appellant told Ackerman that, as he was backing out of a parking space on the day in question, he saw a blonde woman in a two-door car, perhaps with two children. He also saw a man, possibly African-American, coming out of the store. (12 RT 2078-2080, 2086.) At that time, Ackerman did not know that an African-American male would turn out to be important

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[19] Donna's testimony regarding the incestuous conduct and appellant's statements during the 1991 confrontation are summarized in greater detail in Argument III, Sections B and C, *infra*.

to the case. (12 RT 2080.)[20]

Appellant appeared to clearly recall some details of the incident and did not recall others. (12 RT 2085.) Appellant was unable to remember where he had gone after renting the movies. (12 RT 2083.)

C. Testimony of Appellant

In March, 1995, appellant was a First Class Petty Officer in the United States Navy, in which he had served for 17 years. (14 RT 2461-2462.) He had been an aircraft mechanic for 17 years, and, at the time of his arrest, supervised custodial work on the ship. He had advanced in rank during his time in the military. (14 RT 2506-2507.)

On March 27, 1995, appellant drove from Fresno to Lemoore. (14 RT 2463, 2511-2512, 2518.) He arrived in Lemoore around 3:10 p.m. (14 RT 2463, 2517, 2539.) According to appellant, it was raining that day. (14 RT 2572-2573.)[21]

Appellant rented videotapes at Video World III, which was located in the same shopping center as the Food King. (10 RT 1572; 14 RT 2464-2465, 2517, 2533-2534.) He believed that, while he was at the shopping center, he had seen a black man come out of the video store and get into a car in which a white female and two children were sitting. (14 RT 2528-2530.) Appellant then picked up his mail at a post office in downtown Lemoore. (14 RT 2465-2466, 2532-2533.) He next went to Lee TV, where

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[20] Although the record is not clear, it appears that Jackson was African-American. (See 16 RT 2854-2855.)

[21] In rebuttal, Martin Veloz, manager of the Hanford office of the National Weather Service, testified that he reviewed climatological data for the Hanford area and determined that it did not rain there between March 25, 1995, and March 31, 1995. (15 RT 2633-2636.)

he rented another three movies. (14 RT 2466-2467, 2524-2526, 2535-2536.) Appellant then went to Video Zone in Lemoore, where he rented another three adult videos. (14 RT 2467-2468, 2537-2539.) He had not noticed anything amiss while he was at the Food King shopping center. (14 RT 2509.)

Appellant then returned to his apartment, stopping at a convenience store on the way. (14 RT 2468-2470, 2520-2521, 2540.) That evening, he watched all nine videotapes, fast forwarding through the movies, and went out to eat. (14 RT 2470-2471, 2514-2516, 2522.) He did not have anyone else at his apartment that evening. (14 RT 2471.) Appellant explained that every evening, he watched adult movies, read adult magazines, and went out to eat. (14 RT 2471, 2521, 2547-2548.) The following day, he returned videotapes to Video World III and rented three more, which he watched that night. (14 RT 2472-2473.)

Appellant first learned that Maria was missing on either March 30 or March 31. (14 RT 2508-2509.) Several days later, he realized that he might have been there on the day Maria was abducted. (14 RT 2510, 2512, 2567-2569.) He continued thinking about it. (14 RT 2512-2514, 2523.) He denied that he had watched television at Smith's apartment after Maria was taken, and denied that he had become agitated when he saw the news bulletin and fliers regarding Maria's disappearance. (14 RT 2477; 15 RT 2621-2622.)

Appellant shaved his mustache on April 6, 1995, when he was preparing to leave on the detachment. (14 RT 2473-2474, 2544-2545.) He had occasionally shaved his mustache over the years, and it was a coincidence that he shaved it at that time. (14 RT 2507-2508.) He finished moving out of his apartment on April 7, 1995. (14 RT 2542.)

Appellant agreed that he had been edgy on the cruise. However, he explained, he had just taken a new position and had a great deal of responsibility. If he succeeded, he would have been in line for a promotion. (14 RT 2550-2552.)

Appellant was not apprehensive about seeing Cacciaroni. (14 RT 2555.) When he arrived at her office, Cacciaroni and two other individuals were already present. Cacciaroni told him she was assisting Naval Air Station Lemoore's NIS team and the Lemoore Police Department on a case, and asked if he knew what that case might be. (14 RT 2555-2557.) He figured she wanted to question him about Maria's disappearance because he had rented videotapes at the shopping center where she had gone missing. Prior to leaving on the cruise, he had heard and read about her disappearance. (14 RT 2494-2496, 2558.) He did not think he could be of any assistance in the case. (14 RT 2559.) For about 16 days, he had been trying to figure out where he had been on March 27th. (14 RT 2552-2553.)

Appellant told Cacciaroni that he had rented three videotapes at Video World III sometime in the afternoon of March 27th. He described his car and suggested that he could be hypnotized to determine whether he had seen anything that might help in the investigation. (14 RT 2496, 2560, 2564.) He did not tell her he knew what apartment complex Maria was missing from and what street she walked down. (14 RT 2561.) The only part of the shopping center parking lot he was in was near the Video World III store. He testified that it was possible that he had seen Maria. (14 RT 2563.) Other than the fact that he had rented three adult movies at Video World III and that he traveled to Bakersfield every weekend, he had nothing else to offer. (14 RT 2496-2497.)

Appellant asked whether Maria had been found, and Cacciaroni

nodded in the affirmative. He may have then asked, "Was she dead, I presume?" (14 RT 2566.) Appellant admitted that he then started crying. He was concerned about the girl, and hearing that she was dead affected him emotionally. (14 RT 2566-2567, 2569-2570.) In addition, he was under a lot of stress. (14 RT 2569.) He had been following the story and praying that she would be found safe. (14 RT 2567.)

Cacciaroni then asked what he thought ought to happen to the person who did this, and he suggested that the laws in Washington were the best way to deal with such people. (14 RT 2570.) Appellant observed that Washington has stricter laws against child molestation than California. (14 RT 2549.)

Appellant acknowledged that he was nervous and shaking during the interview, and may have said, "I can't stop shaking." He admitted that he probably said, "I don't want to remember." (14 RT 2597.) He recalled saying, "Seriously, do you know for the last week – well, I put it out of my mind. Newspapers lying around with the story, been tempted to read them and I just say no." He explained that he was blaming himself because he may have seen something and perhaps could have saved her life. He also explained that he had not wanted to read any stories about the incident because he wanted to put it out of his mind. (14 RT 2598.)

On a later date, appellant returned to Cacciaroni's office after Claude Hudson reported to several co-workers, including appellant, that Maria's body had been found in Bakersfield. That news affected him greatly, and he went to her office to find out whether it was true. He told Cacciaroni that he felt paranoid and under suspicion. (14 RT 2497-2498, 2553, 2575.) This was because he had just told her that he was at the scene where Maria had been abducted and that he went to Bakersfield every weekend. He told

her he felt that everybody was pointing fingers at him and that he felt sick to his stomach. (14 RT 2575-2578.) Appellant denied saying that the Lemoore Police Department may have seen him in Bakersfield. (14 RT 2576.)

Appellant testified that no one accused him of committing the crime, interrogated him in a harsh manner, or accused him of hiding information. He also acknowledged that, during the interview, he was crying, shaking, rocking back and forth, and putting his head in his hands. (14 RT 2578-2579.) He asked if he was a suspect. As he recalled, Cacciaroni said no. He denied asking whether he was going to be handcuffed and taken to Hawaii. (14 RT 2579-2580.) He did not believe that he said, "I shouldn't be doing this to myself. It should never happen to anyone and I don't know after this." He suggested that Cacciaroni mistakenly had conflated two or three sentences. If he said "I shouldn't be doing this to myself," he meant he was punishing himself for not remembering whether he had seen Maria, when he may have had information that could have saved her life. (14 RT 2580-2582.) After leaving Cacciaroni's office, he prepared a map of the Food King parking lot and adjacent streets, which he showed her later that afternoon. (14 RT 2571.)

Appellant testified that the next time he saw Cacciaroni, which might have been when he passed her in a hallway, he may have told her that perhaps he should not talk to her at all. (14 RT 2583-2584.) They had no other discussion at that time. (14 RT 2585.) He did not tell her that he had heard that Maria had been walking from a residential area, or that she was walking by herself. (14 RT 2584.) He did tell her that "[y]ou should never let them out of your sight." (14 RT 2585.)

Appellant acknowledged that he had engaged in incestuous conduct

with his sister, Donna. It began when he was seven years old and she was about five, and ended when he was 17 and she was 15. (14 RT 2498-2499.) He never forced her to have sex, and never did it without her permission. Sometimes Donna initiated the incest. (14 RT 2499, 2586, 2591.) He testified that much of her testimony was false. (14 RT 2585.)

During appellant's 1991 conversation with Donna regarding their incestuous relationship, she told him that she had been molested by their uncle. Appellant revealed that for ten years he too had been molested by their uncle. (14 RT 2500-2501.) Donna said that she had also been molested by their grandfather. (14 RT 2501.)

Appellant realized that Donna had been affected by the incest, and asked her to forgive him. (14 RT 2501-2502, 2590.) He himself had started feeling guilty about it when he was a teenager, but he had gotten over it. (14 RT 2590.) He may have told her that he could handle the guilt and did not need counseling. (14 RT 2591.) He also may have told her that the reason he never married was in part because he felt he might molest his own children. That fear stemmed from the fact that he had read that individuals who have been molested usually go on to molest other children. (14 RT 2502.)

Appellant denied that, in 1995, he harbored a sexual interest in children. He observed that although Donna was a minor during the time of the molestations, he was only two years older than she. (14 RT 2502-2503.) He did not fixate on her because she was a child, and indeed the sexual contact continued even as Donna grew older. (14 RT 2503.)

Appellant testified that in March, 1994, which was when Angelica Ramirez was abducted in Visalia, California, he was stationed on Whidbey Island, in Washington. (14 RT 2446-2449, 2503-2505.) He denied having

anything to do with the disappearance and death of Maria Piceno. (14 RT 2505.)

Appellant also testified regarding the interview by Ackerman. (15 RT 2595-2612.) According to appellant, he was going to bed after a long workday when he was summoned to speak to Ackerman. (15 RT 2595.) The investigators made clear at the start that they wanted to talk to him about Maria Piceno, and asked him a lot of questions. (15 RT 2596.) He had been thinking about her disappearance for about a month. (15 RT 2596-2597.)

Appellant wanted to help the investigators and to remember as much as he could. (15 RT 2598, 2602-2603.) He recalled that he had been in Fresno the previous weekend to attend the birth of his niece. (15 RT 2606-2607.) He told them he thought he had seen a green Chevy truck, but later realized that he had seen it on another date. (15 RT 2599.) He also described his encounter with two boys in front of the video store, and said he may have also seen a jogger. (15 RT 2599-2601.) He did not reveal that he had gone to other video stores that day because he was embarrassed that he had rented nine adult videotapes in one day. (15 RT 2601-2606.)

When Ackerman asked where appellant was between 1:00 and 4:00 p.m. on the day of Maria's disappearance, he replied, "You guys can pin it down by the video store." He acknowledged that he lied in telling them that he did not remember anything else that happened that afternoon. (15 RT 2608-2609.) He described the route he would have driven to get to Bakersfield, and told them that he recalled being in the Poso Creek area twice, but never where the body was found. (15 RT 2609-2611.)

Appellant told Ackerman that he was interested in women. He did not recall saying, "I lost my sexuality, you know" or "I thought maybe,

okay, if I'd just go out and have sex with someone I'll be all right." He had no sexual interest in prepubescent children. (15 RT 2612.) His sister Donna was the only prepubescent child he was ever sexually attracted to. He did not have such an attraction for his other sister, who was even younger than Donna. (15 RT 2624.)

Appellant had had an extraordinary reaction to Maria's death. His reaction was stronger when he found out she was found in Bakersfield because he had just told Cacciaroni that he went there every weekend and had been in that area (i.e., the shopping center) on the day in question. He felt that he was under suspicion. (15 RT 2613.)

Appellant admitted that the magazines whose titles were introduced by the prosecution had belonged to him. (14 RT 2503.) He testified that he did not know why he was attracted to magazines such as those found in his possession, but again denied having any sexual interest in children. (15 RT 2613.) He admitted owning about 30 magazines with the words "teenage," "school girl," or "teener" in the title, but explained that he was attracted to 18- and 19-year-old women. If he were to be attracted to a minor, it would only be because she looked 18 or older. (15 RT 2614-2615.)

Appellant also testified about the period of his life when he lived on Whidbey Island, Washington. (14 RT 2478-2492.) Although Lisa Kuehne had stayed in his apartment while he was on a cruise, he did not recall her having left anything for him. (14 RT 2482-2483; 15 RT 2618.) He also testified that when he lived in a house with Kellie Carrion, he had a red shower curtain, then later a green one. (14 RT 2486-2490.)[22] When he

[22] Lisa Kuehne testified that appellant had red towels in his bathroom, but she did not recall his having had a red shower curtain or toilet cover. (13 RT 2270-2271, 2277.)

moved to Hanford, he used a green shower curtain and did not own any others. (14 RT 2490-2492.) He denied ever owning or possessing a shower curtain resembling the one shown in court. His friendship with Lisa Kuehne had ended because she refused to pay about $1500 that she owed him. They had an argument about it and, after she continued to refuse to pay him, he cut off the electricity to their residence and moved out. (15 RT 2615-2618.)

D. Penalty Phase

1. Victim Impact Testimony

Maria's mother, Arcelia Ferrel, testified through an interpreter that Maria was a good, noble child. She was also a very helpful and thoughtful daughter and sibling. (25 RT 3129-3130, 3132.) Ferrel testified that Maria was protective of her. (25 RT 3131.) Maria wanted to be a doctor when she grew up, to take care of children and older people. (25 RT 3130.)

On 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 looked at the dresses and showed her mother a picture of the wedding dress she wanted. Ferrel bought a similar dress to bury Maria in. (25 RT 3130-3131.)

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

Ferrel testified that she was very afraid and even hid under a bed out of fear. She was very angry that Maria had died, and felt as if her heart had been ripped out. She initially found it difficult to accept that Maria had died. In fact, she would not permit Maria's burial until she had been shown Maria's body. (25 RT 3134, 3140-3141.)

Ferrel stated that the most difficult thing was to live without her daughter. (25 RT 3134.) Moreover, she was so afraid for the safety of her other children and so oppressed by memories of Maria that she could not sleep, she had to move to another apartment, and she even started dressing her daughter Lucero as a boy. (25 RT 3134-3137.)

Ferrel testified that she continued to think of Maria, and how the killer changed the lives of her family. She had had nightmares ever since Maria died. (25 RT 3137-3140.) At the time of trial, she and Lucero were still in counseling. (25 RT 3140-3141.) Ferrel brought mementos of Maria, such as pictures and a pillow she had made, to court when she testified. (25 RT 3132.)

2. Mitigation Case

The defense presented a single witness at the penalty phase: appellant's mother, Anetta McCurdy. (25 RT 3144.)

Anetta testified that she and appellant's father, Bill McCurdy, had been married for 38 years. They were both from Oklahoma and married in Midwest City, Oklahoma. (25 RT 3145.) Bill and Anetta had four children, appellant (born in 1960), Donna (born in 1962), Jeff (born in 1965), and Christine (born in 1967). (25 RT 3135-3136.) Anetta worked as a waitress; Bill worked as a mechanic. (25 RT 3136.)

As a child, appellant was baptized in the Catholic Church and participated in the Boy Scouts. (25 RT 3143-3144.)

Except for one brief period, appellant's family faced constant financial hardship. Anetta maintained that, in California, even welfare recipients lived better than she and her family had when they were in Oklahoma. (25 RT 3146-3147, 3149, 3152.) Still, the family's hardship continued after they moved to California. (25 RT 3148.) The family had no extra money for presents, and Christmases were pretty tight. Appellant and his siblings would receive only small gifts, such as a pair of pajamas or shoes. (25 RT 3147.)

Appellant's parents tried to hide how poor they were from their children. So, after her children finished eating, Anetta ate whatever was left on their plates. (*Ibid.*) She and her husband did not want anyone to know that they did not have enough to eat, fearing their children would be taken from them. She acknowledged that she and Bill were young and proud, maybe "dumb Okies." (25 RT 3148.)

Anetta characterized her relationship with her husband and children as "all right." She claimed that the family had happy times despite having to live paycheck to paycheck. (*Ibid.*) The family got along with, and watched out for, one another. The children got along, but fought about things such as who had to take the trash out. They were average kids. (25 RT 3150.)

Appellant was a helpful son. He started working as soon as he could, 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 visited them when he could. (25 RT 3155, 3158.)

While he was in the Navy, appellant won a number of awards,

including a Naval Achievement Medal. Anetta did not learn of some of those awards until after his arrest, because appellant did not brag about them. (25 RT 3157-3160.)

Anetta testified as to the positive role appellant had played in his family. For instance, he was never cruel to his siblings or the family's pets. (25 RT 3150-3151.) Appellant became angry with his siblings, one of whom was a drug addict and another of whom was an alcoholic, because his parents were so upset about them. He tried to straighten them out because they were going the wrong direction. (25 RT 3151.)

Appellant was thoughtful and a comfort to his mother. (25 RT 3152, 3156.) After he joined the Navy, Christmases were better. Appellant always made sure that his siblings' children had something unique, and he was interested in their education. He ordered a children's book for one of his nieces. The book had her name printed in the text, which made her feel special. (25 RT 3156.)

Anetta, Bill, and appellant's siblings, Christine and Toby, were supportive of appellant. (25 RT 3157.) Since appellant's arrest, Anetta and Bill had visited him as often as possible. Other family members had visited him as well. Anetta and appellant continued to write to one another. (25 RT 3150-3152.) He was still a meaningful part of her life and she loved him. She intended to continue visiting and supporting him; she would be present at his death in the event he were to be executed. (25 RT 3150-3152.)

Appellant's plight was extremely difficult for the family. The ordeal had taken a toll on appellant's father's health. (25 RT 3163.) Both Anetta and her granddaughter were having nightmares, afraid that appellant would be put to death. (25 RT 3162.) Nothing could have prepared Anetta for

appellant's conviction of murder, but she had no doubt that he was innocent. (25 RT 3158-3159, 3161.)

Anetta testified that appellant had never caused any trouble or heartache, other than his involvement in this case. She wanted him to live, even if he were to be locked up for the rest of his life. (25 RT 3164.)

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I

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

A. Factual Background

On April 26, 1996, appellant filed a motion for change of venue. (1 CT 158.) Attached in support of the motion were sixty-one newspaper articles regarding the case. (1 CT 167-256.) The case was covered by local, regional, and even national print media as well as several Fresno-based network television affiliates. (1 CT 167-256 [newspaper articles]; 1 CT 8-11, 13-15, 37-38, 40-41, 292, 12 CT 3411, 13 CT 3661A [requests to conduct film and electronic media coverage, and attached orders granting requests].) In addition, the case reportedly was featured on a nationally syndicated television program, *America's Most Wanted.* (B RT 182-183, 195; 11 RT 1623, 1627, 1655; 14 RT 2567-2569.) The trial court heard the motion on May 6, 1996, and, the following day, denied the motion without prejudice to renew it. (1 CT 268-269; E RT (May 6, 1996, proceedings) 1-13; E RT (May 7, 1996, proceedings) 1-2.)[23]

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[23] Appellant is aware that the failure to renew a venue motion ordinarily waives a claim of error on appeal. (See, e.g., *People v. Hoover* (1986) 187 Cal.App.3d 1074, 1085.) Appellant submits, however, that it would have been futile to renew the motion, as the record demonstrates the trial court's firm intention to keep the trial in Kings County. (See *People v. Hill* (1998) 17 Cal.4th 800, 820 [appellate issue not waived for failure to object if objection would be futile].) During a hearing on a gag order imposed in the case, the trial court expressed skepticism that a change of venue would constitute a less burdensome alternative to a gag order. The trial court explained its concern that a change of venue would place an "undue burden upon [the] victims' right . . . to have the matter tried in an area where they have access to since they are also the ones to whom, I

The trial court's ruling was erroneous and violated appellant's rights to due process, equal protection, a fair trial and impartial jury, and a reliable determination of penalty. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16.)

B. A Change of Venue Was Required Under State Law And The Federal Constitution

Penal Code section 1033 provides in pertinent part that "[I]n a criminal action pending in the superior court, the court shall order a change of venue . . . to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." Where the issue is raised before trial, doubts should be resolved in favor of a venue change. (*Fain v. Superior Court* (1970) 2 Cal.3d 46, 54, 84; *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 875; see also *United States v. Cores* (1958) 356 U.S. 405, 407.)

On appeal, the reviewing court makes an independent determination of whether a fair trial was obtainable and reverses when the record discloses a reasonable likelihood the defendant did not have a fair trial. (*People v. Coffman* (2004) 34 Cal.4th 1, 44; see also *People v. Douglas* (1990) 50 Cal.3d 468, 495, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4 [the reviewing court must independently examine the record and determine de novo whether a fair trial is or was obtainable].) As this Court has repeatedly explained, in this context, a

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believe, at least in this Court's opinion, that the justice system is directed to resolve for" (A RT (June 23, 1995 proceedings) 21.) Appellant is aware of no such right (compare Cal. Const., art. 1, § 28), and certainly consideration of this "right" should not dictate the outcome of a venue analysis, where the factors to be used in guiding the trial court's ruling are well established. (See e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 45.)

"reasonable likelihood" means "something less than 'more probable than not,' and something more than merely possible." (See, e.g., *People v. Coffman, supra*, 34 Cal.4th at pp. 44-45, citing *People v. Bonin* (1988) 46 Cal.3d 659, 672-673; *People v. Frazier* (1971) 5 Cal.3d 287, 294.)

In conducting its de novo review, the reviewing court considers the following five factors: (1) the nature and gravity of the case; (2) the nature and extent of the media coverage; (3) the size of the community; (4) the status of the defendant in the community; and (5) the prominence of the victim. (*People v. Coffman, supra*, 34 Cal.4th at p. 45.)

Applying these factors to the instant case, it was plainly impossible for a fair trial to be had in Kings County.

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

The nature and gravity of the offense, capital murder, is a primary consideration in assessing whether a change of venue is necessary to provide a fair trial. (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 582.) The term "nature" refers to the "peculiar facts or aspects of a crime which makes it sensational, or otherwise bring it to the consciousness of the community." (*Ibid.*) The "gravity" of a crime is defined by its "seriousness in the law and the possible consequences to an accused in the event of a guilty verdict." (*Ibid.*) "Because it carries such grave consequences, a death penalty case inherently attracts press coverage; in such a case the factor of gravity must weigh heavily in a determination regarding the change of venue." (*Id.* at p. 583.)

The instant case involved the March, 1995, abduction and homicide of eight-year-old Maria Piceno. Maria had walked alone to a shopping center in Lemoore and was abducted a short time later. Approximately two

weeks later, her body was found in a creek approximately 90 miles from Lemoore. (1 CT 193, 196.)

Certainly these alleged offenses were inherently grave, and media coverage of such offenses almost inherently sensationalistic. As appellant noted in his motion, the apparently random abduction and murder of an eight year old girl, taken from a public place by an alleged stranger, is the kind of "crime that can present a fear of 'immediate danger to the public' which must judge the guilt and punishment of the accused. [Citation.]" (1 CT 162, original underscoring.)

Thus, the facts and circumstances of the case were so sensational and grave that a change of venue was required.

2. The Nature And Extent of the Publicity Called For A Change Of Venue

In *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363, the United States Supreme Court stated that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity." This Court has recognized that "[a] reasonable likelihood of unfairness may exist even though the news coverage was neither inflammatory nor productive of overt hostility." (*People v. Tidwell* (1970) 3 Cal.3d 62, 70.) Naturally, then, "[t]he goal of a fair trial in the locality of the crime is practically unattainable when the jury panel has been bathed in streams of circumstantial incrimination flowing from the news media." (*Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 878.) "When a spectacular crime has aroused community attention . . . the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief

in his guilt." (*Id.* at p. 877.)

As noted in the previous section, many of the articles contained inflammatory information, much of it inaccurate, that could not have come before the jury because it related to allegations that had been dismissed, to evidence that had been excluded, or to wholly separate and unrelated crimes, or because it was so patently inadmissible that the prosecution did not even attempt to introduce it.

The prejudice flowing from the media coverage took several forms. First, the media coverage of the case was so extensive, speculative and sensational as to completely undermine the likelihood of a fair trial in Kings County. (1 CT 163-164.) Indeed, a great majority of the jury venire members, including actual jurors, had been exposed to pretrial publicity regarding the case. (See, e.g., CT 1222-1223 [juror #4], 1240-1241 [alternate juror #2], 1258-1259 [juror #6], 1276 [alternate juror #4], 1294-1295 [juror #1], 1914 [juror #3], 1932-1933 [alternate juror #5], 1950 [alternate juror #3], 1969-1970 [juror #5], 2546 [juror #8], 2564-2565 [juror #11], 2582-2583 [juror #7], 2600-2601 [juror #2], 3308-3309 [juror #10], 3326 [alternate juror #1], 3344-3345 [juror #9]; 2nd Aug. CT 409-410 [juror #12]; 1 2nd Supp. Aug. CT 594-595, 612, 628-629, 664-665, 682-683, 700-701, 718-719, 736-737, 754-755; 772-773, 790, 808-809; 2 2nd Supp. Aug. CT 826-827, 862-863, 880-881, 898-900, 916-917, 934, 952-953, 970, 988-989, 1006, 1024-1025, 1042-1043, 1060, 1078-1079, 1096-1097; 3 2nd Supp. Aug. CT 1114-1115, 1132-1133, 1150-1151, 1168-1169, 1204-1205, 1354-1355, 1372, 1390, 1408, 1426-1427, 1444-1445, 1462, 1480-1481; 4 2nd Supp. Aug. CT 1499, 1553-1554, 1571, 1589-1590, 1607, 1625, 1644-1645, 1680-1681, 1698-1699, 1716-1717, 1734-1735, 1752-1753, 1770-1771, 1788; 5 2nd Supp. Aug. CT 1806-1807, 1824-1825, 1842, 1860, 1878-

1879, 1896-1897, 2040, 2058-2059, 2076-2077, 2094-2095, 2112-2113, 2130-2131, 2148-2149, 2166-2167; 6 2nd Supp. Aug. CT 2184-2185, 2202-2203, 2238, 2256-2257, 2274-2275, 2292, 2310-2311, 2328-2329, 2346, 2364, 2382-2383, 2400-2401, 2437-2438, 2455-2456; 7 2nd Supp. Aug. CT 2474-2475, 2492, 2510-2511, 2528-2529, 2661-2662, 2679-2680, 2697-2698, 2715-2716, 2733-2734, 2751, 2787-2788, 2805-2806, 2823-2824, 2841; 8 2nd Supp. Aug. CT 2842, 2859, 2877-2878, 2895-2896, 2913-2914, 2931-2932, 2949-2950, 2967-2968, 2984, 3002-3003, 3020-3021, 3038-3039, 3056, 3074-3075, 3092-3093, 3109-3110, 3127-3128; 9 2nd Supp. Aug. CT 3145-3146, 3163-3164, 3182-3183, 3200, 3218, 3236-3237, 3254, 3272-3273, 3290-3291.) Further, a number of the venire members stated that something they had read or heard had caused them to conclude that appellant was or probably was guilty (1 2nd Supp. Aug. CT 595-596, 701; 2 2nd Supp. Aug. CT 828, 882, 936, 1043-1044; 3 2nd Supp. Aug. CT 1134, 1170, 1206; 4 2nd Supp. Aug. CT 1590, 1681-1682, 1753; 5 2nd Supp. Aug. CT 2059-2060, 2077-2078; 6 2nd Supp. Aug. CT 2203-2204, 2220-2221, 2293-2294, 2384; 7 2nd Supp. Aug. CT 2698; 8 2nd Supp. Aug. CT 2843, 2896-2897, 2915, 2968, 3004; 9 2nd Supp. Aug. CT 3146-3147, 3164, 3237-3238, 3291), or that he deserved the death penalty (1 2nd Supp. Aug. CT 791; 2 2nd Supp. Aug. CT 899, 917; 4 2nd Supp. Aug. CT 1590-1591; 8 2nd Supp. Aug. CT 2843).

Second, other articles were extremely prejudicial in that they contained opinions by law enforcement officials and others that appellant was guilty of the offenses. Again, 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." (1 CT 168.) Another article put forth an uninformed, wholly speculative, but nevertheless devastating

psychological "profile" of appellant, which suggested that his quiet, nondescript life was a classic trait of someone involved in crimes such as those charged against him. (1 CT 235.) Finally, the media reported that appellant was considered a "strong suspect" in the Ramirez case (1 CT 217) and authorities attempted to link appellant with several other slayings involving juvenile victims in both California and Washington (1 CT 217, 222-223, 228, 230-231, 235-238, 247-249).[24]

Third, much of the media's attention was placed on the more lurid yet largely irrelevant aspects of the investigation. For instance, a number of articles related information that appellant had molested his sister over a period of about 13 years and that she suspected his involvement in Maria's abduction and murder. (1 CT 178, 180-181, 184, 195, 207.) One article stated that appellant's sister testified at the preliminary hearing that "her stomach turned when she learned that Maria's body had been found near Poso Creek, an area where the McCurdy family lived when she was a child." (1 CT 180-181.) Another article reported that she testified she had "had an overwhelming feeling" that appellant was involved in the abduction-murder. (1 CT 178.) Similarly, a number of news reports stated that the police had recovered sexually explicit materials belonging to appellant, including magazines and videotapes, some of which allegedly depicted females under the age of 18, books, photographs of children, a computer disc and a computer game. (1 CT 177, 232, 234, 238, 242, 244-245, 252.)

Fourth, a number of articles stated that appellant was accused of

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[24] There is nothing in the record to suggest that appellant had any connection whatsoever to any other homicides.

kidnaping, raping, and sodomizing Maria and committing lewd and lascivious acts before murdering her (1 CT 168-169, 184-185); however, of those crimes, the prosecution ultimately charged appellant only with kidnaping for the purpose of committing an act defined in Penal Code section 288 (2 CT 513-514).[25] And, as noted in Argument III, there was no evidence that Maria had been sexually molested.

Fifth, a number of articles purported to reveal appellant's statements to law enforcement officials, most of which were suppressed by the trial court. (1 CT 168-169, 184-185, 190-191.) For instance, according to one article, an unidentified Kings County law enforcement official described a portion of the interrogation as follows:

> [The official] told of a line of discussion during initial police interviews where a 'good Gene, bad Gene' scenario was allegedly played out. Under that scenario McCurdy allegedly says if 'the bad Gene' were in charge on March 27, the day Maria was abducted, he would have kidnapped her, taken her to his apartment in Hanford, molested her, raped her, sodomized her and then killed her. 'He basically admitted to everything,' the Kings County law enforcement official said.

(1 CT 168.)[26] According to another article, transcriptions of appellant's statements to law enforcement officials "were riddled with statements that

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[25] Although the initial complaint alleged that the murder was committed while appellant was engaged in the commission or attempted commission of rape (§ 190.2, subd. (a)(17)(C)), sodomy (§ 190.2, subd. (a)(17)(D)), and lewd and lascivious acts with a child under 14 (§ 190.2, subd. (a)(17)(E)), those special circumstances were not charged in either the information or amended information. (A CT 1-2; 1 CT 3-4, 6-7; 2 CT 513-514.)

[26] As the defense noted, the Kings County official made this comment in defiance of a "gag order" imposed by the court. (1 CT 164.)

suggest McCurdy felt guilty about the girl's abduction and death." (1 CT 188.)

Sixth, a number of articles described sexually explicit items which were never mentioned, let alone introduced into evidence, at appellant's trial. According to media reports, the items seized from appellant's storage unit included the following: photographs of two children, one of whom was wearing only underwear; videotapes labeled "Kristin," "Lita," "Lita – A Midnight Snack," and "Lita – Dangerous Videos, Vol. 1;" a computer disc titled "Madame Ching's House of Pleasure" and a computer game titled "Sorcerers Get All the Girls." (1 CT 177, 232, 234, 238, 242, 244-245, 252.) A review of the record reveals no mention of any of these items except in the newspaper articles themselves.

Seventh, several articles reported allegations that appellant possessed or duplicated pornographic videotapes featuring Traci Lords, an actress who, as later disclosed publicly, was a minor at the time the films were produced. (1 CT 174, 182, 186, 193, 196, 214, 230-231, 233.) All charges relating to those videotapes, however, were either dismissed or severed prior to appellant's trial. (A CT 84; 1 CT 148.) Moreover, one of the articles characterized the matter in such a way as to suggest inaccurately that appellant may have actually filmed the "pornographic videotape of a minor." (1 CT 227.)

Eighth, a number of articles reported that, at the preliminary hearing, appellant's sister testified that she not only had endured 13 years of sexual abuse by appellant, but that she suspected he was involved in Maria's abduction and murder. (1 CT 178, 180-181, 184, 195, 207.) The trial court specifically ruled that her testimony regarding her suspicions was inadmissible. (10 RT 1437-1438.)

Ninth, certain articles were inflammatory in that they aroused sympathy for Maria's family. For instance, one article noted that Maria's mother "was sobbing and crying in Spanish 'My baby, My baby' as she left the court." (1 CT 168.) Other articles concerned the fact that Maria's mother was unaware that her daughter's body was to be exhumed. (1 CT 250, 255.)

Finally, the emotionally charged atmosphere surrounding the instant case was intensified by the disappearances and murders of two other young girls, Angelica Ramirez and Tracy Conrad. (1 CT 164.) Indeed, the three cases were often discussed in relation to one another, and both law enforcement and the defense tried to determine whether any of the cases were linked. (1 CT 170-173, 199-200, 208-209, 211-212, 213, 215, 225-226.)[27] More important, a sense of fear pervaded the community, as expressed by several participants in a memorial vigil for Maria Piceno:

(1) "'It's really getting scary here,' said vigil participant Salvador Morales of Hanford. 'It's hard to trust anyone nowadays. You can't tell just by looking at someone who wants to hurt or even take a kid.'"

(1 CT 211.)

(2) "'People are being arrested, but we're still having children

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[27] Ramirez was abducted and disappeared from a Visalia, California, swap meet in March, 1994. Her body was found in a drainage ditch days later. She had been strangled and molested. Conrad disappeared in March, 1996, and was found several days later in a ceramic kiln. A Lemoore resident, Kevin Galik, was later arrested in connection with her abduction and murder. (1 CT 170-173, 199-200, 208-209, 211-212, 213, 215, 225-226.) As far as appellant is aware, the Ramirez case remains unsolved. (See Rowley, *Girl's '94 Slaying Haunts Officers*, Tulare Advance-Register (Mar. 25, 2004) p. 1A.)

killed,' said one participant who requested not to be named."

(1 CT 212.)

(3) Angelica Ramirez's mother stated, "It's not fair what happened to these girls . . . These people are crazy. Until something is done about these people, they'll do it next year, too."

(*Ibid.*)

(4) Maria Piceno's mother charged, "Gene McCurdy is an animal, an animal of the worst kind, an animal that preys on little children. . . . There is no doubt in my mind he did it."

(*Ibid.*) Another article commented, "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." (1 CT 217, 219.) A Hanford newspaper editorial noted that "the public imagination, starved for researched information, invented numerous bizarre tales. The media, unable to do its job of checking and reporting the facts [due to a gag order], couldn't help to dispel rumors. So they ran rampant." (1 CT 213.) A prospective juror recalled seeing newspaper photographs showing a crowd of people shouting outside the jail when appellant was taken there. (9 RT 1360, 1365.)

Media coverage concerning appellant's case continued through the time of his trial. (See, e.g., Galvan, *Jury Deliberates McCurdy's Fate: Closing Arguments Give Vastly Different Portrayals of Defendant*, The Fresno Bee (Jan. 30, 1997) p. B1; Galvan, *McCurdy Takes Stand, Claims Innocence*, The Fresno Bee (Jan. 28, 1997) p. A1; Galvan, *McCurdy Witness Stands By His Story: Mychael Jackson Says He Saw Suspect Gene McCurdy Put Maria Piceno In His Truck*, The Fresno Bee (Jan. 24, 1997)

p. B1; Galvan, *McCurdy's Sister Relates Abuse: From The Time They Were Children, She Says He Molested Her*, The Fresno Bee (Jan. 23, 1997) p. B1; Galvan & Uribes, *Waiting For a Miracle: Rene's Parents Keep Vigil*, The Fresno Bee (Mar. 15, 1996) p. A1.) Even Todd Barton, the Kings County Superior Court executive officer designated as the sole media contact, acknowledged that "[t]his is a high-profile case and will be conducted under tight security . . . There are a lot of emotions involved, and we want to provide security to the public." (1 CT 177.)

Thus, consideration of the nature and extent of the publicity favored a change of venue.

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

The size of the community from which the jury pool was selected is relevant in assessing the impact of the press coverage. (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 581.) "In a small town, in contrast to a large metropolitan area, a major crime is likely to be embedded in the public consciousness with greater effect and for a longer time." (*Ibid.*)

For the purpose of venue analysis, Kings County was a small community. 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.) It is a rural county, far from any major city. (1 CT 162.)

This Court has described a community of this size as "relatively small . . . by California standards." (See, e.g., *People v. Williams* (1989) 48 Cal.3d 1112, 1126-1129 [trial court's denial of venue motion constituted reversible error in light of "relatively small" size of Placer County (i.e., 117,000) and other factors]; *Martinez v. Superior Court*, *supra*, 29 Cal.3d at

p. 581 [Placer County, with a population of 106,500, was too small to dissipate the effects of extensive pretrial publicity]; *People v. Frazier*, *supra*, 5 Cal.3d at p. 293, fn. 5 [same (Santa Cruz County, population 123,790)]; *Corona v. Superior Court*, *supra*, 24 Cal.App.3d at p. 875.) Even communities significantly larger than Kings County have been deemed too small to dissipate the effects of pretrial publicity. (See, e.g., *Fain v. Superior Court*, *supra*, 2 Cal.3d at p. 52 [Stanislaus County, population 184,600]; *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623, 626-627 [San Mateo County, population of almost 600,000].)

Thus, consideration of the size of the community favored a change of venue.

4. Appellant's Status Within the Community Called For A Change Of Venue

As appellant noted in his motion:

> [T]he defendant [was] in the community only by virtue of being stationed at the Lemoore Naval Air Station. He has no ties to the community, no family or friends here, and before his arrest was essentially an unknown person in the community. Thus, he is "friendless in a small community" where the "occurrence of the crime was probably fortuitous as to locale.]

(1 CT 162-163, quoting from *Maine v. Superior Court* (1968) 68 Cal.2d 375.) There can be no doubt that appellant became a pariah, not only in Kings County but elsewhere in the Central Valley. (See, e.g., Grossi, *Few in Wasco recall McCurdy and prefer not to think of him*, The Fresno Bee [1 CT 221, 223].) Indeed, appellant's infamy was such that a distant relative in Wasco received "dozens of phone calls and a death threat." (1 CT 221.)

The record indicates that when appellant was returned to Kings County following his arrest, a large, hostile mob awaited him at the Kings

County Jail. (See 9 RT 1360, 1365.) As one reporter observed, "[i]nsults and jeers were hurled as McCurdy passed by a crowd who gathered to watch the spectacle," as appellant arrived at the jail, clad in a bullet-proof vest. (1 CT 225-226.) Another commented, "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." (1 CT 217, 219.)

Thus, appellant's status within the community favored a change of venue.

5. The Prominence of the Victim Called For A Change Of Venue

"The victim's status in the community counts as a factor in assessing the risks of prejudice arising from a trial in the community." (*Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 584, citing *Maine v. Superior Court*, *supra*, 68 Cal.2d at p. 385.) Although Maria Piceno had been an anonymous member of the community when alive, her death gave rise to an outpouring of sympathy and grief within the community, and she became very prominent posthumously. (1 CT 163.)

Kings County residents and law enforcement officials conducted a "massive" search following her disappearance. (1 CT 254.) One article noted that "[f]or two weeks, volunteers and local police scoured the countryside for little Maria." (1 CT 211-212.) More than 100 Kings County residents attended a candlelight vigil held in Maria's memory on the anniversary of her disappearance. (1 CT 211-212.)

Accordingly, this factor also favored a change of venue.

C. The Trial Court's Denial of The Venue Motion Was Prejudicial

In *Martinez v. Superior Court*, *supra*, 29 Cal.3d at p. 574, this Court held that the trial court erred in denying a motion for a change of venue based upon the fact that there was extensive publicity covering the case for a one-year period prior to the venue motion, the community in which the case was tried was relatively small in size (population 106,500), and the accused faced a capital charge. The facts of this case presented an even stronger case for a change of venue.

The charges relating to the abduction and homicide were inherently grave and sensational, and the media coverage was lurid, often inaccurate, and included a great deal of information that did not or could not have come before the jury. Media coverage of the case was generated over a period of almost two years prior to appellant's trial. The victim was an eight-year-old girl whereas appellant essentially was a stranger to the community, and the disappearances and murders of two other little girls intensified the atmosphere of hysteria surrounding the case. The convergence of all these factors made a fair trial in Kings County impossible.

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

II

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

A. Introduction

Appellant moved to suppress statements he made to law enforcement officials during a coercive, "nearly continual" custodial interrogation which took place from April 30, 1995, through May 3, 1995. (1 CT 47-57; 12 CT 3367-3369.) The trial court granted the motion in part, finding that from a certain point in the interrogation on, appellant's statements were involuntary. (1 CT 91; E RT (Mar. 13, 1996, proceedings) 1-17.) With respect to the suppressed statements, the trial court found that the interrogators "transcended the bounds of permissible police conduct," in that 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 noncooperation and implied promises of leniency for cooperation.

(E RT (Mar. 13, 1996, proceedings) 15-16.) The trial court also found that instances of "borderline conduct," which taken individually would not render a statement involuntary, but would tend to support a finding of involuntariness, were too numerous to mention. (*Id.* at pp. 12-15.)

However, the trial court found that, up until the previously mentioned point, appellant's statements were voluntary. As described in greater detail in Section B.2, *infra*, the trial court divided into four sections the part of the interrogation that it found to be voluntary. The court ruled that the initial section of the interrogation occurred without benefit of any

"*Miranda* warning."[28] Nevertheless, the trial court found that section of the interrogation to be admissible in light of the supposedly non-incriminating nature of appellant's statements and the fact that he was subsequently given a *Miranda* warning. (*Id.* at p. 2.) The trial court found that the second section of the interrogation was also admissible, concluding that, after the warning was given, appellant implicitly waived his *Miranda* rights. (*Id.* at pp. 2-3.) The trial court found that the third section of the interrogation began when appellant clearly asserted his right to counsel; the trial court, however, also found that appellant implicitly waived his *Miranda* rights by re-initiating the conversation. (*Id.* at pp. 4-8.) The trial court found that the fourth section of the interrogation was obtained in violation of *Miranda* and therefore could not be used in the prosecution's case in chief but, because it was voluntary, could be used to used to impeach appellant if he were to testify. (*Id.* at pp. 8-17.)

A review of the record demonstrates that the trial court's rulings were erroneous. The statements from the first, second and third sections of the interrogation were obtained in violation of *Miranda*: there was no *Miranda* warning in the first section and no implicit waiver of *Miranda* in the second and third sections. Moreover, the law enforcement officials conducted the *entire* interrogation in an unlawfully coercive fashion, rendering involuntary all of appellant's statements, including those not suppressed by the trial court. Therefore, the trial court erred in admitting appellant's statements.

As a result of the trial court's error, the prosecution unfairly and prejudicially used appellant's statements as, among other things,

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

consciousness of guilt evidence. Moreover, the trial court's error was prejudicial to the extent the trial court found that appellant's statements were found to have established probable cause for his arrest, which led directly to the discovery of Mychael Jackson and the admission of his testimony.

Consequently, the trial court's erroneous admission of appellant's statements violated appellant's right against self-incrimination, and his rights to counsel and to due process, and compels reversal of the guilt verdicts, the kidnap-murder special circumstance, and the death sentence. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15; *Missouri v. Seibert* (2004) 542 U.S. 600; *Miranda v. Arizona*, *supra*, 384 U.S. 436; *Wong Sun v. United States* (1963) 371 U.S. 471; Evid. Code, § 940.)

B. The Trial Court Erred In Partially Denying Appellant's Motion To Suppress His Statements

1. Legal Standards

The Self-Incrimination Clause of the Fifth Amendment guarantees that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., Amend. V.) The Clause, applicable to the states through the due process clause of the Fourteenth Amendment, bars the introduction in criminal prosecutions of involuntary confessions and other statements made in response to custodial interrogation. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 460-464.)

Recognizing that any statement obtained by an officer from a suspect during custodial interrogation is potentially involuntary because such questioning may be coercive, the United States Supreme Court has held that such a statement may be admitted in evidence only if, prior to taking the

statement, the officer advises the suspect of both his right to remain silent and the right to have counsel present at questioning, and the suspect waives those rights and agrees to speak to the officer. (*Id.* at p. 479.) If the suspect indicates that he does not wish to speak to the officer, the interrogation must cease. If he requests counsel, the interrogation must cease until counsel is present. (*Id.* at p. 474.) As the high court explained, "[a] *Miranda* warning functions both to reduce the risk that an involuntary or coerced statement will be admitted at trial and to implement the Fifth Amendment's self-incrimination clause." (*Id.* at pp. 457-458.)

To ensure that officials scrupulously honor a suspect's right to counsel, the high court has established the stringent rule that an accused who has invoked his right to counsel cannot be subjected to further interrogation unless and until he (1) "initiates" further discussions relating to the investigation, and (2) makes a knowing and intelligent waiver of the right to counsel. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045; *Edwards v. Arizona* (1981) 451 U.S. 477, 485-486; *People v. Peevy* (1998) 17 Cal.4th 1184, 1199-1200.) Similarly, where the suspect has asserted his right to remain silent, and has not made a "knowing and intelligent" waiver of that right (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 471), police officers may not resume interrogating him unless they have scrupulously honored that right. (*Michigan v. Mosley* (1975) 423 U.S. 96, 104.)

The failure to give a *Miranda* warning creates an irrebuttable presumption of coercion for the purposes of admissibility in the prosecution's case in chief, but any "patently voluntary" unwarned statements may be used for impeachment. (*Oregon v. Elstad* (1985) 470 U.S. 298, 307.) Moreover, where the interrogators employ a "question first" strategy, even statements made following a *Miranda* waiver may be

found inadmissible. (*Missouri v. Seibert*, *supra*, 542 U.S. at pp. 615-616; *United States v. Williams* (9th Cir. 2006) 435 F.3d 1148.)

A statement is involuntary if the "defendant's will was overborne" by the circumstances surrounding the giving of the statement. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; see also *People v. Sanchez* (1969) 70 Cal.2d 562, 572.) In deciding the question of voluntariness, the high court has directed courts to consider "the totality of the circumstances." (*Withrow v. Williams* (1993) 507 U.S. 680, 693-694; see also *People v. Williams* (1997) 16 Cal.4th 635, 660.) Relevant are "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity [citation]; the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health [citation]." (*Withrow v. Williams*, *supra*, 507 U.S. at pp. 693-694; see also *People v. Williams*, *supra*, 16 Cal.4th at pp. 659-660.) "Interrogation tactics need not be violent or physical in nature to be deemed coercive. Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." (*Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416 (*en banc*).) The burden is on the prosecution to prove the voluntariness of a statement by a preponderance of the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 404.)

This Court independently reviews the trial court's ruling regarding whether a defendant invoked his *Miranda* rights (see *People v. Ashmus* (1991) 54 Cal.3d 932, 969, abrogated on another ground in *People v. Yeoman* (2003) 31 Cal.4th 93, 117) and whether his statements were voluntary (*People v. Neal* (2003) 31 Cal.4th 63, 80).

2. Factual Background

Evidence presented at the hearing on the suppression motion and at

the preliminary hearing established that on April 30, 1995, a team of law enforcement officials (Special Deputy United States Marshal Bruce Ackerman, Lieutenant Mark Bingaman of the Kings County Sheriff's Office, Naval Investigative Service Agent Mike Devine, and Commander Kim Morrell of the Lemoore Police Department) boarded the naval ship on which appellant was stationed for the purpose of questioning him. (B RT 7, 167; C RT 308-309; D RT (Jan. 19, 1996, proceedings) 19-20; D RT (Jan. 22, 1996, proceedings) 233.) The ship was then at sea, some distance from Japan. (C RT 308-309, 322.) The investigation team did not have an arrest warrant at the time they boarded the ship, but Bingaman claimed at the suppression hearing that he believed they had probable cause to arrest appellant at that time, based on the totality of the information they had collected. (D RT (Jan. 19, 1996, proceedings) 19, 49-50.)

Prior to interrogating appellant, Bingaman, Ackerman and Devine discussed what they should do in the event appellant asserted his *Miranda* rights. They agreed that if he did assert his rights, their efforts would be in vain. At the suppression hearing, Bingaman claimed not to recall whether they decided to continue questioning appellant even if he invoked his rights. (D RT (Jan. 19, 1996, proceedings) 54-56.)

The interrogation began at approximately 10:00 p.m. on April 30, 1995, and ended at approximately 4:00 a.m. on May 1, 1995. (C RT 308-309, 319, 321, 323, 327; D RT (Jan. 19, 1996, proceedings) 20, 23, 56, 59, 95, 111.) The interview was essentially continuous until about 2:00 a.m., when appellant was left alone for about 20 minutes while the investigators consulted with one another. (D RT (Jan. 19, 1996, proceedings) 65, 95.)

Although the trial court divided the portions of the interrogation challenged here into four sections, and analyzed each section separately, it

did so solely to explain its rulings. These sections represented an analytical construct, and did not reflect breaks in the interview.[29]

a. First Section Of The Interrogation[30]

At approximately 10:00 p.m., appellant was escorted to an interview room by naval officers.[31] On the orders of the ship's commanding officer, appellant was in restraints. Ackerman and Bingaman began interrogating appellant, and they were later joined by Devine. (C RT 308-310, 319, 321, 323, 327, 330-334; D RT (Jan. 19, 1996, proceedings) 20, 22-23, 56, 59, 95.) Bingaman considered the interrogation to be custodial in nature, and, in his judgment, appellant was not free to leave. (C RT 310; D RT (Jan. 19, 1996, proceedings) 22.)

The interrogation took place in a room so small that no more than two to four people fit inside at the same time. (C RT 308-309, 320; D RT (Jan. 19, 1996, proceedings) 21; D RT (Jan. 22, 1996, proceedings) 155.) At various times, each of the four law enforcement officials also monitored

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[29] The interview transcripts were prepared and compiled in a haphazard fashion. (See D RT (Jan. 22, 1996, proceedings) 213, 244.) The interview of April 30 and May 1, 1995, appears in the following order: (1) Exhibit 1A (comprised of three sections, numbered as pages 1 through 56, 1 through 49, and 1 through 6, respectively); (2) Exhibit 1B (pages 7 through 45); (3) Exhibit 1C; and (4) Exhibit 1D. The interview of May 2, 1995, appears in the following sequence: (1) Exhibit 1E; (2) Exhibit 1F; (3) Exhibit 1G; (4) Exhibit 1H; and, (5) Exhibit 1I. The interview of May 3, 1995, appears in the following sequence: (1) Exhibit 1J; (2) Exhibit 1K; (3) Exhibit 1L; (4) Exhibit 1M; (5) Exhibit 1N; (6) Exhibit 1O; and (7) Exhibit 1P. (See D RT (Jan. 19, 1996, proceedings) 61-62, 116-118.)

[30] The transcript of the first section of the interrogation is contained in Exhibit 1A, pp. 1-13. (3 Aug. CT 633-645.)

[31] Both Ackerman and Devine recalled that appellant had already worked a full shift that day. (D RT (Jan. 22, 1996, proceedings) 214, 239.)

the interrogation from just outside the room. (C RT 343-344; D RT (Jan. 19, 1996, proceedings) 21-22; D RT (Jan. 22, 1996, proceedings) 236, 242.)

The investigators introduced themselves, explaining that they were members of a task force. Ackerman stated that "Carol" (i.e., Special Agent Carole Cacciaroni) told them that appellant had been helpful, and that "we want these to stop, so we assume you do to [sic]." (Exhibit [hereafter "Exh."] 1A, p. 1; 3 Aug. CT 633.) Appellant replied, "Yes." He then stated, "Uh, to tell you the truth uh, last time I talked to her (inaudible) I've been trying to put it out of my mind . . . So much stress, uh." (*Ibid.*) Ackerman told appellant that he was one of a number of people on the ship whom they needed to interview. (Exh. 1A, p. 2; 3 Aug. CT 634.) After eliciting information about appellant's background (Exh. 1A, pp. 1-10; 3 Aug. CT 633-642), Ackerman asked whether appellant had any significant information, and asked that he tell them how he "view[ed] things" (Exh. 1A, at pp. 10-11; 3 Aug. CT 642-643). Appellant asked for water. (Exh. 1A, p. 12; 3 Aug. CT 644.)

b. Second Section Of The Interrogation[32]

After further discussion, and without taking a break, Bingaman finally gave a *Miranda* admonition. (Exh. 1A, p. 13; 3 Aug. CT 645.) Appellant responded, "They always tell you to get a lawyer. I don't know why." (Exh. 1A, p. 14; 3 Aug. CT 646.) At that point, the interrogators did not cease the interrogation or ask appellant to clarify whether he was invoking his right to counsel. Instead, Ackerman replied that they could not advise him, but were concerned with getting his help because they believed

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[32] The transcript of the second section of the interrogation is contained in Exh. 1A, p. 13, through Exh. 1A, second p. 19. (3 Aug. CT 645-707.)

he could help them. Appellant explained that he felt like a suspect because he had been going to Bakersfield every weekend and was in the area (i.e., near Food King) when Maria was taken. Ackerman then assured appellant that "we're trying to help you." (*Ibid.*)

Appellant informed the interrogators that he was having difficulty breathing, and Ackerman then urged him to take deep breaths and said he was not mad at appellant. (Exh. 1A, p. 16; 3 Aug. CT 648.) Ackerman reiterated that he believed appellant might have helpful information. (Exh. 1A, pp. 16-17; 3 Aug. CT 648-649.) Appellant responded that he feared he would realize he had seen something he could have stopped, and that it would be difficult to live with this knowledge. (Exh. 1A, p. 17; 3 Aug. CT 649.)

Ackerman urged appellant to recount his activities on the day of the crime. (Exh. 1A, pp. 17-18; 3 Aug. CT 649-650.) Appellant said he could not stop shaking. (Exh. 1A, p. 18; 3 Aug. CT 650.) Appellant stated that sometime between 1:00 p.m. and 4:00 p.m. he rented videotapes at the Food King shopping complex. After leaving the video store he went to the post office. (Exh. 1A, pp. 19-34; 3 Aug. CT 651-666.) Appellant did not know whether he had seen Maria. (Exh. 1A, p. 13; 3 Aug. CT 656.)

At some point, Ackerman suggested, "[I]t's obvious to me in, in when you talk about it, not wanting to think about stuff that there's something that your mind is telling you, you need to think about." (Exh. 1A, p. 35; 3 Aug. CT 667.) Appellant replied that hypnosis might reveal that he had seen something, perhaps in his peripheral vision. (*Ibid.*)

Ackerman then asked appellant where Maria lived. After appellant answered that he did not know, Ackerman stated, "Well you have an idea in your mind. Sometimes you'll see things you know, leave an image in your

mind and you won't bring it up to your conscience, but your subconscience [sic] will kind of nudge like a fleeting image across your mind type thing." (Exh. 1A, p. 36; 3 Aug. CT 668.) Appellant continued trying to recall what he had seen and done around the time Maria was abducted. (Exh. 1A, p. 36-49; 3 Aug. CT 668-681.) During that time, appellant told Ackerman that he could not relax and that he wanted a cigarette, explaining that he had quit smoking two weeks earlier. (Exh. 1A, p. 39; 3 Aug. CT 671.) During this exchange, appellant again asked for water, had difficulty breathing, and could not stop shaking. (Exh. 1A, pp. 37, 39; 3 Aug. CT 669, 671.)

Appellant stated that he had rented adult movies on the afternoon Maria was abducted, perhaps at more than one video store. He learned of her disappearance several days later and, the following week, realized that he had been in the area at the time of her abduction. He said that, despite his efforts to recall the events of that afternoon, that was all he could remember. (Exh. 1A, pp. 49-51; 3 Aug. CT 681-683.) Ackerman then stated,

> I have interviewed and talked to hundreds and hundreds of people. I've done this work for the last [sic], qualified as an expert in state, federal and military courts, and the way you talk about the possible blocked memories is very significant to me that you probably do have some blocked memories, and it is very consistent with what I know in talking to other people that have blocked memories but there is something significant there that your subconscience [sic] probably is trying to tell you to remember, and it's obviously something very important or else your subconscience [sic] wouldn't be trying to tell you.

(Exh. 1A, pp. 51-52; 3 Aug. CT 683-684.) Appellant resumed his effort to recall that afternoon. (Exh. 1A, pp. 52-56; 3 Aug. CT 684-688.) Among other things, he recalled seeing a black, or possibly Mexican, man get into a car in which a blonde woman and two kids were sitting. (Exh. 1A, pp. 55-

56; 3 Aug. CT 687-688.)

Appellant stated that his memory was fuzzy and that he was confused. (Exh. 1A, second p. 1; 3 Aug. CT 689.) Then, after eliciting appellant's opinion as to what kind of person would have committed the crime (Exh. 1A, second pp. 1-4; 3 Aug. CT 689-692), Ackerman inquired about appellant's early dating history (Exh. 1A, second pp. 4-5; 3 Aug. CT 692-693). After appellant mentioned a former girlfriend who had died, Ackerman suggested that grief can cause people to do strange things. (Exh. 1A, second pp. 5-6; 3 Aug. CT 693-694.)

Ackerman then advised appellant that one of his responsibilities is to "profile people." Ackerman explained, "I look at people's behavior, look at their actions, their words. Sometimes actions speak much louder than words. Sometimes actions shout and scream." Ackerman also compared himself to an "old time tracker[]," able to "tell you all about the animal" from tracks in the sand or snow. (Exh. 1A, second p. 6; 3 Aug. CT 694.) He suggested that whoever killed Maria was not a "Jeffrey Dahmer type[]," but instead was struggling with some sort of conflict. (Exh. 1A, second p. 7; 3 Aug. CT 695.)

Ackerman suddenly produced one of appellant's magazines, explaining that "[t]his is one of the things I use to draw a profile." (Exh. 1A, second p. 8; 3 Aug. CT 696.) Ackerman also told appellant that a warrant had been served on his storage space. Appellant responded, "Ah, okay. I understand it now. You know, you guys have me as a suspect so." (Exh. 1A, second p. 9; 3 Aug. CT 697.)

Ackerman assured appellant that they were not mad at him and did not think he was a bad person, but added, "But you can understand from our point of view why we need to talk to you." (Exh. 1A, second pp. 9-10; 3

Aug. CT 697-698.) Ackerman inquired about appellant's possession of videotapes featuring Traci Lords, a porn star who was a minor when she starred in some of her films. Appellant expressed concern that he would be charged with copyright infringement for having duplicated the videotapes. (Exh. 1A, second pp. 10-12; 3 Aug. CT 698-700.)

Ackerman then suggested that "the hard thing is for the guy to be honest with himself." (Exh. 1A, second p. 12; 3 Aug. CT 700.) Trying to persuade appellant to talk, Ackerman claimed, "I don't think you'll find two more understanding guys in the world than we are. This is all we do. We're not sitting here condemning you. We're not sitting [sic] bad thought's [sic] about you. We're, you know, jumpin' down your throat, as much as we can we wanna understand and the only way we can understand is for you to talk with us. And our motivation is not to give you grief or punishment problem [sic]." (Exh. 1A, second pp. 12-13; 3 Aug. CT 700-701.) After Ackerman suggested that appellant had "baggage" and that this might be the time to deal with it, appellant responded, "I can't handle this" and also said he needed a cigarette. (Exh. 1A, second p. 13; 3 Aug. CT 701.)

After Ackerman said they needed appellant's help, appellant responded, "But I'm not your man." (Exh. 1A, second p. 14; 3 Aug. CT 702.) Ackerman observed that appellant was showing a lot of emotion, but appellant explained that he was concerned that they viewed him as a pervert because of his magazines and videotapes. (Exh. 1A, second pp. 14-15; 3 Aug. CT 702-703.) Ackerman stated that the magazines showed that appellant had an interest in young girls, but appellant denied having any such interest. (Exh. 1A, second p. 16; 3 Aug. CT 704.) Ackerman and Devine continued to press appellant about his possession of adult materials,

suggesting that he needed to "deal with this issue" and that "the behavior doesn't stop just because you wish it to stop." (Exh. 1A, second p. 18; 3 Aug. CT 706.)

c. Third Section Of The Interrogation[33]

At that point, Devine stated that a lot of people who possess such magazines had something happen to them in their early lives, and asked appellant whether anything had happened to him. Appellant responded, "I can't say. I want a lawyer." (Exh. 1A, second pp. 18-19; 3 Aug. CT 706-707.) After a pause, appellant commented, "I don't know if you guys got any other suspects or what." (Exh. 1A, second p. 19; 3 Aug. CT 707.) Rather than terminate the interview or ask appellant to clarify his statement regarding his request for a lawyer, the investigators continued to interrogate him. (*Ibid.*)

During a brief discussion of appellant's feeling that he was a suspect, appellant again asked for water, and Ackerman stated, "Obviously this is a very emotional, very difficult thing for you to deal with." (Exh. 1A, pp. 20-21; 3 Aug. CT 708-709.) Appellant replied, "Yeah, oh boy. Uh, I don't know what to do." At that point Ackerman said, "It's up to you." Appellant responded, "I want to help you guys. I want you guys to find him, but I don't want to incriminate myself." (Exh. 1A, second p. 21; 3 Aug. CT 709.) Again the investigators failed to terminate the interview or at least clarify whether appellant was willing to continue answering questions, but instead just continued with the interrogation. (*Ibid.*)

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[33] The transcript of the third section of the interrogation is contained in Exh. 1A, second p. 19, through Exh. 1A, second p. 44. (3 Aug. CT 707-732.)

Appellant denied that he was involved in the offenses against Maria, adding that he was guilty only of possessing the magazines and videotapes. (Exh. 1A, second p. 21; 3 Aug. CT 709.) The interview continued, with the investigators asking further questions about his magazines and videotapes. (Exh. 1A, second pp. 21-25; 3 Aug. CT 709-713.)

Ackerman suddenly changed tack, saying, "Okay, let me be honest with you. Gene . . . I already know." (Exh. 1A, second p. 25; 3 Aug. CT 713.) He then launched into questions about appellant's incestuous conduct, which appellant explained was consensual. (Exh. 1A, second pp. 25-29; 3 Aug. CT 713-717.) When Ackerman continued to question appellant about his early sexual experiences, appellant said, "I can't talk no more." Ackerman did not terminate the interrogation, but instead urged appellant to "deal with this." (Exh. 1A, second p. 29-31; 3 Aug. CT 717-719.)

Appellant then asked Ackerman to take blood and hair samples from him. (Exh. 1A, second pp. 31-32; 3 Aug. CT 719-720.) Ackerman replied that that would be done, and then asked appellant to consider the possibility that he was blocking out significant information. Ackerman again compared himself to an old-time tracker, and suggested that although one may try to suppress painful "issues," those issues will manifest themselves in other, more powerful ways. (Exh. 1A, second pp. 32-34; 3 Aug. CT 720-722.) Ackerman maintained that the rate at which appellant bought or rented videotapes suggested a strong need to satisfy himself sexually. (Exh. 1A, second pp. 35-37; 3 Aug. CT 723-725.)

When appellant stated that he was not a murderer, just someone who watched videos, Ackerman again accused him of harboring sexual desires for young girls. (Exh. 1A, second pp. 38-39; 3 Aug. CT 726-727.)

Although appellant said he had come to terms with his early sexual experiences, Ackerman insisted that it continued to affect his life, even if he did not realize it. (Exh. 1A, second pp. 39-41; 3 Aug. CT 727-729.)

Appellant reiterated that he was not involved in the offenses against Maria, and urged the investigators to take DNA evidence. (Exh. 1A, second pp. 41-42; 3 Aug. CT 729-730.) Once again, he explained that he rented three videotapes in the shopping center from which Maria had been taken, and then went to the post office. That night, he watched a television program, *Melrose Place*, and probably went to bed around midnight. He returned the videotapes the following day. (Exh. 1A, second pp. 42-43; 3 Aug. CT 730-731.)

d. Fourth Section Of The Interrogation[34]

Continuing the interrogation without a break, Devine then asked appellant to talk about the childhood incest he had experienced, and appellant replied, "I'd rather not say." Devine did not terminate the interrogation, but instead continued to ask about the incest. Devine asked appellant when he had his first sexual experience, and appellant said when he was six or seven years old. Devine then asked who else was involved, and appellant responded, "I'd rather not say." Devine observed that appellant was probably "on the receiving end of something," but appellant answered, "I don't know. I'd rather not talk about it." (Exh. 1A, second p. 44; 3 Aug. CT 732.)

Devine suggested that whatever was inside appellant was tied up like a knot and that it would be best if he got it out, but appellant again insisted

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[34] The transcript of the fourth section of the interrogation is contained in Exh. 1A, second p. 44, through Exh. 1B, p. 44. (3 Aug. CT 732-781.)

that he did not want to share it. Devine continued asking about appellant's early sexual experiences, but appellant again stated that he did not want to talk about it. Again, Devine continued with the interrogation. (Exh. 1A, second p. 45; 3 Aug. CT 733.) He asked appellant whether those experiences had had an effect on him, and appellant again said, "I'd rather not talk about it." (Exh. 1A, second pp. 45-46; 3 Aug. CT 733-734.)

Ackerman then took over the interrogation, asking appellant to describe the person responsible for the crimes against Maria. Appellant continued to insist that he had had nothing to do with those offenses. (Exh. 1A, second p. 46 through third p. 1; 3 Aug. CT 734-738.)

The investigators then confronted appellant with a letter containing the phrase "Lover's Dreams" and references to a child, insisting that the letter belonged to him.[35] (Exh. 1A, third pp. 2-4; 3 Aug. CT 739-741.) Appellant said, "I want a lawyer, enough said." Ackerman did not terminate the interview, saying he was going to show something to appellant. Again appellant demanded, "I want a lawyer." (Exh. 1A, third pp. 4-5; 3 Aug. CT 741-742.)

At that point, Devine and Ackerman told appellant he could "think about this for a minute" and left the room. (Exh. 1A, third p. 5; 3 Aug. CT 742.) Outside the interview room, they informed Bingaman that appellant had requested an attorney. Bingaman "somewhat made plans" as to how he would proceed. (D RT (Jan. 19, 1996, proceedings) 83-84.) Approximately 21 minutes later, at approximately 2:00 a.m., Bingaman entered the interview room, supposedly to clarify appellant's request for an attorney (*id.*

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[35] The parties later stipulated that appellant knew nothing about the letter, which contained the lyrics of a song and had been written down by another person. (C RT 382-383; D RT (Jan. 19, 1996, proceedings) 82-83.)

at pp. 84-85, 95), and apparently had to awaken appellant (Exh. 1A, third p. 5; 3 Aug. CT 742). Appellant was lying down and appeared to be tired. (D RT (Jan. 19, 1996, proceedings) 94.)

Bingaman said he wanted to talk to appellant "before we end this interview," and asked if he wanted to contact a particular attorney. (Exh. 1A, third pp. 5-6; 3 Aug. CT 742-743; D RT (Jan. 19, 1996, proceedings) 90-91, 93-94.) Appellant said he did not know whom he should call, having never been in such a situation before. Appellant complained that he was being confronted with a letter he had not written and advised Bingaman that he did not want to talk any further. (Exh. 1A, third p. 6; 3 Aug. CT 743.) Bingaman again asked appellant to identify an attorney, adding that he did not know what had been shown to appellant. Appellant described the letter, then Bingaman asked if that was what he wanted to talk to an attorney about. (Exh. 1A, third p. 6; 3 Aug. CT 743; D RT (Jan. 19, 1996, proceedings) 90-91.)

After appellant reaffirmed that he wanted to talk to an attorney, Bingaman attempted to elicit further discussion. Bingaman again pressed appellant for the name of an attorney. Appellant replied that he could not afford one. When appellant replied that he did not know what to do, Bingaman urged, "Well, talk to me. I mean seriously, Talk to me, Gene." (Exh. 1A, third p. 6; Exh. 1B, pp. 7-8; 3 Aug. CT 743-745.)

Appellant repeated that he did not commit the offenses. (Exh. 1B, p. 9; 3 Aug. CT 746.) Bingaman continued to question appellant about the letter, but assured him, "I'm here to help you." (Exh. 1B, pp. 9-11; 3 Aug. CT 746-748.) The investigator again observed that he seemed very emotional. (Exh. 1B, p. 10; 3 Aug. CT 747.) Bingaman said, "Nobody is gonna harm you, blame a murder on you or much less try and ruin your

career, okay? Now, just work with me a little bit here okay?" (Exh. 1B, p. 11; 3 Aug. CT 748.) Bingaman insisted that "[i]f you want that attorney, doggone it, then I'm gonna try and get you an attorney," yet he continued to question appellant. (Exh. 1B, p. 12; 3 Aug. CT 749.) As Bingaman continued the interrogation, appellant was shaking, and said that he was "[s]hook up really bad." (Exh. 1B, p. 13; 3 Aug. CT 750.)

Eventually, Bingaman told appellant, "We have a strong case against you, Gene. I'm gonna make no bones about it. I have enough to take you back to the United States to face charges for murder[.] I want you to know that straight up, but before I do that is why we invited Mr. Ackerman and Dr. [sic] Devine[,] fly them all the way here to Japan to come on board. 'Cause they look beyond the guilt. They look beyond the killing. They look beyond the terrible mess of what's society, whatever and they look at the individual to work and to help him, only him and I appreciate that." (Exh. 1B, p. 22; 3 Aug. CT 759.)

Continuing to urge appellant to confess, Bingaman stated:

> It's a fact of life and why does a grown person take a child's life and before we get too caught up in trying to catch the killer and throw him behind bars and do all this stuff, what was in his life that hurt him so bad the child in that man's life that hurt him so bad that it, he is doing things beyond his control now. Are you with me, Gene?
>
> . . .
>
> And I look at you tonight and I know you're that story and I know you need some help and I've brought the most talented individual in the country to work with you. *I am not interested in, in putting you behind bars. I am not interested in the punishment aspect.*

(Exh. 1B, p. 23; 3 Aug. CT 760, italics added.) Nevertheless, appellant again declared that he did not commit the crimes. (*Ibid.*)

A short time later, Bingaman asked about a notebook, which

appellant apparently kept to take notes regarding the adult movies he watched. Appellant again invoked his right to silence, declaring "I'd rather not say to you," but was again ignored by Bingaman. (Exh. 1B, p. 28; 3 Aug. CT 765.)

Not long after that, Bingaman suggested once again that appellant was subconsciously blocking information about the incident from surfacing. (Exh. 1B, p. 34; 3 Aug. CT 771.)

Bingaman subsequently asked why appellant had rented a room at the Vineyard Inn, a motel in Lemoore, on March 27. Once again, appellant was being confronted with information that appears to be untrue. (Exh. 1B, pp. 42-43; 3 Aug. CT 779-780.)[36] Appellant replied, "Okay, here we go again. I wanna see a lawyer." Nevertheless, Bingaman continued to press him. (Exh. 1B, p. 43; 3 Aug. CT 780.) Bingaman told appellant, "you've gotta 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 states." (Exh. 1B, p. 44; 3 Aug. CT 781.) Despite Bingaman's insistence to the contrary, appellant attempted to explain that he knew nothing about the reservation. (Exh. 1B, pp. 44-45; 3 Aug. CT 781-782.) Bingaman also stated that he wanted to ask him about the motel reservation in a polygraph examination, and suggested that appellant made the reservation for a purpose. (Exh. 1B, p. 45; 3 Aug. CT 782.) The interrogation then continued until approximately 4:00 a.m. on May 1, 1995. (Exhs. 1C and 1D; D RT (Jan. 19, 1996, proceedings)

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[36] At a hearing on the suppression motion, Bingaman claimed that it was later determined that there was another Gene McCurdy stationed at the base, implicitly acknowledging that appellant had not reserved a room at the Vineyard Inn. (D RT (Jan. 19, 1996, proceedings) 102-104.)

111.)[37]

At that point, Bingaman handcuffed appellant and told him that he was under arrest for murder. (Exh. 1D, pp. 8-16; 3 Aug. CT 822-830; D RT (Jan. 19, 1996, proceedings) 163-164, 173, 181-187, 198.) Within a minute or two, Devine informed appellant that Bingaman lacked the authority to arrest him and that in fact he was not under arrest. (D RT (Jan. 19, 1996, proceedings) 207-209, 221-222, 235-236.)

Appellant was subsequently held pursuant to an "order of confinement" obtained by the officers, and was transferred to an army base in Japan for further interrogation, which the officers resumed on May 2, 1995.[38] (*Id.* at pp. 231-234, 237.) A judge signed an arrest warrant on May 3, 1995, and appellant was arrested and delivered to civilian authorities pursuant to that warrant on either May 3 or May 4, 1995. (A CT 6; D RT (Jan. 19, 1996, proceedings) 235.)

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[37] Exhibits 1C and 1D include an additional 45 pages of interview. However, because the trial court correctly suppressed as involuntary all statements beyond page 44 of Exhibit 1B (3 Aug. CT 781; E RT (Mar. 13, 1996, proceedings) 17), appellant does not synopsize the remainder of the interrogation.

[38] Agent Devine explained that a confinement order, which is issued by the ship's commanding officer, authorizes the confinement of an individual for up to seven days without a hearing on probable cause. (D RT (Jan. 22, 1996, proceedings) 234-235.) The record is unclear as to whether the confinement order in this case was obtained on April 30 or May 1, 1995. (*Id.* at pp. 232-234.)

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

A review of the "totality" of the circumstances surrounding the interrogation of appellant demonstrates that all of his statements were violative of *Miranda* (see, e.g., *Miranda v. Arizona*, *supra*, 384 U.S. at p. 479; *Oregon v. Elstad*, *supra*, 470 U.S. at p. 307), and also were involuntary (see, e.g., *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *Ashcraft v. Tennessee* (1946) 327 U.S. 274, 278-279; *People v. Neal*, *supra*, 31 Cal.4th at p. 79), and should have been suppressed for all purposes.

a. The Statements From The First Section Of The Interrogation Were Inadmissible

The trial court found that appellant was in custody from the beginning of the interrogation. (E RT (Mar. 13, 1996, proceedings) 3.)[39] Moreover, the court acknowledged that this custodial interrogation "got off to an improper start," in that the officers failed to advise appellant of his *Miranda* rights before beginning their questioning.[40] (*Id.* at p. 2.) However, the trial court ruled that, considering the circumstances of the case, including the supposedly non-incriminating nature of appellant's initial (un-Mirandized) statements, and the fact that he was subsequently given a *Miranda* warning, those un-Mirandized statements were voluntary.

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[39] At the time he was conducting the interrogation, Lieutenant Bingaman had considered it to be custodial in nature. (C RT 310; D RT (Jan. 19, 1996, proceedings) 22.)

[40] The trial court stated that the portion of the interrogation preceding the *Miranda* warning is contained in the first 11 pages of the interview transcript. In fact, it was the first 12½ pages of that transcript. (E RT (Mar. 13, 1996 proceedings) 2; see also Exh. 1A, pp. 1-13; 3 Aug. CT 633-645.)

(*Ibid.*, citing *Oregon v. Elstad*, *supra*, 470 U.S. 298.) In so ruling, the trial court erred.

As a preliminary matter, the trial court was mistaken to rely on the non-incriminating nature of the statements and the later *Miranda* warning in finding the statements voluntary. The *Miranda* opinion itself cautions that "[n]o distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 477.) Moreover, the un-Mirandized statements could not be rendered voluntary by the fact that appellant was *later* read a Miranda advisement. (See *Oregon v. Elstad*, *supra*, 470 U.S. at p. 307.) The fact that the trial court considered these "factors" in making its ruling betrayed a misunderstanding of the law regarding the voluntariness of a statement.

In any event, a proper review of the totality of the circumstances surrounding appellant's initial, un-Mirandized statements demonstrates that those statements were involuntary. (See *Withrow v. Williams*, *supra*, 507 U.S. at pp. 693-694.) Among the factors a court is to consider in determining the voluntariness of a statement are the following: promises, whether explicit or implicit, of leniency (see, e.g., *Arizona v. Fulminante* (1991) 499 U.S. 279, 285-286; *People v. Cahill* (1991) 5 Cal.4th 478, 482, fn. 1); threats, whether explicit or implicit, that the suspect will be punished unless he confesses (see, e.g., *People v. Cahill* (1994) 22 Cal.App.4th 296, 311); attempts to convince the suspect that he is guilty but unaware of his guilt due to mental illness (see, e.g., *People v. Hogan* (1982) 31 Cal.3d 815, 840-841, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836); other forms of psychological coercion exploiting the suspect's particular vulnerabilities (see, e.g., *Blackburn v. Alabama* (1960)

361 U.S. 199, 206-208; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28); deception (see, e.g., *People v. Hogan*, *supra*, 31 Cal.3d at pp. 840-841; *People v. Engert* (1987) 193 Cal.App.3d 1518, 1524); prolonged, continuous questioning (see, e.g., *Blackburn v. Alabama*, *supra*, 361 U.S. at p. 206; *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226; *Ashcraft v. Tennessee*, *supra*, 327 U.S. at pp. 276-277); and deliberate violation of *Miranda* for the purpose of obtaining impeachment evidence (*People v. Neal*, *supra*, 31 Cal.4th at pp. 80-81).

Several of these factors combined to render appellant's statements involuntary. First, the interrogating officers' failure to give a *Miranda* warning was an important factor to consider in determining whether appellant's statements were voluntary. (*Brown v. Illinois* (1975) 422 U.S. 590, 604-605.) This factor should weigh especially heavy here because the record suggests that the police purposefully failed to read the advisement. (See *Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, 1029 [trial court erred in admitting defendant's statements, even though it did so for the purpose of impeachment, where the sheriff's officers set out on a deliberate course of action to violate *Miranda*, and where, under state law, they were used to prove his guilt]; *People v. Neal*, *supra*, 31 Cal.4th at pp. 80-81 [where the defendant invoked his right to counsel several times but was ignored by the interrogating officer, who hoped to elicit impeachment evidence, his statements were held to be involuntary].) Again, Lieutenant Bingaman acknowledged that, prior to the interrogation, he and other interrogators discussed what they should do if appellant were to invoke his rights. (D RT (Jan. 19, 1996, proceedings) 54-56.)

Second, the circumstances under which the interrogation took place contributed to its coercive nature. (See *Withrow v. Williams*, *supra*, 507

U.S. at pp. 693-694.) Again, the very setting in which the interrogation took place was inherently intimidating and coercive. (*Ibid.* [location of interrogation is a factor to consider in determining voluntariness of statement].) Appellant was placed in restraints prior to being escorted to the interview room. (C RT 308-310, 319, 321, 323, 327, 330-334; D RT (Jan. 19, 1996, proceedings) 20, 22-23, 56, 59, 95.) The interrogation took place in a cramped room (C RT 308-309, 320; D RT (Jan. 19, 1996, proceedings) 21, 155) and involved at least four law enforcement officials (B RT 7, 167; C RT 308-309, 343-344; D RT (Jan. 19, 1996, proceedings) 19-22; D RT (Jan. 22, 1996, proceedings) 233, 236, 242). The interrogation took place while appellant was at sea (C RT 308-309, 322) and therefore had nowhere to go. Under these circumstances, a reasonable person in appellant's position would have recognized immediately that the interview was custodial in nature, notwithstanding the interrogator's claim that he was but one of 26 individuals they intended to interview (Exh. 1A, p. 2; 3 Aug. CT 634). (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 662.)

Moreover, the interrogation began at 10:00 p.m., after appellant had worked a full day (C RT 308-309, 319, 321, 323, 327; D RT (Jan. 19, 1996, proceedings) 20, 23, 56, 59, 95, 111; D RT (Jan. 22, 1996, proceedings) 214, 239), and therefore was already tired. (See *Withrow v. Williams*, *supra*, 507 U.S. at pp. 693-694 [the length of the interrogation, and the suspect's physical and mental health, are factors to consider in determining voluntariness of statement].)

Finally, appellant was in obvious distress from the very start of the interrogation. (See *People v. Farnam* (2002) 28 Cal.4th 107, 182 [this Court considered the fact that the defendant was emotional during interview in addressing voluntariness of his confession].) At the outset of the

interrogation, appellant stated, "Uh, to tell you the truth uh, last time I talked to her (inaudible) I've been trying to put it out of my mind . . . So much stress, uh." (Exh. 1A, p. 1; 3 Aug. CT 633.) A short time later, he asked for water. (Exh. 1A, p. 12; 3 Aug. CT 644.)

Under these circumstances, the trial court erred in finding that statements made by appellant during the first section of the interrogation were involuntary. Those statements should have been suppressed for all purposes.[41]

b. The Statements From The Second Section Of The Interrogation Were Inadmissible

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

The trial court found that appellant's comment did not constitute a request for counsel, and that his subsequent conversation constituted an implicit waiver of his *Miranda* rights. (E RT (Mar. 13, 1996, proceedings) 2-3.) The trial court also found that Ackerman's response to appellant

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[41] The trial court also erred in failing to recognize that, because the officers did not advise appellant of his *Miranda* rights, the statements could not be introduced in the prosecution's case in chief. (*Oregon v. Elstad*, *supra*, 470 U.S. at p. 307.) However, appellant acknowledges that the prosecution did not introduce any statements until its cross-examination of appellant. (15 RT 2596.)

conveyed a willingness to abide by a request for counsel. (*Id.* at p. 3.) The trial court's rulings as to this section of the interrogation were incorrect.

As a result of the trial court's ruling, the prosecution, during its case in chief, introduced several statements made by appellant during the second portion of the interrogation. Specifically, the prosecution elicited Ackerman's testimony regarding appellant's statements that he owned adult magazines and videotapes, that he had seen a black man in the Food King parking lot, and that he was concerned he was blocking out information. (12 RT 2076-2080, 2083.) Also, in its cross-examination of appellant, the prosecution introduced a number of statements he had made during the second section of the interrogation. (15 RT 2597-2612.) Specifically, the prosecution elicited, among other things, appellant's testimony that he told the investigators that he could not stop shaking, that he did not want to remember or read about the case, and that he had lied during the interrogation (*ibid.*). (See Section C, *infra.*)

(1) Appellant Invoked His Right To Counsel, And He Did Not Implicitly Waive That Right

In *Edwards v. Arizona*, *supra*, 451 U.S. at p. 484, the high court directed that the reviewing court presume that a suspect who has asserted the right to counsel, but whose interrogation continues, has not waived the right to counsel when he makes a statement. (*People v. Peevy*, *supra*, 17 Cal.4th at pp. 1199-1200.) This presumption may be dispelled if the suspect reinitiates contact, so long as there are facts relevant to the suspect's state of mind showing a valid (i.e., knowing and intelligent) waiver. (*Edwards v. Arizona*, *supra*, 451 U.S. at pp. 482, 485, 486, fn. 9; see also *Smith v. Illinois* (1984) 469 U.S. 91, 95; *Oregon v. Bradshaw*, *supra*, 462 U.S. at pp. 1044-1045; *People v. Bradford* (1997) 15 Cal.4th 1005, 1036.)

In determining whether there was a waiver, courts are bound to "indulge every reasonable presumption against waiver" and should not "presume acquiescence in the loss of fundamental liberty." (*Barker v. Wingo* (1972) 407 U.S. 514, 525.) Application of these principles in this case demonstrates that appellant did not waive his right to counsel and that the interrogators failed to scrupulously honor that right. (*Michigan v. Mosley*, *supra*, 423 U.S. at p. 104.)

Appellant's statement, "They always tell you to get a lawyer" (Exh. 1A, p. 14; 3 Aug. CT 646), constituted an unequivocal, if inartful, request for counsel, posed by an individual with no prior criminal history, who was therefore unfamiliar with the rights and procedures to which he was constitutionally entitled. (See, e.g., *Alvarez v. Gomez* (9th Cir. 1999) 185 F.2d 995, 997 [defendant invoked right to counsel by asking three questions, including, "Can I get an attorney now man?"]; *United States v. de la Jara* (9th Cir. 1992) 973 F.2d 746, 750 [defendant invoked right to counsel by asking, "Can I call my attorney?"]; *Shedelbower v. Estelle* (9th Cir. 1989) 885 F.2d 570, 571-573 [defendant invoked right to counsel by saying, "You know, I'm scared now. I think I should call an attorney."]; *State v. Bohn* (Mo. App. 1997) 950 S.W.2d 277, 281 [defendant invoked right to counsel by saying, "I feel like I ought to have a good counselor"].)

Appellant was not required to utter any "talismanic phrases" to invoke his rights to silence and to counsel. (See *Bobo v. Kolb* (7th Cir. 1992) 969 F.2d 391, 396; accord *People v. Peracchi* (2001) 86 Cal.App.4th 353, 360.) "'A desire to halt the interrogation may be indicated in a variety of ways,' and the words used by [appellant] 'must be construed in context.'" (*People v. Hayes* (1985) 38 Cal.3d 780, 784-785, quoting *In re Joe R.* (1980) 27 Cal.3d 496, 515.) A reasonable law enforcement officer

Joe R. (1980) 27 Cal.3d 496, 515.) A reasonable law enforcement officer would have recognized that appellant was requesting counsel. (*Davis v. United States* (1994) 512 U.S. 452, 459.)

Contrary to the trial court's finding, Ackerman's response did not convey a willingness to abide by a request for counsel. (E RT (Mar. 13, 1996 proceedings) 3.) Instead, Ackerman side-stepped appellant's statement about counsel, asserting that he could not advise appellant (Exh. 1A, p. 14; 3 Aug. CT 646), and then continued to press appellant for information, stating his belief that appellant could help the law enforcement officers (*ibid.*). Even if appellant's statement was unclear, Ackerman should have sought to clarify whether appellant was willing to proceed with the interrogation without counsel. (See *People v. Box* (2000) 23 Cal.4th 1153, 1194-1195; *People v. Johnson* (1993) 6 Cal.4th 1, 27.)

The trial court also erred in finding that appellant's subsequent conversation constituted an implied waiver of those rights. (E RT (Mar. 13, 1996 proceedings) p. 3.) A "knowing and intelligent" waiver of the right to counsel requires the following: (1) the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and (2) the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) Neither condition was met in this case. Indeed, appellant's statement, "I don't know why ["[t]hey always tell you to get a lawyer]" (Exh. 1A, p. 13; 3 Aug. CT 645), demonstrates that he did not understand either the nature of the right being abandoned or the consequences of the decision to do so.

The trial court's reliance upon *People v. Crittenden* (1994) 9 Cal.4th

83 and *Davis v. United States*, *supra*, 512 U.S. 452 was misplaced. (E RT (Mar. 13, 1996, proceedings) 3-4.) In *Crittenden*, the suspect asked, "Did you say I could have a lawyer?" The interrogating officer replied that he could have an attorney if he wanted one, but the suspect did not respond. The police did not ask any further questions at that time. Several hours later, after he was again given a *Miranda* warning, he expressly waived his rights and spoke to the police. (*People v. Crittenden*, *supra*, 9 Cal.4th at pp. 123-124.) In *Davis*, the suspect waived his *Miranda* rights and spoke to the police for about an hour and a half before saying, "Maybe I should talk to a lawyer." The interrogating officers then made it clear to him that if he wanted a lawyer, they would stop questioning him, and asked whether he was asking for a lawyer or merely making a comment. The suspect replied that he was not asking for a lawyer, then added, "No, I don't want a lawyer." (*Davis v. United States*, *supra*, 512 U.S. at p. 455.) Here, in contrast, appellant was not re-warned, the officers made no attempt to clarify appellant's wishes, and appellant did not affirmatively waive his right to counsel.[42]

Accordingly, the trial court erred in finding that appellant waived his right to counsel. Appellant's statements should have been suppressed for all purposes. (See *People v. Neal*, *supra*, 31 Cal.4th at p. 79.) At the very least, the prosecution should have been barred from introducing the statements in its case in chief. (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 479; *Oregon v. Elstad*, *supra*, 470 U.S. at p. 307.)

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[42] The United States Supreme Court has pointed out that, although police officers are not obligated to clarify an ambiguous or equivocal statements by a suspect, it is the better police practice to clarify whether he actually wants an attorney. (*Davis v. United States*, *supra*, 512 U.S. at p. 461.)

(2) Even If Appellant Waived His Right To Counsel, His Statements During The Second Section Of The Interrogation Were Involuntary

A review of the totality of the circumstances reveals that, during the second section of the interrogation, the officers intensified their use of various coercive techniques, including: disregard of appellant's repeated invocations of his rights, psychological manipulation, deception, promises of leniency, and threats. As a result, appellant's statements were rendered involuntary.

First, appellant continued to be in an emotional state during this portion of the interview. (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 182.) His distress intensified. Appellant was shaking, had difficulty breathing, and wanted water. (Exh. 1A, pp. 16-17, 37, 39; 3 Aug. CT 648-649, 669, 671.) Later, he stated, "I can't handle this" and said he needed a cigarette. (Exh. 1A, second p. 13; 3 Aug. CT 701.)

Second, there had been no change in time or circumstances to dissipate the taint flowing from the involuntariness of his pre-warning statements. (See *Oregon v. Elstad*, *supra*, 470 U.S. at p. 318; *United States v. Williams, supra*, 435 F.3d at p. 1153.) The second section of the interrogation followed directly from the first section, with no break in the interrogation, no change in the identity of the interrogators, and no change in location. Thus, appellant's will to invoke his rights had been undermined prior to the *Miranda* warning, and, in the absence of any change in time or circumstances, remained so despite the warning. (Cf. *Oregon v. Elstad*, *supra*, 470 U.S. at pp. 300-302, 314-315 [defendant's post-warning statements were deemed voluntary and admissible where (1) his pre-warning statements had been voluntary and (2) he made his post-warning

statements after (a) being transported to another location, (b) approximately an hour had passed following the initial statement, (c) another officer was involved in taking the second statement, and (d) a complete *Miranda* warning was given prior to the second statement].)

Third, appellant's post-warning statements should be deemed involuntary in light of the officers' apparent plan to disregard any invocations of his rights. (D RT (Jan. 19, 1996, proceedings) 54-56.) As noted in the previous section, deliberate police conduct intended to circumvent *Miranda* may bear on the voluntariness of a suspect's statements. (See *Henry v. Kernan*, *supra*, 197 F.3d at p. 1029; *People v. Neal*, *supra*, 31 Cal.4th at pp. 80-81.)[43]

Fourth, from early in this part of the interrogation, Ackerman utilized a strategy of unceasing psychological manipulation of appellant, suggesting that he was subconsciously suppressing information (Exh. 1A, p. 35; 3 Aug. CT 667). (See, e.g., *Blackburn v. Alabama*, *supra*, 361 U.S. at pp. 206-208; *People v. Hogan*, *supra*, 31 Cal.3d at pp. 840-841; *People v. Spears*, *supra*, 228 Cal.App.3d at pp. 27-28.) Ackerman's suggestion that appellant was subconsciously blocking out inculpatory information effectively constituted an improper attempt to convince appellant that, due to mental illness, he was unaware of his guilt. (See *People v. Hogan*, *supra*, 31 Cal.3d at pp.

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[43] Significantly, a number of courts, including this Court, have disapproved of police practices intended to circumvent *Miranda*. (See *Missouri v. Seibert*, *supra*, 542 U.S. at pp. 615-616; *United States v. Williams*, *supra*, 435 F.3d at pp. 1159-1160; *Henry v. Kernan*, *supra*, 197 F.3d at p. 1029; *People v. Neal*, *supra*, 31 Cal.4th at pp. 80-81; see also *California Attorneys for Criminal Justice v. Butts* (1999) 195 F.3d 1039, 1050 [holding that district court correctly ruled that police officers who had intentionally violated *Miranda* were not entitled to qualified immunity from civil suits].)

841-842.)

In a related ploy, Ackerman began to suggest that he had expertise regarding suppressed memory. (Exh. 1A, pp. 51-52; 3 Aug. CT 683-684.) He also claimed to be a profiler, comparing himself to an "old time tracker[]," able to decipher behavior and words. (Exh. 1A, second pp. 6-7; 3 Aug. CT 694-695.) Invoking his purported status as a profiler, Ackerman dramatically confronted appellant with an adult magazine seized from appellant's stored property. In fact, Ackerman lacked any such expertise. As he would later admit, he did not possess any degrees in psychology. (12 RT 1870.) In effect, Ackerman was suggesting that he could tell, even if appellant could not, that appellant was suppressing information. Especially given appellant's fragile emotional state, it is likely that appellant's statements were influenced by Ackerman's deceptive suggestions. (See, e.g., *People v. Hogan*, *supra*, 31 Cal.3d at pp. 840-841; *People v. Engert*, *supra*, 193 Cal.App.3d at p. 1524.)

Fifth, during this segment of the interrogation, the officers made several promises of leniency, each of which likely induced appellant to make statements to the police. (See, e.g., *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 285-286; *People v. Cahill*, *supra*, 5 Cal.4th at p. 482, fn. 1.) For instance, Ackerman's claim that "we're trying to help you" (Exh. 1A, p. 14; 3 Aug. CT 646) represented an implicit promise of leniency. Similarly, Ackerman made an implicit promise of leniency when he claimed, "[O]ur motivation is not to give you grief or punishment problem [sic]." (Exh. 1A, second pp. 12-13; 3 Aug. CT 700-701.) Appellant could only have believed that he would receive more lenient treatment *so long as* he told the authorities what they wished to hear. (See, e.g., *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 285-286; *People v. Cahill*, *supra*, 5 Cal.4th at p. 482,

fn. 1.)

Finally, Ackerman interrogated appellant about videotapes he owned which featured porn actress Traci Lords. Thus, as his own statements show, appellant's anxiety likely was intensified by the threat that he would be charged in connection with his duplication of the videotapes (Exh. 1A, second pp. 10-12; 3 Aug. CT 698-700). (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 182.)

In sum, appellant's will was overborne by all these circumstances (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226), and, consequently, all statements made by appellant during the second section of the interrogation were involuntary and should have been suppressed for all purposes. (See, e.g., *Jackson v. Denno*, *supra*, 378 U.S. at pp. 385-386; *Ashcraft v. Tennessee*, *supra*, 327 U.S. at pp. 278-279; *People v. Neal*, *supra*, 31 Cal.4th at p. 79.)

c. The Statements From The Third Section Of The Interrogation Were Inadmissible

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

As a result of the trial court's ruling, the prosecution, during its cross-examination of appellant, introduced several statements he had made during the third section of the interrogation. (15 RT 2612, 2614.) As

described in greater detail in Section C, *infra*, the prosecution elicited, among other things, statements appellant made regarding his sexuality as well as the fact that he owned magazines purportedly relating to teenagers. (*Ibid.*)

(1) Appellant Did Not Waive His Right To Counsel

In ruling that appellant implicitly waived his right to counsel, the trial court found the following factors to be particularly significant: (1) the improper preliminary questioning had yielded no inculpatory information; (2) appellant had been advised of his *Miranda* rights approximately 1 hour and 45 minutes earlier; (3) appellant had waived those rights by his conduct; (4) the investigators had not yet engaged in any badgering, hectoring or verbal intimidation tactics, nor had they yet made any improper inducements or implied promises of leniency; (5) appellant knew by then that he was a suspect; (6) appellant had just seen that he had the power to terminate the questioning by simply requesting a lawyer; and (7) as the investigator was preparing to leave, appellant reinitiated the conversation by asking if there were other suspects and stating that he felt he was the investigator's main suspect. (E RT (Mar. 13, 1996, proceedings) pp. 6-7.)

However, the trial court's findings were erroneous because they ignored the following: (1) whether appellant's statements were inculpatory or exculpatory was not only irrelevant (*Miranda v. Arizona*, *supra*, 384 U.S. at p. 477), but the interrogation had elicited prejudicial, if not inculpatory, information, in that appellant had begun to discuss his adult magazines and videotapes and his early sexual experiences, and had said he felt like a suspect (Exh. 1A, pp. 4-12 and second pp. 1-19; 3 Aug. CT 636-644, 689-707); (2) Ackerman had made implicit promises of leniency, claiming that they only wanted to help appellant (Exh. 1A, p. 14; 3 Aug. CT 646) and did

not want to give "grief or punishment problem [sic]" (Exh. 1A, second pp. 12-13; 3 Aug. CT 700-701); (3) Ackerman had already twice ignored appellant's invocations of his *Miranda* rights (Exh. 1A, p. 14 and second pp. 18-19; 3 Aug. CT 646, 706-707); and (4) it was clear that appellant continued to be intimidated by the situation, as he was shaking, had difficulty breathing, said he needed a cigarette, expressed concern about his career, and asked for water. (Exh. 1A, pp. 12, 18, 37, 39, and second p. 13; 3 Aug. CT 644, 650, 669, 671, 701). Therefore, it cannot be said that appellant knowingly and intelligently waived his right to counsel within the meaning of *Moran v. Burbine*, *supra*, 475 U.S. at p. 421.

The trial court found that, by stating "I want to help you guys. I want you guys to find him, but I don't want to incriminate myself" (Exh. 1A, second p. 21; 3 Aug. CT 709), appellant was not invoking his rights, but merely stating the reasons for his ambivalence. In fact, appellant's statement unambiguously invoked his right against self-incrimination. (See *Davis v. United States*, *supra*, 512 U.S. at p. 459; *People v. Michaels* (2002) 28 Cal.4th 486, 510 [assuming that the *Davis* rule requiring that invocation of right to counsel be unambiguous also applies to invocation of the right against self-incrimination]; *People v. Box*, *supra*, 23 Cal.4th at pp. 1194-1195 [same].) Appellant was explaining why he was invoking his right to silence, not the reasons for his supposed ambivalence. Even if appellant's statement was unclear, the officers should have attempted to clarify his wishes. (See *Davis v. United States*, *supra*, 512 U.S. at p. 455.)

Moreover, the trial court erroneously concluded that appellant knew he had the right to counsel and the power to terminate questioning. (E RT (Mar. 13, 1996, proceedings) 7-8.) In so finding, the trial court disregarded the fact that up to that point the interrogators had ignored appellant's

requests for counsel and invocations of the right to remain silent. (Exh. 1A, p. 14 and second pp. 18-19; 3 Aug. CT 646, 706-707.) Additionally, appellant continued to be in such a distraught emotional state that one could not properly attribute to him such clarity of thought. (Exh. 1A, second pp. 20-21; 3 Aug. CT 708-709.)

Shortly thereafter, Ackerman suddenly broached the topic of appellant's incestuous conduct. (Exh. 1A, second pp. 25-29; 3 Aug. CT 713-717.) When appellant told him,"I can't talk no more," Ackerman did not terminate the interrogation, but instead urged appellant to "deal with this." (Exh. 1A, second pp. 29-31; 3 Aug. CT 717-719.) Once again, the investigators failed to scrupulously honor appellant's request for silence. (Cf. *Michigan v. Mosley*, *supra*, 423 U.S. at p. 104.)

Under these circumstances, it cannot be said that appellant waived his right to counsel, particularly in light of the presumption against waiver. (*Barker v. Wingo*, *supra*, 407 U.S. at p. 525.)

(2) Even If Appellant Waived His Right To Counsel, His Statements During The Third Section Of The Interrogation Were Involuntary

Many of the factors that show appellant did not waive his right to counsel during the third section of the interrogation also establish that his statements were involuntary. The officers continued to engage in coercive techniques, while appellant continued to exhibit serious emotional distress.

First, the investigators' continuing disregard of appellant's requests for counsel and to remain silent (Exh. 1A, p. 14 and second pp. 18-19, 29-31; 3 Aug. CT 646, 706-707, 717-719) rendered his ensuing statements involuntary. Indeed, this Court has declared that a suspect's re-initiation of a police interview may be involuntary where, as here, the police have

repeatedly ignored his invocations of his *Miranda* rights. (*People v. Neal*, *supra*, 31 Cal.4th at pp. 81-82.) In such a situation, the suspect could only conclude that the police would not recognize his right to silence or right to counsel until he confessed. (*Id.* at p. 82.)

Moreover, Ackerman continued to claim, falsely, that he was a profiler, and again compared himself to an "old time tracker[]," able to decipher behavior and words. (Exh. 1A, second pp. 32-37; 3 Aug. CT 720-725.) In fact, as noted previously, Ackerman lacked any such expertise. (12 RT 1870.) Again, Ackerman was suggesting that he could tell, even if appellant could not, that appellant was suppressing information. (See, e.g., *People v. Hogan*, *supra*, 31 Cal.3d at pp. 840-841; *People v. Engert*, *supra*, 193 Cal.App.3d at p. 1524.)

Finally, it is likely that appellant's will to invoke his rights continued to be impaired by his emotional state (Exh. 1A, second pp. 20-21; 3 Aug. CT 708-709). (See *People v. Farnam*, *supra*, 28 Cal.4th at p. 182.)

Accordingly, appellant's statements were involuntary and should have been suppressed for all purposes.

d. The Statements From The Fourth Section Of The Interrogation Were Inadmissible

With respect to the fourth section of the interrogation, the trial court properly found that appellant's statements were obtained in violation of *Miranda*, but erred in finding that they were voluntary and admissible for the purpose of impeachment. (E RT (Mar. 13, 1996, proceedings) 8-17.) As appellant demonstrates below, his statements were involuntary and should have been excluded for all purposes.

First, as in the second and third portions of the interrogation, the officers repeatedly ignored appellant's invocations of his right to counsel and his right to silence. The fourth part of the interrogation began when

Agent Devine asked appellant to talk about the childhood incest he had experienced, and appellant replied, "I'd rather not say." Devine, however, continued to ask about the incest. When Devine asked who else was involved, appellant responded, "I'd rather not say." Devine observed that appellant was probably "on the receiving end of something," but appellant answered, "I don't know. I'd rather not talk about it." (Exh. 1A, second p. 44; 3 Aug. CT 732.)

Devine did not stop. Instead, he suggested that whatever was inside appellant was tied up like a knot, and that it would be best if he got it out, but appellant again insisted that he did not want to share it. Undeterred, Devine continued asking about appellant's early sexual experiences, but appellant again stated that he did not want to talk about it. Again, Devine continued with the interrogation. (Exh. 1A, second p. 45; 3 Aug. CT 733.) He asked appellant whether those experiences had had an effect on him, but appellant again said, "I'd rather not talk about it." (Exh. 1A, second pp. 45-46; 3 Aug. CT 733-734.) Within the space of a few minutes, therefore, appellant had invoked his right to silence four more times, only to be ignored. (Cf. *Michigan v. Mosley*, *supra*, 423 U.S. at p. 104; *People v. Neal*, *supra*, 31 Cal.4th at pp. 81-82.)

When appellant was confronted with, and accused of writing, an apparently incriminating letter, which he had actually not written (Exh. 1A, third pp. 2-4; 3 Aug. CT 739-741), he said, "I want a lawyer, enough said." Ackerman did not terminate the interview, but instead said he was going to show something to appellant. Again appellant demanded, "I want a lawyer." (Exh. 1A, third pp. 4-5; 3 Aug. CT 741-742.) Although Devine and Ackerman left the interview room at that point, Bingaman "somewhat made plans" as to how he would proceed in light of appellant's request, and

soon resumed the interrogation under the pretext that he was there to ask whether appellant wanted to contact a particular attorney. (Exh. 1A, third pp. 4-6; 3 Aug. CT 741-743; D RT (Jan. 19, 1996, proceedings) 83-85, 90-91, 93-94.) Bingaman's intention to continue the interrogation was betrayed by his statement that he wanted to talk to appellant "before we end this interview." (Exh. 1A, third p. 5-6; 3 Aug. CT 742-743; D RT (Jan. 19, 1996, proceedings) 90-91, 93-94.)

Although appellant stated that he did not want to talk any further, Bingaman continued to question him. (Exh. 1A, third p. 6; 3 Aug. CT 743; D RT (Jan. 19, 1996, proceedings) 90-91.) Indeed, Bingaman continued to question appellant even after appellant reaffirmed that he wanted to talk to an attorney. (Exh. 1A, third p. 6; Exh. 1B, pp. 7-8; 3 Aug. CT 743-745.)

By that point, appellant had invoked either his right to counsel or his right to silence no fewer than 12 times, only to be disregarded. (Exh. 1A, p. 14, second pp. 18-19, 44-46, and third pp. 2-6; 3 Aug. CT 646, 706-707, 732-734, 739-743.) Surely, by then, appellant would have recognized that any invocation of his rights would be futile. (See *Michigan v. Mosley*, *supra*, 423 U.S. at p. 104; *People v. Neal*, *supra*, 31 Cal.4th at pp. 68, 81-82 [defendant's statement held involuntary where, among other things, police continued to interrogate him even though he invoked his right to counsel nine times].)

A short time later, appellant again invoked his right to silence, declaring "I'd rather not say to you," but was yet again ignored by Bingaman. (Exh. 1B, p. 28; 3 Aug. CT 765.) That is, Bingaman had again failed to scrupulously honor appellant's right to silence. (See *Michigan v. Mosley*, *supra*, 423 U.S. at p. 104; *People v. Neal*, *supra*, 31 Cal.4th at pp. 68, 81-82.)

Second, Bingaman suggested once more that appellant was subconsciously blocking out information about the incident. (Exh. 1B, p. 34; 3 Aug. CT 771.) He also confronted appellant with false information, i.e., appellant's supposed reservation of a motel room on March 27, 1995. (Exh. 1B, pp. 42-43; 3 Aug. CT 779-780.) Similarly, the investigator insisted falsely that appellant had written a letter which contained the phrase "Lover's Dreams" and references to a child. (Exh. 1A, third pp. 2-4; 3 Aug. CT 739-741.) It is likely that appellant's statements were induced by these deceptive, psychologically coercive suggestions. (See, e.g., *Blackburn v. Alabama*, *supra*, 361 U.S. at pp. 206-208; *People v. Spears*, *supra*, 228 Cal.App.3d at pp. 27-28; *People v. Hogan*, *supra*, 31 Cal.3d at pp. 840-841; *People v. Engert*, *supra*, 193 Cal.App.3d at p. 1524.)

Third, the officers continued to make implicit promises of leniency. For instance, Bingaman assured appellant that "I'm here to help you" and that "Nobody is gonna harm you, blame a murder on you or much less try and ruin your career, okay? Now, just work with me a little bit here okay?" (Exh. 1B, pp. 9-11; 3 Aug. CT 746-748.) A short time later, Bingaman claimed that Ackerman and Devine "look beyond the guilt. They look beyond the killing. They look beyond the terrible mess of what's society, whatever and they look at the individual to work and to help him, only him and I appreciate that." (Exh. 1B, p. 22; 3 Aug. CT 759.) Expanding on that claim, Bingaman stated, "I am not interested in, in putting you behind bars. I am not interested in the punishment aspect." (Exh. 1B, p. 23; 3 Aug. CT 760.)

These statements constituted implicit promises that appellant would receive favorable treatment, or would not face punishment, *so long as* he confessed. The trial court's ruling that appellant's statements were

voluntary was belied by these implicit promise of leniency. (See, e.g., *Arizona v. Fulminante*, *supra*, 499 U.S. at pp. 285-286; *People v. Cahill*, *supra*, 5 Cal.4th at p. 482, fn. 1.)

Fourth, when Bingaman questioned appellant about his supposed reservation of a motel room on March 27, 1995, he implied that appellant would be detained and taken back to the United States if he did not answer him. (Exh. 1B, pp. 42-44; 3 Aug. CT 779-781.) Appellant surely would have taken Bingaman's statement as an implied threat that he would be returned to the United States unless he confessed to the abduction and murder. (See, e.g., *People v. Cahill*, *supra*, 22 Cal.App.4th at p. 311.)

Finally, the fact that appellant was obviously fatigued, and continued to be in an emotional state, left him particularly susceptible to such ploys. (See *Withrow v. Williams*, *supra*, 507 U.S. 694 [suspect's physical condition and mental health are factors to consider in determining voluntariness of statements]; *People v. Farnam*, *supra*, 28 Cal.4th at p. 182.) At around 2:00 a.m., he lay down and fell asleep, but was awakened a short time later. (Exh. 1A, third p. 5; 3 Aug. CT 742; D RT (Jan. 19, 1996, proceedings) 94-95.) At another point, Bingaman commented that appellant seemed very emotional. (Exh. 1B, p. 10; 3 Aug. CT 747.) A short time later, appellant was shaking, and stated that he was "[s]hook up really bad." (Exh. 1B, p. 13; 3 Aug. CT 750.)

In light of the foregoing, it cannot be said that appellant's statements were voluntary.

e. Conclusion

Although the trial court found that, at page 44 of Exhibit 1B, the interrogators ultimately "transcended the bounds of permissible police conduct" (E RT (Mar. 13, 1996 proceedings) 11-19), they had been using

precisely the same coercive techniques prior to that point. Indeed, the totality of the circumstances shows that appellant's "will was overborne" throughout the entire interrogation. (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226.)

First, there is reason to believe that, prior to beginning the interrogation, the officers had decided to ignore any invocations of appellant's rights. (D RT (Jan. 19, 1996, proceedings) 54-56, 83-84.) Second, the interrogators failed to provide a second *Miranda* warning at any time during this portion of the interrogation. (See *United States v. Hsu* (9th Cir. 1988) 852 F.2d 407, 410.) Third, from the very outset of the interrogation, the officers employed a wide array of coercive tactics. Among other things, they repeatedly ignored appellant's requests for counsel and requests to remain silent (Exh. 1A, p. 14 and second pp. 18-19, 44-46, and third pp. 2-6; 3 Aug. CT 646, 706-707, 732-734, 739-743), asserted that appellant was suppressing his memory (Exh. 1A, p. 35, second pp. 32-37; Exh. 1B, p. 34; 3 Aug. CT 667, 720-725, 771), claimed that Ackerman was a trained profiler (Exh. 1A, pp. 51-52 and second pp. 32-37; 3 Aug. CT 683-684, 720-721), made promises of leniency (Exh. 1A, p. 14 and second pp. 12-13; Exh. 1B, pp. 9-11, 22-23; 3 Aug. CT 646, 700-701, 746-748, 759-760), and confronted appellant with false information (Exh. 1A, third pp. 2-4; Exh. 1B, p. 44; 3 Aug. CT 739-741, 781) and thinly veiled threats (Exh. 1A, third pp. 2-4; Exh. 1B, pp. 22, 44; 3 Aug. CT 739-741, 759, 781). All of this took place over many hours in a cramped room aboard a ship faraway at sea, and involved an emotionally overwrought suspect.

Moreover, as noted above, the trial court's ruling revealed a misunderstanding of the law relating to the voluntariness of a suspect's

statement. (E RT (Mar. 13, 1996, proceedings) 2.) Because the record reveals that the trial court considered improper "factors" with respect to the first section of the interrogation, the correctness of each of the rulings challenged here must be called into question.

All of appellant's statements were involuntary and were obtained by the interrogators' "exploitation" of their illegal conduct. (See *Dunaway v. New York* (1979) 442 U.S. 200, 218-219; *Brown v. Illinois*, *supra*, 422 U.S. at pp. 604-605; *Wong Sun v. United States*, *supra*, 371 U.S. at pp. 487-488.) Therefore, all of appellant's statements before that point should have been suppressed for all purposes. (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 255; *People v. Neal*, *supra*, 31 Cal.4th at pp. 81-82.) The trial court thus erred in admitting them into evidence.

C. The Trial Court's Error Was Prejudicial

The effect of the erroneously admitted statements was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Cahill*, *supra*, 5 Cal.4th at pp. 509-510.) Applying the *Chapman* test, this Court is "compelled to conclude there is at least a reasonable 'possibility that the evidence complained of "might have contributed"' to the guilt verdicts, special circumstance finding, and sentence of death. (See *People v. Powell* (1967) 67 Cal.2d 32, 56-57, quoting *Fahy v. Connecticut* (1963) 375 U.S. 85, 86.)

Although appellant's statements did not amount to a confession, they were nevertheless prejudicial. First, Ackerman testified as to appellant's admission that he owned numerous adult magazines, some of which featured models who appellant admitted appeared younger than 18 years old. (12 RT 2076-2077.) As appellant discusses in Argument III, evidence relating to the magazines was both irrelevant and unduly inflammatory;

Ackerman's testimony compounded the prejudice by confirming that the magazines belonged to appellant.

Second, Ackerman testified that appellant told him that he had seen a man, possibly African-American, in the Food King parking lot. (12 RT 2078-2080.) Appellant's statement came in the midst of his attempt to somehow remember what he had seen on a particular day more than one year earlier. Therefore, his vague "recollection" that he may have seen an African-American man, even offered in good faith, should have carried little weight. However, the prosecutor was able to use this testimony to suggest that appellant was referring to prosecution witness Mychael Jackson, thereby inadvertently corroborating that crucial prosecution witness, who was otherwise saddled with serious credibility problems. The prosecutor not only elicited Ackerman's testimony that a black male (that is, Jackson) would turn out to be important to the case (12 RT 2080), but, during his closing argument, the prosecutor inaccurately stated that appellant said Jackson had been at the Food King parking lot (16 RT 2855).

Third, Ackerman testified that appellant expressed concern that he was blocking out information. (12 RT 2083.) However, as noted above, the interrogating officers themselves repeatedly suggested that appellant may have been blocking out information. Ackerman's suggestion that he had expertise as a profiler likely persuaded appellant that Ackerman had special insight into his memory and/or subconscious, and that Ackerman knew things about appellant that appellant did not know or remember.

Fourth, admission of appellant's statements allowed the prosecution to use his fearful and confused responses and demeanor during the coercive interrogation against him, unfairly creating inferences that appellant was conscious of his guilt. For instance, the prosecutor's cross-examination

highlighted appellant's failure to tell police that he had rented adult videotapes at three stores, not one (15 RT 2602-2604, 2608), and his fear that he was or might be a suspect (15 RT 2612-2613). Indeed, it is likely that admission of the statements impelled appellant to testify and explain his version of events and interpretation of his statements, where otherwise he would not have had to do so. (See *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1064.)

Finally, the trial court's error in finding the statements voluntary was also prejudicial to the extent that the ruling constituted the basis for the court's admission of Jackson's testimony. (E RT (Mar. 13, 1996, proceedings) 17-18.) Specifically, the trial court ruled that, even absent those statements obtained in violation of *Miranda*, the police had sufficient information to arrest appellant. (*Ibid.*) However, several of the most prejudicial statements – including appellant's statements that he owned the adult-oriented magazines and videotapes, that he saw a black man in the Food King parking lot, and that he was concerned that he was blocking out information (Exh. 1A, pp. 17, 55-56, and second p. 8; 3 Aug. CT 649, 687-688, 696) – were elicited during a portion of the interview where the trial court found no *Miranda* violation. (E RT (Mar. 13, 1996, proceedings) 2-3.)

In sum, because appellant's statements were crucial aspects of the evidence at both the guilt and penalty phases, the State cannot show that their erroneous admission was harmless beyond a reasonable doubt. Consequently, the entire judgment must be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

III

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

A. Introduction

Recognizing the weakness of its case (see, e.g., 2 CT 478), the prosecution moved in limine to introduce various items of evidence, including evidence of appellant's incestuous conduct with his sister and his possession of adult-oriented material, to establish issues such as appellant's motive for and intent in abducting Maria Piceno. (Evid. Code, §§ 1101, 1108.) Ultimately, the trial court admitted the following evidence:

(1) The testimony of appellant's sister, Donna Holmes, that appellant had engaged in incestuous conduct with her on a continuing basis from the time he was five years old until he was a teenager;

(2) Donna's testimony that, during a 1991 confrontation about their incestuous conduct, appellant apologized and stated that he had never married because he feared he would molest his children;

(3) A list of 29 adult-oriented magazines recovered from a storage unit rented by appellant;

(4) The testimony of a prosecution expert, Bruce Ackerman, regarding the nature of the magazines; and,

(5) Evidence that appellant rented nine adult videotapes on March 27, 1995. (2 CT 308-310.)

The trial court's rulings were erroneous: all the evidence permitted under Evidence Code sections 1101 and 1108 was inadmissible and highly prejudicial. Specifically, as appellant demonstrates below, none of this evidence bore any relationship to whether appellant was guilty of the charged offenses, yet it was extremely inflammatory and likely to create a

bias against him. All of it should have been excluded.[44]

The procedural background relating to this evidence is set forth in this introduction. In Sections B through D, *infra*, appellant shows that the trial court erred in admitting all this evidence. In Section E, *infra*, he demonstrates that the errors rendered his trial and the resulting verdicts unconstitutional. And in Section F, *infra*, he establishes that these errors, individually and in combination, require reversal of the judgment in its entirety.

1. Litigation Regarding Admissibility Of Evidence Under Evidence Code Sections 1101 and 1108

a. The Motions In Limine

In his trial brief, appellant moved in limine pursuant to Evidence Code sections 352 and 1101, subdivision (a), to exclude (1) Donna's testimony concerning both the incest and appellant's statements regarding the incest, and (2) evidence that appellant possessed adult movies and magazines. (1 CT 298-299.)

In response, the prosecution made a written offer of proof as to the challenged evidence. (2 CT 308-309.) The prosecution requested that Donna be permitted "to testify to fourteen years of continuos [sic] sexual abuse by the defendant consisting of conduct at the ***very least*** amounting to both sexual batteries in violation of 243.4 of the Penal Code and indecent exposure in violation of 314 of the Penal Code. The defendant[']s conduct consisted of fondling the victim, rubbing his penis on her genitals and having her orally copulate him." (2 CT 476, original bold; 2 CT 309.) The

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[44] Significantly, in denying appellant's motion for a new trial, the trial court noted that there were issues in the case, including its analysis of evidence admitted under section 1108 of the Evidence Code, that were "far from cut and dry." (G RT (Apr. 22, 1997, proceedings) 26.) The court's observation was apt.

prosecution also requested that Donna be permitted to testify that, in 1991, she confronted appellant about the incest, and that during the confrontation, he stated that he had never married because he was afraid he would molest his children. (2 CT 476.) According to the prosecution, her testimony was admissible under Evidence Code sections 1108 and 352, and was relevant to prove appellant's motive for and intent in abducting Maria. (*Ibid.*; 2 CT 309)

The prosecution also sought to introduce: a list of the titles of 29 magazines seized from appellant's storage unit, which magazines, the prosecution argued, "indicate the defendant has an interest in young girls;" testimony that the magazines contained photographs "of young girls engaged in sexual activity;" and evidence that appellant rented nine pornographic videotapes on March 27, 1995. (2 CT 308-310.)

According to the prosecution, the evidence was relevant to prove appellant's motive and intent to commit a violation of Penal Code section 288, subdivision (a). (2 CT 309-310.)[45] The prosecution further argued that the videotapes and magazines were admissible under the rationale set forth in *People v. Memro* (1995) 11 Cal.4th 786, 864-865. Finally, the prosecution argued, the videotape rentals were "inextricably tied up with the events of March 27, 1995." (2 CT 310.) The prosecution acknowledged that "[b]ecause of the absence of physical evidence of molestation the **only** evidence the people can present on the issue of intent

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[45] Section 288, subdivision (a), provides that "[a]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member 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 . . . ."

the 9 rented pornographic videos as well as the magazines." (2 CT 478, original bold and underscoring.)

On December 23, 1996, the trial court heard the motions in limine. (RT of Dec. 23, 1996, proceedings, pp. 1-60.)

b. Appellant's Proposed Stipulation

On December 27, 1996, appellant filed a proposed stipulation as to the intent element of Penal Code section 207, subdivision (b). (2 CT 503-504.) Appellant renewed his objections to the proffered evidence, but in the event the trial court found such evidence admissible as to the element of intent, he offered to stipulate that whoever abducted Maria Piceno did so for the purpose of sexual molestation. (2 CT 504.) On December 31, 1996, the prosecution filed an opposition to the proposed stipulation. (2 CT 506-507.)

c. The Trial Court's Rulings As To The Incest, Appellant's Alleged Reason For Not Marrying, And The Videotape Rentals

On January 21, 1997, the trial court rendered its rulings as to most of this evidence. As the trial court noted, a violation of Penal Code section 288 is specifically included as a "sexual offense" within the meaning of Evidence Code section 1108. (10 RT 1438-1439.) The trial court reasoned that, because appellant was being tried for kidnaping a child for the purpose of committing a violation of section 288, the charge constituted a crime that "involv[ed]" conduct prohibited by section 288. (10 RT 1439.) Therefore, the trial court ruled, evidence relating to appellant's incestuous conduct with his sister and his later apology for that conduct was admissible under Evidence Code section 1108 (subject to an Evidence Code section 352 analysis) to show his character and his motive to commit the charged

offenses. (10 RT 1439-1440.)[46]

The trial court then weighed the evidence pursuant to Evidence Code section 352, finding that, in connection with other evidence offered by the prosecution, such evidence was probative to show that appellant had had a lifelong sexual interest in pubescent and prepubescent girls.[47] According to the trial court, such evidence was highly relevant to the issue of motive, and its probative value outweighed any undue prejudice, tendency to confuse issues, or undue consumption of time. (10 RT 1440-1441.) In so ruling, the trial court stated that it had considered the remoteness in time of appellant's conduct and the fact that appellant was a minor when most of that conduct allegedly occurred. (10 RT 1440.)[48]

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[46] The trial court stated that "with regard to . . . the proffered testimony [of Donna Holmes] of the alleged criminal acts committed upon [her] and the defendant's alleged admission by way of apology for those acts, the court has been asked to consider that testimony under Evidence Code section 1108." (10 RT 1438.) A review of the record demonstrates that in fact the trial court was not specifically asked to consider admitting evidence regarding the apology. Rather, in its requests that Donna Holmes be permitted to testify regarding her confrontation with appellant, the prosecution repeatedly referred to appellant's statement regarding his never having married, and never referred explicitly to his alleged apology. (2 CT 308-309, 476, 506.) Moreover, the trial court did not explain why it considered Evidence Code section 1108 applicable to appellant's apology.

[47] Presumably, the trial court was referring to evidence that: appellant had told his sister that he had never married because he feared he might molest his own children (see Section C, *infra*); he possessed various adult magazines, some of which purported to depict teenage females (see Section D, *infra*), he had rented adult videotapes on the day of Maria's abduction (see Section D, *infra*); and statements he had allegedly made to a member of his squadron, which statements were never introduced into evidence (see 1 CT 298; 2 CT 474).

[48] The trial court failed to expressly state any ruling as to that proposed stipulation. However, in admitting evidence relating to

The trial court next ruled that Donna's testimony that appellant told her that he never married for fear he would molest his children was admissible under Evidence Code section 1101 as probative of motive and identity. (10 RT 1441-1444.) The court further found that that testimony was inadmissible under Evidence Code section 1108 because it did not constitute evidence of other crimes. (*Ibid.*) The trial court also found that the probative value of this evidence outweighed any undue prejudicial effect, tendency to confuse issues, or undue consumption of time. (10 RT 1444.)

Finally, the trial court deemed admissible evidence that appellant had rented pornographic videotapes on March 27, 1995. According to the trial court, evidence of the videotape rentals was relevant to show appellant's state of mind, to wit, an interest in and/or preoccupation with his sexual passions "at the time in question." (10 RT 1444-1445.) The trial court further found that, under Evidence Code section 352, the probative value of such evidence outweighed any undue prejudice, tendency to confuse issues, or undue consumption of time. (*Ibid.*)[49]

d. The Hearing Pursuant To Evidence Code Section 402 And The Trial Court's Ruling Regarding The Magazines

On January 22 and 23, 1997, the trial court held a hearing pursuant to

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appellant's incestuous conduct and his apology for that conduct, the trial court implicitly denied appellant's proposed stipulation to the intent element of section 207, subdivision (b). (10 RT 1433-1453; G RT (Apr. 22, 1997, proceedings) 23-24.)

[49] The trial court's rulings with respect to appellant's incestuous conduct, his alleged statement as to why he had never married, and his videotape rentals were consistent with tentative rulings it had announced on January 16, 1997. (F RT (Jan. 16. 1997, proceedings) 4-6.)

to Evidence Code section 402, to address the admissibility of evidence relating to appellant's magazines. The sole witness presented at the hearing was prosecution expert Bruce Ackerman, who, in March and April, 1995, had worked for the United States Postal Inspection Service. (11 RT 1837.) Ackerman testified about the nature and content of the magazines constituting Exhibit 30. (11 RT 1837-1856; 12 RT 1859-1871.)

Following Ackerman's testimony, the prosecution requested that it be permitted to present evidence relating to the magazines in the form of testimony, rather than by showing the magazines to the jury. The prosecution further requested that Ackerman be permitted to opine that the possession of such materials is significant "for the purposes he stated." (12 RT 1871.) However, the prosecution agreed that Ackerman did not claim to be qualified to render an opinion that, because appellant possessed such materials, he was a pedophile. (12 RT 1871-1872.)

Defense counsel argued that the evidence had little relevance because Ackerman could not testify as to what extent people with no sexual interest in elementary school children possess such materials. (12 RT 1872.) Moreover, defense counsel observed that the prosecution's offer of proof presented a "Hobson's choice." On the one hand, introduction of the magazine titles only would mislead the jury by suggesting that the magazines depicted young children. On the other hand, introduction of the magazines themselves would be prejudicial in that they represented the kind of material that, although legal, could evoke "extreme visceral reaction" and "strong opinions" among jurors. (12 RT 1872-1873.) Defense counsel thus requested that "this whole line of inquiry be excluded." (12 RT 1874.)

Citing *People v. Clark* (1992) 3 Cal.4th 41, the trial court found that the evidence was relevant to the issue of motive. (12 RT 1874-1875.) In so

ruling, the trial court acknowledged that in each of the photos which Ackerman identified as the most extreme examples, the individual depicted was significantly more developed than a prepubescent child. Nevertheless, the trial court found that factors such as shaved genitalia, the presence of items such teddy bears and pigtails, text referring to schoolgirls and teenagers, combined with Ackerman's expertise and his testimony that he had found such materials to interest admitted pedophiles, had substantial probative value. (12 RT 1874-1875.)

The trial court further found that, under Evidence Code section 352, the probative value of such evidence outweighed any undue prejudice, tendency to confuse issues, or undue consumption of time. The trial court expressed its doubt that photographs of females in explicitly sexual positions would compromise the jury's ability to consider the evidence for the relevant and proffered purpose, given "what people are exposed to on a daily basis" in the media. Accordingly, the trial court admitted the evidence. (12 RT 1875.)

2. Legal Standards Governing the Admissibility of "Uncharged Misconduct" Evidence

a. Evidence Code Section 1101

Subdivision (a) of Evidence Code section 1101 provides that "[e]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." As Witkin has explained:

> The reasons for exclusion are: '*First*, character evidence is of slight probative value and may be very prejudicial. *Second*, character evidence tends to distract the trier of fact from the main question of what actually happened on the particular occasion and permits the trier of fact to reward the good man and to punish the bad man

> because of their respective characters. *Third*, introduction of character evidence may result in confusion of issues and require extended collateral inquiry.' [Citations.]

(1 Witkin Evid. (4th ed. 2000) § 42, p. 375, italics original.)

The rule excluding evidence of criminal propensity is over three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647, cited in *People v. Falsetta* (1999) 21 Cal.4th 903, 913, and *People v. Alcala* (1984) 36 Cal.3d 604, 630-631.) Indeed, the propensity rule is in effect in every jurisdiction in the United States. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 392; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381 & fn. 2 [citing statutes and cases codifying or adopting the rule]; *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

However, Evidence Code section 1101, subdivision (b), permits the use of evidence of uncharged misconduct when "relevant to prove some fact (such as motive, opportunity, intent [. . .]) other than his or her disposition to commit such an act." (*People v. Catlin* (2001) 26 Cal.4th 81, 145-146.) The critical inquiry in assessing the materiality of evidence concerning uncharged misconduct is the nature and degree of similarity between the uncharged misconduct and the charged offense. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402.) Although the least degree of similarity is required to prove intent, "the uncharged misconduct must be sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance.' [Citations.]" (*Id.* at p. 402.)

This Court has recognized, however, that evidence of uncharged misconduct "'is so prejudicial that its admission requires extremely careful analysis.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, citing *People v. Smallwood* (1986) 42 Cal.3d 415, 428, and *People v. Thompson* (1988) 45

Cal.3d 86, 109.) The primary focus of this careful analysis, of course, is to ensure that the evidence is *not* offered to prove character or propensity *and* that its practical value outweighs the danger that the jury will nevertheless view it as evidence of criminal propensity. Therefore, even if character evidence is relevant within the meaning of Evidence Code section 1101, subdivision (b), such evidence may not be admitted if its probative value is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury," under Evidence Code section 352. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404, citing *People v. Thompson*, *supra*, 45 Cal.3d at p. 109.)

This Court has enumerated five factors which a trial judge must consider in weighing evidence of uncharged misconduct under Evidence Code section 352: (1) whether the evidence is material, i.e., the tendency of the evidence to demonstrate the issue for which it is being offered; (2) the extent to which the source of the evidence is independent of the evidence of the charged offense; (3) whether the defendant was punished for the uncharged misconduct; (4) whether the uncharged misconduct is more inflammatory than the charged offense; and (5) whether the uncharged misconduct is remote in time. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

Trial court rulings on the admissibility of evidence under Evidence Code section 1101(b), and on the admission or exclusion of evidence under section 352, are both reviewed for abuse of discretion. (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101, subd. (a)]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [Evid. Code, § 352].)

b. Evidence Code Section 1108

As noted above, Evidence Code section 1101, subdivision (a), prohibits the admission of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Because "[e]vidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense," such evidence traditionally has been subject to exclusion as improper character evidence in criminal trials. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179.) Indeed, "[t]he defendant must be tried for what he did, not who he is." (Romney, *Statutes That Are Internally Contradictory: The Collision of An Irresistible Force With An Immovable Object* (2003) 31 W.St.U.L.Rev. 99, 128.)

Evidence Code section 1108, subdivision (a), however, provides that "[i]n 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. . . ." In enacting Evidence Code section 1108, the Legislature "determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature . . . determined the need for this evidence is 'critical' given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial. . . ." (*People v. Fitch*, *supra*, at pp. 181-182, citation and fn. omitted; see also *People v. Falsetta*, *supra*, 21 Cal.4th at p. 916.)

In *Falsetta*, this Court identified three factors to guide the trial court's exercise of discretion in deciding whether to admit evidence under Evidence Code section 1108: (1) the burden on the defense in having to

defend against the uncharged offenses; (2) judicial efficiency; and (3) whether admission of the defendant's uncharged offenses results in undue prejudice. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 916; see also *People v. Frazier* (2001) 89 Cal.App.4th 30, 40-42 [applying those factors in evaluating the trial court's admission of evidence under Evidence Code section 1108].)

The historical notes regarding Evidence Code section 1108 indicate that the Legislature rejected "more exacting requirements of similarity between the charged offense and the defendant's other offenses," on the ground that "[m]any sex offenders are not 'specialists,' and commit a variety of offenses which differ in specific character. Although this Court has not decided whether the uncharged sex offenses must be similar to the charged offenses to support the inference that the defendant has a disposition to commit sex offenses (see *People v. Reliford* (2003) 29 Cal.4th 1007, 1012 & fn. 1), admission of evidence requires that there be "a direct relationship between the prior offense and an element of the charged offense" (*People v. Daniels* (1991) 52 Cal.3d 815, 857).

Trial court rulings on the admissibility of evidence under Evidence Code section 1108 are reviewed for abuse of discretion. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 367; see also *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 917-918.)

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

1. Introduction

Pursuant to Evidence Code section 1108, the trial court admitted evidence that appellant engaged in incestuous conduct with his sister when they were children and teenagers, and that appellant later apologized for

that conduct. (10 RT 1438-1441.) Although appellant was only two years older than Donna, the trial court found such evidence probative of appellant's character and his motive – namely, "a lifelong sexual interest in pubescent and prepubescent girls" – to commit the offenses with which he was charged (10 RT 1440). (See Section A, *supra.*)

Ultimately, however, the trial court instructed the jury pursuant to CALJIC 2.50 that it could consider the evidence only for the limited purpose of determining if it showed the existence of the element of intent or a motive for the crime. (12 CT 3447-3448; 15 RT 2672-2675; 16 RT 2706-2707.)[50] The fact that the trial court gave this instruction suggested that the jury was to consider the evidence as if it had been admitted pursuant to

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[50]As modified by the trial court, the instruction read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial.
>
> Such evidence, if believed, was not received and may not be considered by you to prove that defendant is a person of bad character or that [he] [she] has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining whether it tends to show:
>
> The existence of the intent which is a necessary element of the crime charged;
>
> A motive for the commission of the crime charged;
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

section 1101, subdivision (b), not section 1108, of the Evidence Code.

The trial court abused its discretion in admitting evidence of appellant's incestuous conduct, whether it did so under section 1101 or section 1108 of the Evidence Code, because it simply had no relevance for any permissible purpose. Even assuming *arguendo* that the evidence had some slight probative value, the trial court should have excluded it under Evidence Code section 352 because its emotional impact could only have prejudicially inflamed the jurors against appellant and far outweighed any probative value.

2. Donna Holmes's Testimony Regarding Incestuous Conduct With Appellant

Donna Holmes testified that she was appellant's sister, younger than appellant by two years. She testified that appellant began fondling her when he was five years old and she was three years old. (11 RT 1804-1806.) Over the next two years or so, he did that perhaps several times a week. (11 RT 1806.) Because appellant told her that they would get into trouble if she told anyone about it, she did not inform her parents. (11 RT 1805.)

When appellant was seven and Donna five, the incest began to take place on an almost nightly basis. (11 RT 1807.) Appellant usually took off his underwear or exposed himself, and got in bed with her. Usually, he lay on top of her, removed her underwear, and mimicked intercourse, without any penetration. (11 RT 1808.) He also fondled her and tried to get her to place her hands into his pants. (11 RT 1809.)

Starting when appellant was 12 or 13 years old, he often tried to persuade Donna to engage in intercourse. (11 RT 1809-1813.) Although he sometimes tried to physically penetrate her, she was able to push him away. (11 RT 1811-1812.) Occasionally, he tried to kiss her and fondle her

breasts. (11 RT 1812.) He also asked her to let him engage in anal sex with her, saying that his friends' sisters let his friends do it because it was not considered bad. (11 RT 1827.)

When appellant was around 13 or 14 years old, the incestuous conduct took place nightly, and frequently during the day as well. (11 RT 1812-1814.) On one occasion, Donna threatened to tell her parents what was happening. Appellant became angry and said he would kill her if she did. (11 RT 1824-1825.) On another occasion, appellant fondled her and tried to persuade her to perform oral sex. (11 RT 1817-1819.)

Starting about the time appellant was 17 years old, the incestuous contact became less frequent. (11 RT 1821.) The final incident occurred when Donna was 16 or 17. She had just taken a shower and was clad only in a towel, when appellant entered the bedroom. He grabbed the towel and pushed her onto the bed. He held her down and tried to penetrate her, but she pushed him away and threatened to have her fiancé beat him up. (11 RT 1822-1823.) He never touched her again. (11 RT 1823.)

Donna acknowledged that appellant had never penetrated her. (11 RT 1824.) She also acknowledged that, although they sometimes physically fought with one another, she did not think he was ever violent during the sexual conduct. (11 RT 1814-1816, 1824.)

Donna further testified that in 1991, when both she and appellant were visiting their parents' home, she confronted him about his incestuous conduct. (11 RT 1827.) When she said she wanted to talk to him about it, appellant said he had been thinking about it a lot himself and that he wanted to talk to her as well. He said he was sorry for what had happened and asked whether she could forgive him. (11 RT 1829.) Donna encouraged him to get counseling, but appellant said he did not need it. He told her that

what he had done came from a need for love and affection, not sexual satisfaction. (11 RT 1830.)

3. The Evidence Was Inadmissible Under Evidence Code Section 1108

The trial court initially admitted the evidence of appellant's incest with his sister under Evidence Code section 1108. However, the trial court instructed the jury that the evidence could be considered only for the limited purpose of proving intent or motive, which is consistent with section 1101, not section 1108, of the Evidence Code. The discrepancy between the trial court's explicit ruling and its instructions suggests that at some point the trial court recognized that the evidence was inadmissible under Evidence Code section 1108. That conclusion would have been correct. The trial court's initial, express ruling was erroneous, because (1) neither the incest evidence nor the kidnaping charge was a "sexual offense" under Evidence Code section 1108; and (2) the incest evidence should have been excluded under the factors set forth in *People v. Falsetta*, *supra*, 21 Cal.4th at pp. 915-916.

a. Evidence Code Section 1108 Was Inapplicable In This Case

In *People v. Falsetta*, *supra*, 21 Cal.4th at p. 915, this Court pointed out, "As the legislative history indicates, the Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations." The instant case did not present any such scenario: there was no sexual offense committed against Maria, in secret or otherwise, and there was no "he said/she said" credibility

determination for the jury to make with respect to the charged offenses.

Indeed, neither the incest evidence nor the charged offenses constituted "sexual offenses" within the meaning of Evidence Code section 1108, which defines a "sexual offense" as "a crime under the law of a state or of the United States that involved any of" several specified offenses. Under Penal Code section 26, children under the age of 14 years old are deemed incapable of committing a crime "in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." Therefore, as defense counsel pointed out, at least some of the incest did not constitute a "prior sexual offense" within the meaning of Evidence Code section 1108, because appellant was incapable of committing criminal conduct at the time due to his young age. (RT of Dec. 23, 1996, proceedings, p. 25; see § 26.)

The prosecution bore the burden of proving that appellant knew the wrongfulness of his conduct (*In re Manuel L.* (1994) 7 Cal.4th 229, 236), but made no such showing here. Although the prosecutor referred to a threat appellant made to prevent Donna from reporting the incest, Donna testified that appellant made that threat when he was 13 or 14 years old. (RT of Dec. 23, 1996, proceedings, p. 27; 11 RT 1812-1814, 1824-1825.) Appellant's threat, whether it occurred when he was 13 or 14 years old, was irrelevant to the issue of his capacity to commit a crime prior that point. The prosecution simply failed to carry its burden of proving that appellant understood the wrongfulness of his incestuous conduct from the age of 5 until the age of 13 or 14. Consequently, all evidence of incest before appellant was 14 years old did not relate to a "sexual offense" and should have been excluded. (§ 26.)

Evidence Code section 1108 also was inapplicable because none of

the charged offenses involved conduct proscribed by Penal Code section 288. Appellant was not charged with a violation of section 288 or any other offense listed in Evidence Code section 1108, all of which involve *sexual* conduct. There was no evidence that appellant "willfully and lewdly commit[ted] any lewd or lascivious act" within the meaning of that statute. Instead, the prosecution charged appellant only with kidnaping Maria Piceno *for the purpose of* committing an act defined in section 288. (1 CT 93-101, 137, 148, 156.) That is, the charged offense, i.e., section 207, subdivision (b), involved an *intent* to commit a violation of section 288, not an actual violation of that section.[51]

Similarly, because appellant was not charged with an attempt to violate section 288 (§§ 664/288), Evidence Code section 1108, subdivision (d)(1)(F), providing that "[a]n attempt . . . to engage in conduct described in this paragraph" constitutes a sexual offense, is inapplicable. Appellant acknowledges that, in *People v. Pierce* (2002) 104 Cal.App.4th 893, 898-899, the Court of Appeal held that assault with intent to commit rape was a "form" of attempted rape, qualifying it as a sexual offense under Evidence Code section 1108, subdivision (d)(1). That opinion, however, should be disapproved insofar as it permits trial courts to ignore the plain language of the statute and admit offenses other than those specifically listed therein.

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[51] The prosecution recognized it could not produce evidence that appellant had violated section 288. Although the complaint alleged that Maria's murder was committed while appellant engaged in the commission and attempted commission of rape (§ 190.2, subdivision (a)(17)(C)), sodomy (§ 190.2, subdivision (a)(17)(D)), and lewd and lascivious acts with a child under 14 (§ 190.2, subdivision (a)(17)(E)), the information contained no charges or allegations of sexual conduct. (A CT 1-3; 1 CT 6-7; see also 2 CT 478 [in its motion in limine, prosecution acknowledged the absence of physical evidence of molestation].)

(See, e.g., *Burden v. Snowden* (1992) 2 Cal.4th 556, 562 [as a matter of statutory construction, courts must "look first to the language of the statute, giving effect to its plain meaning."].)

Even if the analysis in *Pierce* were correct, kidnaping with the intent to commit a lewd and lascivious act (§ 207, subd. (b)) is not a "form" of attempted commission of section 288 (§§ 664/288). "To be guilty of an attempt, a defendant harboring the required specific intent must commit a direct but ineffectual act toward commission of the target crime." (*Hatch v. Superior Court* (2000) 80 Cal.App.4th 170, 187.) Because, as demonstrated in the following section, the "uncharged misconduct" evidence had no probative value to show that appellant intended to violate section 288, it cannot be said that any of his acts, including kidnaping, constituted an "overt act directed towards immediate consummation" of an act proscribed by section 288. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1373-1374, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 454.)

Under these circumstances, the trial court erred in concluding that kidnaping a child "for the purpose of" committing a violation of section 288 constituted a crime that "involved" conduct prohibited by section 288, and that evidence relating to appellant's incestuous conduct was therefore admissible under Evidence Code section 1108. (10 RT 1439-1440.)

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

In any event, a review of the factors set forth in *Falsetta* – specifically, (1) the burden on the defense in having to defend against the uncharged offenses, (2) judicial efficiency, and (3) whether admission of the defendant's uncharged offenses results in undue prejudice – demonstrates that the trial court abused its discretion in admitting evidence

of appellant's conduct under Evidence Code section 1108. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 915-916.)

In *Falsetta*, this Court rejected the defendant's due process challenge to Evidence Code section 1108 on the ground that he, like "defendants in similar circumstances," would not be unduly burdened by having to defend against the "other acts" evidence because he had already been convicted of those other acts. (*Id.* at p. 916.) Moreover, this Court concluded that Evidence Code section 1108 would not sidetrack judicial efficiency because (a) it permits the trial court to exclude evidence of other crimes under Evidence Code section 352, and (b) "in cases such as the present case, involving only the defendant's prior convictions based on his guilty pleas, no such inefficient sidetracking will occur." (*Id.* at pp. 911, 916.)

Appellant was unduly burdened by having to defend against the other acts evidence. He has never been arrested or tried for, let alone convicted of, offenses relating to his conduct with Donna. Here, though, appellant was presented with the essentially impossible burden of disproving his sister's accusations. Appellant submits that he simply could not have rebutted testimony about matters alleged to have occurred when he was but a child and adolescent, and over a period of many years. Thus, in admitting the evidence the trial court *created* precisely the kind of "he said/she said" credibility contest Evidence Code section 1108 was enacted to help resolve. (*Id.* at p. 918.)

In addition, admission of the evidence in this case thwarted the interest in judicial efficiency. Because appellant was neither prosecuted for nor convicted of any acts against his sister, litigation relating to, and presentation of evidence regarding, the alleged prior conduct necessarily required "inefficient sidetracking" of the proceedings. (*Id.* at pp. 911, 916.)

In *Falsetta*, this Court instructed that, in carrying out the "careful weighing process under [Evidence Code] section 352," trial courts

> must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

(*Id.* at p. 917.) Bearing these factors in mind, a review of the trial court's application of Evidence Code section 352 in the instant case demonstrates that any probative value of this evidence was far outweighed by its prejudicial effect.

First, as noted above, Evidence Code section 1108 was inapplicable because none of the charged offenses involved "conduct" proscribed by Penal Code section 288. (See Section 3.B.a, *supra*, which appellant incorporates by reference herein.)

Second, as noted above, the nature of the evidence was extremely inflammatory. (See, e.g., *Benton v. State*, *supra*, 461 S.E.2d at p. 205 (conc. opn. of Sears, J.).) Donna testified at length that, over a period of about fourteen years, appellant engaged in a number of sexual acts with her, including: fondling (11 RT 1804-1806, 1808-1809, 1812, 1817-1819); exposing himself (11 RT 1808); urging her to engage in vaginal intercourse, anal sex, and oral sex (11 RT 1809-1813, 1817-1819, 1827); and trying unsuccessfully to penetrate her (11 RT 1811-1812, 1822-1823). In addition, the jurors might have concluded that the fact appellant was only 5 years old when he began to engage in such conduct demonstrated that he was innately evil, and therefore must have done whatever he was charged

with, or, alternatively, deserved to be punished even if the prosecution had failed to prove his guilt beyond a reasonable doubt.

Third, evidence of appellant's incestuous relationship with his sister had absolutely no probative value in the instant case. Appellant was himself a minor when he engaged in most of these acts, and was nearly the same age as Donna. Moreover, much of this conduct occurred before appellant was 14 years old and therefore did not constitute a "prior sexual offense" within the meaning of Evidence Code section 1108. (See Section 3.B.a, *supra*.)

In addition, there was no evidence to show that appellant's childhood and adolescent conduct demonstrated that as an adult he possessed any sexual interest in young girls. Appellant was 35 years old at the time of the charged offenses, and the victim was an 8-year-old girl. (1 CT 168, 175; 10 RT 1506; 25 RT 3135-3136.) In contrast, appellant was a very young child, and was not much older than Donna, when the incest began. Almost all of the incestuous contact occurred when appellant was a minor. (11 RT 1804-1820.) Moreover, contradicting the purportedly probative value of the incest evidence, appellant remained sexually interested in Donna even as she grew older and matured physically (11 RT 1809-1823), suggesting that he was specifically drawn to her, regardless of her age. On the other hand, the record is devoid of evidence of any sexual conduct with children other than Donna. There was no evidence that appellant had molested any other children with whom he had lived or had close ties, including his youngest sister (11 RT 1807, 1810; 25 RT 3135-3136), three children with whom he had shared a house (13 RT 2226-2227), and his nieces, one of whom was nine years old (25 RT 3146, 3152).

People v. Harris (1998) 60 Cal.App.4th 727 is instructive. There,

the Court of Appeal reversed the defendant's convictions for several sex offenses against two women, ruling that the trial court erred in admitting evidence of a prior violent sexual offense. In so holding, the Court of Appeal concluded that the evidence of a prior burglary offense, which also involved a "viciously beaten and bloody victim," and some testimony regarding the occurrence of a rape, was "inflammatory *in the extreme*." (*People v. Harris*, *supra*, 60 Cal.App.4th at pp. 734, 738, original italics.) The evidence of the prior offense, which had not resulted in a rape conviction, also led to the danger of confusing the issues for the jury, who may have felt the need to punish the defendant for the prior crime. (*Id.* at p. 738.) The court determined that the probative value of the prior offense was insignificant because there lacked "any meaningful similarity at all." (*Id.* at p. 740.) In light of the lack of significant probative value and the highly prejudicial nature of the prior offense evidence, the Court of Appeal held the evidence should not have been admitted, and reversed the conviction. (*Id.* at p. 741.) A similar analysis applies in this case.

Fourth, appellant's conduct with his sister was extremely remote. At the time of the charged offenses, appellant was 35 years old. (1 CT 175; 25 RT 3145.) Thus, the conduct at issue had occurred roughly 16 to 30 years prior to the charged offenses. Although no specific time limit has been established for determining when an offense is too remote to be admissible pursuant to Evidence Code section 1108, a substantial gap between the prior offenses and the charged offenses means that it is less likely that the defendant had the propensity to commit the charged offenses. (*People v. Branch* (2001) 91 Cal.App.4th 274, 285.)

Moreover, although courts have admitted acts which occurred as much as 30 years prior to the charged offenses (*People v. Branch*, *supra*, 91

Cal.App.4th at pp. 284-285; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395), in such cases, the probative value of the evidence outweighed the remoteness because of the close similarity of the charged and uncharged offenses. Here, appellant's conduct with Donna was in no way similar to the charged offenses and should have been excluded. (See *People v. Harris*, *supra*, 60 Cal.App.4th at pp. 730-733, 740-741 [in case charging defendant with using a position of trust as a mental health nurse to engage in sex with two women who were "vulnerable due to their mental condition," evidence of a "brutal" rape he had committed 23 years earlier was held to be too dissimilar to have any significant probative value].) In addition, the trial court in appellant's case stated that it was considering the remoteness of the uncharged conduct, but failed to explain why the probative value of the offenses was not so attenuated by either the passage of time or dissimilarity of the acts as to permit admission of the evidence. (10 RT 1440.)

Fifth, as appellant explains in greater detail below, absent the evidence of his conduct with Donna, the jury would have been far less likely to find appellant guilty of the charged offenses. For instance, the jury would have been less likely to credit the testimony of prosecution witnesses Mychael Jackson, Mary Alliene Smith and Mary Lazaro, and more likely to find that defense evidence relating to the abduction and murder of Angelica Ramirez raised a reasonable doubt as to appellant's guilt. (*Infra*, at pp. 167-168.)

Finally, there were less prejudicial alternatives available to the trial court. For instance, it could have accepted appellant's proposed stipulation as to the intent element of section 207, subdivision (b), or it could have excluded evidence regarding appellant's conduct with his sister while he

was a minor (§ 26). (12 CT 503-504.)[52]

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

As this case illustrates, Evidence Code section 352 has proven to be an ineffective safeguard against the long-noted dangers of propensity evidence. (Cf. *People v. Falsetta*, *supra*, 21 Cal.4th at p. 916.) Although the seminal cases interpreting Evidence Code section 1108 involved prior offenses which were so similar that their probative value was unmistakable (*People v. Falsetta*, *supra*, 21 Cal.4th at pp. 908, 910-922 [where charged offenses included forcible oral copulation, evidence of prior uncharged rapes was admissible under Evid. Code, § 1108]; *People v. Fitch*, *supra*, 55 Cal.App.4th at pp. 176-184 [in case in which defendant was charged with rape, trial court properly admitted evidence of a prior uncharged rape]), that section, as applied by the trial courts and Courts of Appeal, now seems to permit virtually unrestricted admission of propensity evidence. (See, e.g., *People v. Mullens* (2004) 119 Cal.App.4th 648, 663-664 [admission of evidence of uncharged offenses of which the defendant had been acquitted]; *People v. Medina* (2003) 114 Cal.App.4th 897, 902 [uncharged offenses need not have occurred prior to charged offenses]; *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506 [evidence of prior uncharged conduct admissible for *any* relevant purpose]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284-285 [evidence of offenses which had occurred 30

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[52] As noted in footnote 48, *supra*, the trial court implicitly denied or, at the very least, failed to rule on appellant's proposed ruling. (10 RT 1433-1453; G RT (Apr. 22, 1997, proceedings) 23-24.)

years prior to charged offenses were not too remote to be admitted]; *People v. Frazier, supra*, 89 Cal.App.4th at pp. 40-41 [it is enough that charged and uncharged offenses are sexual offenses as defined in Evidence Code section 1108]; *People v. Waples, supra*, 79 Cal.App.4th at p. 1395 [evidence of offenses which had occurred 18 to 25 years prior to charged offenses were not too remote to be admitted].)

In enacting Evidence Code section 1108, the Legislature did not intend that the trial court enjoy unfettered discretion to admit such evidence regardless of the likelihood of prejudice. (See Historical and Statutory Notes, 29B West's Ann. Evid. Code (2005 supp.) foll. § 1108, p. 162.) Moreover, this Court recognized that Evidence Code section 1108 would be unconstitutional but for the presence of a safeguard to prevent undue prejudice from the admission of a defendant's other offenses. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 916-922.) However, that supposed safeguard, i.e., Evidence Code section 352, failed in this case.

The trial court abused its discretion in admitting the evidence pursuant to Evidence Code section 1108 (*People v. Falsetta, supra*, 21 Cal.4th at pp. 917-918; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125) and its admission constituted a manifest injustice (Cal. Const., art. VI, § 13; Evid. Code, § 353).

4. The Evidence Was Inadmissible Under Evidence Code Section 1101

The trial judge erroneously admitted the incest evidence to prove appellant's motive on the kidnaping charge, i.e., to prove that he kidnaped Maria for the purpose of committing lewd and lascivious conduct in violation of section 288, subdivision (a). The trial court did not find that the incest evidence, by itself, was probative of motive. Rather, the trial court concluded that the incest evidence, "in connection with the other evidence

discussed in [its] ruling," showed appellant's "lifelong interest in pubescent and prepubescent girls." (10 RT 1439.)

Because the jury was instructed that it could consider the evidence solely to determine whether appellant had the requisite motive or intent, the trial court's admission of the evidence should be analyzed under Evidence Code section 1101. The incest evidence, however, did not meet the threshold for admission under Evidence Code section 1101, subdivision (b), and even if it did, its probative value was substantially outweighed by the risk of undue prejudice. Moreover, to the extent the trial court admitted the evidence to show appellant's character (10 RT 1439), it erred in doing so (Evid. Code, § 1101, subd. (a)).

Appellant did not concede that he committed any act against Maria. Identity was a central issue in this case. It is fundamental that "where the identity of the actor is in dispute and the uncharged conduct fails to satisfy the stringent 'so unusual and distinctive as to be like a signature" standard enunciated in *Ewoldt*, the uncharged conduct is not admissible on such issues as intent, motive or lack of mistake or accident – all of which presume the identity of the actor is known." (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 166, citing *People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2.) Therefore, the trial court erred in admitting the evidence as probative of motive and intent. (See *People v. Von Villas* (1992) 10 Cal.App.4th 201, 263 ["Von Villas denied any participation in the robbery and related charges, therefore the issue of his intent was not relevant."]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1063-1064 [because defendant denied sexual involvement with child and therefore did not place his intent in issue, child's testimony should not have been admitted to prove intent].)

In addition, the incest evidence was inadmissible to prove intent because appellant "[took] some action to narrow the prosecution's burden of proof." (*People v. Daniels*, *supra*, 52 Cal.3d at p. 858; see also *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 400, fn. 4.) Specifically, appellant offered to stipulate that whoever abducted Maria Piceno did so for the purpose of sexual molestation. (2 CT 504.)

In any event, a review of the evidence in light of the factors to be considered under Evidence Code section 352 (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405) demonstrates that the trial court abused its discretion in admitting it. First, appellant's incestuous conduct with a sister just two years younger than he was not sufficiently similar to the charged offense to establish motive, intent, or any other legally permissible fact. The charged offense, however, involved offenses which were different in kind from childhood and adolescent brother/sister incest: the abduction and murder of a child by an adult stranger, involving no evident molestation. Appellant was 35 years old at the time of the charged offenses, and the victim was an 8-year-old girl. (1 CT 168, 175; 10 RT 1506; 25 RT 3135-3136.) In contrast, appellant was a very young child, and was not much older than Donna, when the incest began. Almost all of the incestuous contact occurred when appellant was a minor. (11 RT 1804-1820.) Moreover, contradicting the purportedly probative value of the incest evidence, appellant remained sexually interested in Donna even as she grew older and matured physically (11 RT 1809-1823), suggesting that he was specifically drawn to her, regardless of her age. On the other hand, the record is devoid of evidence of any sexual conduct by appellant with children other than Donna. There was no evidence that appellant had molested any other children with whom he had lived or had close ties,

including his youngest sister (11 RT 1807, 1810; 25 RT 3135-3136), three children with whom he had shared a house (13 RT 2226-2227), and his nieces, one of whom was nine years old (25 RT 3146, 3152).

This Court's opinion in *People v. Guerrero* (1976) 16 Cal.3d 719 is instructive on this point. In that case, the defendant was charged with killing a 17-year-old girl. This Court held that evidence of a prior rape offense should have been excluded as immaterial to the issue of intent. Although the evidence was ambiguous as to whether the victim's death was caused by blows from a blunt instrument or by a fall, this Court recognized that evidence of the prior rape failed to resolve that ambiguity. (*Id.* at pp. 726-727.) Moreover, in the absence of evidence that the defendant had raped or attempted to rape the victim, evidence of the prior rape was immaterial. (*Id.* at pp. 727-728.) Finally, because few of the asserted similarities between the offenses aided in placing the defendant at the scene of the charged murder, the lack of "substantial similarity" also barred evidence of the rape on the issue of identity. (*Id.* at pp. 725-726.)[53]

As in *Guerrero*, there is no evidence in this case that any sexual offense was committed against the victim. Indeed, as the prosecutor in this case conceded, there was absolutely no physical evidence that Maria had

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[53] Significantly, this Court concluded that the offenses were not "substantially similar" notwithstanding the trial court's finding that the offenses shared the following similarities: (1) the defendant drove a maroon Pontiac Le Mans in both instances; (2) the victims were of approximately the same age; (3) the defendant initially drove with other males in the car; (4) he drove around the city, stopping at the same parking lot; (5) the defendant and his companions stopped to buy beer; (6) the crimes involved sexual activity; (7) the defendant took or tried to take the victims home alone; and (8) there was an inference that the defendant used a wrench in both crimes. (*People v. Guerrero*, *supra*, 16 Cal.3d at pp. 723-724.)

been molested. (2 CT 478.) The incest evidence here, like the prior rape in *Guerrero*, was immaterial. In other words, appellant's uncharged incestuous conduct was too dissimilar to the kidnaping charge to support an inference that he "probably harbored the same intent [or motive] in each instance." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 399.)

In addition, the evidence regarding the incestuous conduct was also inadmissible to prove motive because it was not connected to the offenses against Maria, i.e., there was no "nexus between the prior crime and the current one . . . ." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 399.) Although a person "tends to act in conformity with his state of mind or emotion," there is nothing about appellant's incestuous conduct as a minor from which it can logically or reasonably be inferred that he harbored a motive to commit a lewd or lascivious act against Maria. (*People v. De La Plane* (1979) 88 Cal.App.3d 223, 246, overruled on another ground in *People v. Green* (1980) 1 Cal.3d 1, 39, fn. 25; see also *People v. Daniels* (1991) 52 Cal.3d 815, 856 [evidence may be properly introduced to establish motive where there is a "direct relationship between the prior offense and an element of the charged offense"].)

Appellant also notes that the trial court agreed that, in this case, the term "motive" was used in two ways: (1) as a concept closely related to the issue of identity; and (2) as essentially equivalent to "intent." (See 15 RT 2672-2674.) Therefore, the trial court was required to find that "the uncharged misconduct [was] sufficiently similar to support the inference that the defendant 'probably harbored the same intent in each instance'" (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402) before admitting the evidence to prove intent. To the extent it admitted the evidence under the lower "nexus" standard used for evidence relating to motive, rather than the

stricter similarity test used for evidence relating to intent, the trial court erred. (*Id.* at pp. 399, 402.)

Plainly put, the incest evidence was not probative of motive or intent. Under the trial court's ruling, any man who, as a child or teenager, had an incestuous relationship with his younger sister is deemed under California law to harbor forever a motive and intent to commit lewd and lascivious acts on young girls. Such a sweeping proposition is illogical and certainly untrue. The incest evidence was simply forbidden character evidence.

Second, the source of the character evidence was not independent of the evidence of the charged offense and consequently its probative value is diminished. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) Donna was the source of the information regarding the incestuous conduct and was the first person to draw a possible link between appellant and the charged offenses. (B RT 51-52.)

Third, appellant was never arrested, charged, tried, or convicted of the uncharged conduct. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) This fact exacerbated the prejudicial effect of the incest evidence, because "the jury might have been inclined to punish [appellant] for the uncharged offenses" rather than carefully assess whether the prosecution had proved his guilt of the crimes against Maria beyond a reasonable doubt. (*Id.* at p. 405.)[54]

Fourth, the uncharged offense was extremely inflammatory. (See

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[54] Moreover, as noted above, much of this conduct occurred when appellant was presumptively incapable of engaging in criminal conduct. (§ 26.) At a minimum, therefore, the trial court should have excluded all references to incest which occurred before appellant was 14 years old.

People v. Ewoldt, *supra*, 7 Cal.4th at pp. 404-405.) Donna testified at length that, over a period of about 14 years, appellant engaged in a number of sexual acts with her, including: fondling (11 RT 1804-1806, 1808-1809, 1812, 1817-1819); exposing himself (11 RT 1808); urging her to engage in vaginal intercourse, anal sex, and oral sex (11 RT 1809-1813, 1817-1819, 1827); and trying unsuccessfully to penetrate her (11 RT 1811-1812, 1822-1823). Moreover, it hardly need be stated that incestuous relationships have been historically taboo and are viewed as deeply repugnant. (See, e.g., *Benton v. State* (Ga. 1995) 461 S.E.2d 202, 205 (conc. opn. of Sears, J.); Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and The Politics of Disgust* (Summer 2005) 99 Nw. U. L. Rev. 1543; McDonnell, *Is Incest Next?* (Winter 2004) 10 Cardozo Women's L.J. 337; Herring, *Foster Care Placement, Reducing the Risk of Sibling Incest* (Summer 2004) 37 U. Mich. J.L. Reform 1145.) In short, Donna's testimony was devastating.

Fifth, as the trial court acknowledged (10 RT 1440), appellant's conduct was clearly remote in time. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) The prosecution was permitted to use juvenile acts – some 30 years old – to obtain a capital murder conviction.

Thus, each of the factors set forth in *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405, favored exclusion of the evidence, and therefore the trial court abused its discretion in admitting it (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101, subd. (a)]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [Evid. Code, § 352]) and its admission resulted in a manifestly unjust trial (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. 1, §§ 7, 15, 16; see also Cal. Const., art. VI, § 13; Evid. Code, § 353).

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

Pursuant to Evidence Code section 1101, the trial court admitted evidence that appellant had once told his sister, Donna Holmes, that the reason he had never married was out of fear he *would* molest his own children. (10 RT 1441; see also 2 CT 476.)[55] The trial court found that this evidence was admissible to prove motive. (10 RT 1442.) Donna testified before the jury that, during a 1991 confrontation regarding appellant's prior incestuous conduct with her, he told her that one of the reasons he never got married was that he was afraid he *might* molest his own children. (12 RT 1827, 1830.)

The trial court abused its discretion in admitting this evidence and, in so doing, committed reversible error because: (1) the identity of the perpetrator of the offenses against Maria Piceno was in dispute; (2) the evidence lacked sufficient similarity to the charged crimes to permit its admission under Evidence Code section 1101; (3) the prosecution impermissibly used this testimony as propensity evidence to prove appellant committed the crimes against Maria Piceno; and (4) the effect of the evidence relating to appellant's statement was so inflammatory that it could only have unfairly biased the jurors against him.

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[55] The procedural history relating to, and the legal standards governing, the admission of this evidence is summarized in the Introduction to this section (*supra*, at pp. 105-116).

1. The Trial Court Abused Its Discretion in Admitting Appellant's Statement to His Sister

As with evidence of appellant's incestuous conduct with his sister, appellant's statement should not have been admitted on the issue of motive because identity was a key issue in the case. (See Section B.4, which appellant hereby incorporates by reference.) Moreover, as demonstrated below, appellant's statement as to why he had never married had little if any relevance to establishing appellant's identity, motive or intent to commit the charged offenses, or to any other purpose allowed under Evidence Code section 1101, subdivision (b).

a. Appellant's Statement to His Sister Was Not Sufficiently Similar to The Charged Offense To Justify Its Admission

Although a defendant's past conduct need not constitute a crime to be admissible under Evidence Code section 1101, subdivision (b) (see, e.g., *In re Malone* (1996) 12 Cal.4th 935, 947; *People v. Clark*, *supra*, 3 Cal.4th at p. 125), the "other acts" and the charged offense must be sufficiently similar for the "other acts" to be admissible (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 402). Here, appellant's statement to his sister regarding his never having married did not constitute sexual conduct, let alone lewd conduct with a minor. Moreover, appellant's statement did not constitute evidence of any prior sexual conduct. Even if appellant's statement was suggestive of his sexual fears or desires, it manifested a fixation on *incest*, not sexual interest in minors. It certainly did not suggest that he ever acted on those fears or desires by kidnaping a complete stranger, let alone an 8-year-old child.

Accordingly, it cannot be said that appellant's purported statement and any of the charged offenses "share[d] common features that [were]

sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] (*People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) That is, there is simply no way that "the pattern and characteristics of the crimes [were] so unusual and distinctive as to be like a signature. [Citation.]" (*Ibid.*) Nor was his statement sufficiently similar to the charged offenses to support the inference that appellant "probably harbored the same intent in each instance." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 399.) Similarly, there was nothing about appellant's statement from which it could logically or reasonably be inferred that he harbored a motive to commit any offense against Maria, a complete stranger. (*People v. De La Plane, supra*, 88 Cal.App.3d at p. 246; see also *People v. Daniels, supra*, 52 Cal.3d at p. 856.) And, as with the evidence of appellant's incestuous conduct, the statement was inadmissible to prove motive because it was not connected to the offenses against Maria and there was no "nexus between the prior crime and the current one . . . ." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 399.)

A review of cases in which statements were introduced pursuant to Evidence Code section 1101 is instructive. For instance, in *In re Malone, supra*, the defendant/petitioner introduced evidence that a prosecution witness, Charles Laughlin, "had a consistent practice of collecting incriminating information regarding his fellow jail residents and offering it to law enforcement officials with the hope and expectation of receiving beneficial treatment in his own pending cases." This Court held that such evidence was relevant to show a plan or scheme by Laughlin common to Malone's case and others. (*In re Malone, supra*, 12 Cal.4th at p. 947.)

In *People v. Clark, supra*, 3 Cal.4th at pp. 70, 127, the defendant was charged with the murder of several prostitutes, one of whom was

decapitated. This Court held that the following evidence was admissible: (1) evidence that Clark collected various items of clothing from, and wore the underwear of, old girlfriends; (2) Clark's admission that, since his school days, he had been unable "to look at sex straight on" and that "it had to be kinky;" (3) evidence that he had hired a dancer to perform for him and a companion, and to engage in three-way sex with them; and (4) the testimony of one Donielle Patton that Clark "liked to pick up prostitutes, that he had offered her money to help him pick up new sexual partners, and that he stated to her that he had found a new 'sexual high' in slitting prostitutes' throats while engaged in sex, so he could feel their vaginas tighten as they died." (*Id.* at pp. 124-125.) Clark also argued that the trial court improperly admitted, or improperly permitted to remain in evidence, a document in which he apparently described his participation in the murder of a prostitute named "Cathy." (*Id.* at pp. 123-124.)

As this Court explained, in each instance there existed the requisite similarity between the uncharged conduct and the charged offenses, and therefore all of the evidence was admissible. The evidence that Clark wore women's underwear was probative of identity, because "the circumstances of the killings suggested that the killer collected and kept trophies of his kills in the form of some items of their clothing." (*Id.* at p. 125.) His admission that he needed sex to be "kinky" corroborated evidence of his interest in prostitutes and necrophilia, features that he shared with the murder, and was therefore probative of identity. (*Ibid.*) Testimony regarding his hiring of the dancer was relevant to show his fondness for hiring prostitutes, which was relevant to identity and motive. (*Ibid.*) Patton's testimony was admissible because, among other things, it was probative of identity, given that the murder victims were all prostitutes, and

that one of the victims had been decapitated. (*Id.* at pp. 125-127.) Finally, in light of an accomplice's testimony that Clark had picked up and murdered a prostitute named Cathy, this Court held that the document was admissible to prove motive, identity, and other issues. (*Id.* at pp. 123-124.)

And in *People v. Harris* (1978) 85 Cal.App.3d 954, 956, the defendant was charged with various sexual offenses against several young boys. All five victims testified that Harris had forced or induced him to enter an automobile (three of the boys testified that it was a white automobile), drove to a secluded location, where, at knife point or by threat of shooting, Harris sodomized him. (*Id.* at p. 956.) Accordingly, the trial court properly admitted evidence (i.e., a little boy's statement, "I don't have to get in your car, Mister, to show you where it's at") relating to uncharged conduct, as relevant to establish Harris's modus operandi and identity with respect to the charged offenses. (*Id.* at pp. 956-958.)

Significantly, each of those cases addresses the admissibility of evidence relating to *conduct*, i.e., actions or admissions indicating conduct. As such, the evidence in those cases was far more probative than appellant's expression of his fears. His statement simply does not "tend logically, naturally, and by reasonable inference, to establish any fact" such as motive or intent. (*People v. Elder* (1969) 274 Cal.App.2d 381, 393-394.)

b. The Trial Court Should Have Excluded The Evidence Pursuant to Evidence Code Section 352

As appellant has noted, this Court has set forth several factors to be considered by the trial court in applying Evidence Code section 352 to evidence offered pursuant to Evidence Code section 1101. (See Section A.2.a, *supra*, at p. 114, discussing *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) A review of the *Ewoldt* factors demonstrates that, even if

appellant's statement as to why he never married was sufficiently similar to the charged offense under Evidence Code section 1101, the trial court should have excluded appellant's statement pursuant to Evidence Code section 352.

As shown above, the evidence was immaterial, i.e., did not tend to establish the facts for which it was offered. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) In addition, as with the incest evidence, Donna was the source of appellant's statement about the reason for not marrying, the information regarding the incestuous conduct, and first linked appellant to the charged offenses. (B RT 51-52.) Therefore, the source of the character evidence was not independent of the evidence of the charged offense. (See *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.) Moreover, appellant was never convicted of any crime in relation to the uncharged conduct, nor could he have been, and his statement did not constitute a criminal act. (*Ibid.*) And, finally, while appellant's statement was not as inflammatory as the charged offenses, it would have contributed unfairly to the jury's bias against him. (*Ibid.*)[56] Under *Ewoldt*, the prejudicial impact of appellant's statement far outweighed its minimal, even nonexistent, probative value.

The trial court's reliance upon *People v. Clark*, *supra*, 3 Cal.4th 41 in weighing the evidence under Evidence Code section 352 was misplaced. In particular, the trial court erred in rejecting appellant's argument that Clark's necrophilic activities and fantasies distinguished *Clark* from the instant case. (10 RT 1441-1444.)

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[56] Because appellant's statement did not relate to any conduct, the "remoteness" factor was inapplicable. (*People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405.)

First, the trial court found that *Clark* held admissible evidence of sexual interests much less distinctive than necrophilia. (10 RT 1442-1443.) However, the evidence the trial court pointed to (i.e., testimony that Clark collected various items of clothing from and wore the underwear of old girlfriends; his admission that since high school he had been unable "to look at sex straight on" and that "it had to be kinky;" and evidence that Clark had a fondness for hiring prostitutes) was both distinctive and directly linked to the charged offenses. In contrast, appellant's statement was, at most, suggestive of a concern with *incest*, and the trial court erroneously equated a preoccupation with incest with an attraction to little girls. Moreover, as noted previously, appellant's statement was not linked to any conduct whatsoever.

Second, the trial court suggested that, while the evidence of appellant's sexual preoccupation with and attraction to young girls was probably less distinctive than an interest in necrophilia, such preoccupation was probative of a motive not shared by a large majority of the population. (10 RT 1443.) However, even if appellant harbored sexual fears or desires relating to incest, and even if such feelings are relatively uncommon, they are not probative of any motive to commit the charged offenses.

Finally, the trial court in appellant's case erred to the extent it relied on the *Clark* Court's treatment of Evidence Code section 352 with respect to evidence admitted under Evidence Code section 1101. Again, this Court has held that, even if evidence of uncharged misconduct is *relevant* under Evidence Code section 1101, it may be inadmissible nevertheless under Evidence Code section 352. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) In *Clark*, however, this Court merged the separate but related issues of relevance under Evidence Code section 1101 and admissibility under

Evidence Code section 352.

Specifically, in *Clark,* this Court held that the trial court did not abuse its discretion under Evidence Code section 352 in admitting a writing detailing the defendant's participation in a murder because the writing had significant probative value, i.e., it corroborated an accomplices's testimony. (*People v. Clark*, *supra*, 3 Cal.4th at p. 124.) Similarly, this Court held that the trial court did not abuse its discretion under Evidence Code section 352 in admitting a witness's testimony that the defendant had found a new sexual high in slitting prostitutes's throats because that testimony was highly probative of his interests. (*Id.* at p. 127.) However, under Evidence Code section 352, the probative value of the evidence is not the issue, since that provision assumes the evidence is relevant. Rather, the question under Evidence Code section 352 is whether "the probative value [was] substantially outweighed by the probability that its admission [would] (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Therefore, this Court did not meaningfully analyze the evidence under Evidence Code section 352.[57]

Thus, as with the evidence of appellant's incestuous conduct, each of the factors set forth in *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405, favored exclusion of the evidence. The trial court abused its discretion in

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[57] This Court did not address Evidence Code section 352 with respect to other evidence offered under Evidence Code section 1101 (i.e., evidence that Clark wore women's clothing; his admission that sex had to be "kinky;" and, evidence regarding his hiring of a dancer). (*People v. Clark*, *supra*, 3 Cal.4th at pp. 124-125.) However, even if this Court's conclusion that such evidence was probative of disputed issues constituted an implicit holding that the trial court did not abuse its discretion under Evidence Code section 352, that implicit holding was incorrect for the same reason.

admitting it (*People v. Lewis*, *supra*, 25 Cal.4th 610 at p. 637 [Evid. Code, § 1101, subd. (a)]; *People v. Ashmus*, *supra*, 54 Cal.3d at p. 973 [Evid. Code, § 352]) and its admission constituted a manifest injustice (Cal. Const., art. VI, § 13; Evid. Code, § 353).

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

1. The In Limine Hearing And The Trial Court's Rulings

At the time of the Evidence Code section 402 hearing, Ackerman was a consultant for state, federal, and local law enforcement in the area of child pornography and persons with a sexual interest in young children. According to Ackerman, in March and April, 1995, he worked for the United States Postal Inspection Service. (11 RT 1837.) He had worked for the Postal Service for approximately ten years. (11 RT 1854.) Over the course of his career, he had: viewed more than 10,000 child pornography magazines, 10,000 photographs depicting children engaged in sexual activity, 600 hours of videotape of child pornography, and 10,000 letters from individuals with a stated sexual interest in minor children; co-authored a chapter in a law enforcement textbook; interviewed over 120 individuals with a stated sexual interest in minor children; and participated in numerous investigations, including searches, of such individuals. (11 RT 1847, 1854-1855.) He did not, however, possess any degrees in psychology. (12 RT 1870.)

Ackerman testified that he found appellant's possession of the magazines in Exhibit 30 to be significant in that their very titles referred to sexual activity involving teenagers, and the magazines displayed a number of photographs depicting individuals engaged in sexual activity. (11 RT

1839, 1850-1851.) As he observed, Exhibit 30 included magazines such as *School Girl*, *Teenage Sperm*, *School Girls Open Up*, *Maximum Perversion*, *Teeners from Holland*, *Weekend Teenage Special*, and *Seventeen* (11 RT 1838, 1844), and most of the magazine titles contained the words "teenage" or "young" (11 RT 1838, 1848).[58] However, appellant's collection also included magazines, such as *Hustler*, which unambiguously depict adult women. (11 RT 1852.)

Ackerman acknowledged that he considered appellant's magazines to represent "child erotica," rather than "child pornography," because they purported to depict teenagers, not children. Ackerman testified about a number of the magazine photographs, including those he believed most strongly supported his opinion that the photographs constituted "child erotica." (11 RT 1852-1853, 1855-1856; 12 RT 1859.)

Ackerman opined that the youngest model appeared to be perhaps 14 or 15 years old, but acknowledged that she had developed breasts and genitalia, as well as pubic hair. (11 RT 1845-1846.) Another photograph depicted a female with a "youthful-looking" face and body, which was accompanied by text reading, "After all, I was not a full-grown woman yet." She too, however, had developed breasts and pubic hair. (12 RT 1860-1861.)

Several photographs of yet another model, which appeared in a magazine entitled "School Girls 17," depicted a "youthful-looking female." Ackerman acknowledged, however, "some development" of her breasts and the presence of pubic hair. (12 RT 1861-1863.) Another set of

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[58]According to Ackerman, appellant told him that the models in the magazines looked younger than 18 but he did not know their actual ages. (12 RT 1870-1871.)

photographs, from a magazine entitled "17 School Girls," was accompanied by text claiming that the models were 16 years old. Ackerman opined that the models were youthful and not fully developed. (12 RT 1864.)

Ackerman suggested that in child erotica, what satisfies the reader's interest is the "totality" of several factors, such as the model's appearance, the title of the publication, the text (e.g., claims that the model is still developing), and the use of props (e.g., teddy bears and dolls) or alterations of her appearance (e.g., pigtails and shaved pubic regions). (12 RT 1865-1867.) By way of example, Ackerman identified several photographs which were staged so as to suggest that the physically mature or maturing model was actually younger. (11 RT 1840, 1844; 12 RT 1866-1867.)

Although Ackerman testified that some of the models appeared to be young, he conceded that he could not determine that they were in fact minors and that he lacked the qualifications to do so. (11 RT 1840, 1842-1843; 12 RT 1859-1860, 1864.)[59] He also admitted that he lacked the qualifications to determine whether the Postal Service would declare the magazines to be illegal contraband. (12 RT 1859-1860.) Moreover, none of the photographs showed, or even purported to show, prepubescent

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[59] In reaching his opinion that the models appeared to be under the age of 18, Ackerman relied on what he called the "Tanner Scale." He explained that the scale "relate[s] to" stages in an individual's physical development, and ranges from 1 (signifying prepubescence) through 5 (signifying physical maturity). (11 RT 1841-1842.) The method apparently requires that the examiner rate the development of the subject's breasts, pubic hair and other indications of female development from childhood to adulthood. (12 RT 2093.) In view of such characteristics, he opined that most of the models appeared to be a 4 or 5 on the scale. (11 RT 1840.) Significantly, Dr. Bolduc, the forensic pathologist who conducted the post-mortem examination in this case, was unfamiliar with the concept of "Tanner Stages." (RT 2154.)

children. (11 RT 1842-1845.)

Nevertheless, Ackerman testified that "[v]ery clearly these magazines would appeal to somebody who had an interest in *prepubescent teenagers*." (11 RT 1851, italics added.)[60] Ackerman claimed that he had found such magazines, *Seventeen* in particular, on numerous occasions when conducting searches of individuals who had expressed sexual interest in minors. (11 RT 1838, 1847.) Those individuals had obtained such magazines, even though they were interested in prepubescent children, either because they could not obtain actual child pornography or in addition to actual prepubescent child pornography. (11 RT 1847; 12 RT 1867, 1869.)[61] Some individuals with an express interest in minor children also possess magazines depicting adult models, such as *Hustler* and *Playboy*. (11 RT 1848.)

Ackerman conceded that an individual who possesses such photographs might be interested in post-pubescent, teenage girls rather than prepubescent children. He agreed that there are magazines which go to great lengths to depict legal age models as very young girls, and that such magazines are available at adult book stores. (12 RT 1868-1869.) Moreover, he acknowledged that he had never conducted, nor was he aware

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[60] "Puberty" is defined as "the condition of being or the period of becoming first capable of reproducing sexually marked by maturing of the genital organs, development of secondary sex characteristics, and in the human and in higher primates by the first occurrence of menstruation in the female; *broadly*: the age at which puberty occurs being typically between . . . 11 and 14 in girls and often construed legally as . . . 12 in girls." (Webster's Third New International Dictionary (1976) p. 1835.)

[61] At another point, however, Ackerman testified that such images, in themselves, would not interest a pedophile interested in prepubescent girls. (11 RT 1847.)

of, any studies regarding the extent to which individuals with no sexual interest in prepubescent children possess such magazines. (12 RT 1869-1870.)

At the conclusion of the hearing, the trial court allowed the prosecutor to introduce testimony and other evidence relating to the magazines as probative of appellant's motive. (12 RT 1874-1875.) The court also admitted evidence regarding the videotapes appellant had rented on March 27, 1995, the day Maria Piceno was abducted. According to the trial court, evidence that appellant rented the videotapes was probative of his state of mind – his interest in and/or preoccupation with his sexual passions – at the time of the charged offenses. (10 RT 1444-1445.)

Specifically, the trial court's rulings permitted the prosecutor to introduce evidence that: appellant rented nine adult videotapes on March 27, 1995, near the time and location of Maria's abduction (10 RT 1575-1577; 12 RT 2104-2106, 2108, 2112, 2115); police officers recovered a number of adult magazines from a storage unit rented by appellant (12 RT 2063-2067); and appellant later admitted that he had purchased the magazines (12 RT 2076). The ruling also permitted Ackerman to describe the magazines and photographs contained in Exhibit 30, and to draw conclusions as to what they showed about the person who possessed them. (12 RT 2071-2100).

2. The Evidence Presented To The Jury Relating to Appellant's Possession of Adult-Oriented Material

a. The Videotape Rentals

At trial, the prosecution offered, and the trial court admitted, evidence that appellant had rented nine adult videotapes on March 27, 1995. Receipts from a video store located in the same shopping center as the Food

King indicated that appellant rented three videotapes from his store on March 27, 1995, at 3:28 p.m. The videotapes were entitled *Playboy Wet and Wild*, *Sex on the Beach* and *Country Cousins*. (10 RT 1572, 1575-1577.) The films rented by appellant were "unrated" rather than "explicitly adult" (that is, x-rated) movies. Even individuals under the age of 18 were permitted to rent unrated films, whereas one had to be at least 18 years old to rent x-rated films. (10 RT 1577-1578.)

Appellant rented three adult films at another video store in Lemoore on March 27, 1995, at 3:34 p.m.. (12 RT 2101, 2104-2106.) Specifically, he rented x-rated movies titled *Warm Pink*, *Hot Pursuit* and *Erotic*. (12 RT 2108.) Anyone of at least 18 years of age could rent such films. (12 RT 2104.) Appellant also rented three adult films – *Love Letters*, *Milli-Manilli* and *Super Star 6 Challenge* – from a third video store in Lemoore on March 27, 1995, at 4:10 p.m. (12 RT 2112, 2115.)

Finally, prosecution expert Bruce Ackerman testified that appellant stated that he was at a video store located in the Food King shopping center on March 27, 1995, to rent adult videos, and that he had rented videotapes at that store on many occasions, sometimes on a daily basis. (12 RT 2021-2072, 2077, 2083.)

b. The Evidence Relating To Appellant's Magazines

The trial court admitted evidence that, on April 20, 1995, an investigator with the Kings County District Attorney's Office seized a number of magazine and videos from a storage unit rented by appellant. The 29 magazines contained in Exhibit 30 represented perhaps 35 to 40% of the total recovered from the storage unit. (12 RT 2063-2065.) Exhibit 45 was a list of the magazines contained in Exhibit 30. (12 RT 2066-2067.)

Ackerman's testimony before the jury was generally consistent with his testimony at the 402 hearing (11 RT 1837-1856; 12 RT 1859-1871.)

3. The Trial Court Erred In Admitting The Evidence

As noted above, appellant did not concede that he had committed any offense against Maria. Because the issue of the perpetrator's identity was in dispute, the trial court erred in admitting evidence regarding appellant's magazines and videotapes on the issues of motive and state of mind. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2; *Hassoldt v. Patrick Media Group, Inc.*, *supra*, 84 Cal.App.4th at p. 166.)

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

a. The Evidence Regarding Appellant's Magazines And Videotapes Was Not Admissible Under Evidence Code Section 1101, Because It Was Not Sufficiently Similar To The Charged Offenses

(1) Possession Of The Magazines

In finding that evidence relating to the magazines was relevant to the issue of motive (12 RT 1874-1875), the trial court cited *People v. Clark*, *supra*, 3 Cal.4th 41. However, the court failed to explain how that opinion applied to the facts of this case. In any event, its reliance on *Clark* was misplaced.

In *Clark*, this Court held that evidence that the defendant possessed a picture of a "decapitated head orally copulating a severed penis" was properly admitted as "probative of [his] interest *in that matter*." (*People v. Clark*, *supra*, 3 Cal.4th at p. 129, italics added.) This conclusion was based on the direct connection between that evidence and the facts of the case: the defendant was charged with, among other things, decapitating one of his victims and soliciting an act of oral copulation, then attempting to stab, another. (*Id.* at pp. 74-76.) Further, a witness testified that the defendant told her he "had found a new way of reaching a sexual 'high': [engaging] a prostitute in sex and slit[ting] her throat." (*Id.* at p. 83.) In light of that testimony, and the specific relationship of the unusual subject of the picture to the facts of the case, it was reasonable to find that the evidence was probative.[62]

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[62] In *Clark*, the defense objected to this evidence solely on grounds of relevance and Evidence Code section 352, but not Evidence Code section 1101. (*People v. Clark*, *supra*, 3 Cal.4th at pp. 127-129.) Therefore, arguably, a lower threshold of similarity was acceptable in that case.

Here, however, even assuming there is some link between the mere possession of sexually explicit materials depicting children and the motive to engage in a lewd act with a child, none of appellant's magazines depicted, or even purported to depict, prepubescent children. Indeed, the essential subject matter of the magazines was sexuality among *teenagers* (not prepubescent children), and Ackerman was unable to determine whether any of the models was actually under the age of 18. (12 RT 2074-2075, 2090-2091.)[63] The vast majority of the models appeared to have physical signs of sexual maturity. (12 RT 2092 [developed breasts]; 12 RT 2092-2093, 2098 [pubic hair].)

Although Ackerman testified before the jury that he had never found such magazines in the possession of a person who had *not* expressed a sexual interest in minors (12 RT 2093), he acknowledged at the 402 hearing that such possession suggested an interest in teenagers rather than prepubescent children. (12 RT 1868-1869.) Moreover, even though appellant admitted that the girls looked like they might be under 18 years of age, he did not know whether they were. And he certainly did not think

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[63] Appellant further submits that to the extent the Court suggested that the defendant's possession of sexually explicit drawings and photographs of *young adult* males was relevant to demonstrate his intent to assault the victim, who was a young boy, *Memro* was wrongly decided. (See *State v. Bates* (Minn. 1993) 507 N.W.2d. 847, 851-852 [the defendant's sexual attraction to men was irrelevant to whether he molested the child victims; however, the error was not prejudicial because other evidence, including the defendant's statements, demonstrated his attraction to children].) Significantly, although in *Memro* this Court upheld the admission of material depicting young adult males, it singled out the defendant's photographs of young boys as probative of his intent to commit a lewd or lascivious act with the prepubescent victim. (*People v. Memro*, *supra*, 11 Cal.4th at pp. 864-865.)

they appeared to be prepubescent. (12 RT 2076; 15 RT 2614-2615.)

Moreover, in contrast to *People v. Clark*, *supra*, 3 Cal.4th at p. 129, there was no direct connection between the evidence and the facts of this case. In *Clark*, the picture of a severed head orally copulating a penis, which was found in the defendant's possession, was similar in nature to crimes with which he had been charged. (*Ibid.*) Specifically, there was evidence that he had decapitated one of his victims, and that semen was found in the mouth of the severed head. (*Id.* at pp. 76, 127.) In appellant's case, however, there was no such link between the magazines and any of the charged crimes.

Appellant acknowledges that this Court has upheld the admission of pornographic evidence lacking a direct link to the facts of the case. (*People v. Memro*, *supra*, 11 Cal.4th at pp. 864-865.) In *Memro*, this Court held that the trial court properly admitted evidence that the defendant had pornographic depictions of young males in his home as proof of his "intent to do a lewd and lascivious act with" the seven-year-old male victim. Specifically, this Court found that magazines and photographs "contain[ing] sexually explicit stories, photographs, and drawing of males ranging in age from prepubescent to young adult" were relevant and admissible under Evidence Code section 1101, subdivision (b), because "in the context of defendant's possession of them, [they] yielded evidence from which the jury could infer that [defendant] had a sexual attraction to young boys and intended to act on that attraction," and thus that he intended to and did commit a lewd or lascivious act upon the person of the victim. (*Id.* at pp. 864-865.)

The only authority cited in support of the holding in *Memro* was *People v. Bales* (1961) 189 Cal.App.2d 694, 701, in which the Court of

Appeal held that evidence that the defendant possessed a nude photograph of the very person he was charged with sexually molesting was admissible to show his "licentious disposition toward" her. (*People v. Memro*, *supra*, 11 Cal.4th at p. 865.) The fact that Memro had pictures of prepubescent males might have indicated his sexual attraction to young boys, but did not prove he intended to sexually assault the victim in that case, and the direct nexus to the charged crimes found in *People v. Bales*, *supra*, 189 Cal.App.2d at p. 701 and *People v. Clark*, *supra*, 3 Cal.4th at p. 129, was completely lacking. As the Ninth Circuit Court of Appeals observed as follows in *People of Territory of Guam v. Shymanovitz* (9th Cir. 1998) 157 F.3d 1154, 1159:

> Criminal activity is a wildly popular subject of fiction and nonfiction writing--ranging from the National Enquirer to *Les Miserables* to *In Cold Blood.* Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct. Under the government's theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov's *Lolita,* and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories. Woe, particularly, to the son accused of patricide or incest who has a copy of *Oedipus Rex* at his bedside.

Therefore, the Court held, the defendant's possession of sexually-explicit magazines tended to show, at most, that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and *not* that he actually engaged in, or even had a propensity to engage in, any sexual *conduct* of any kind. (*Id.* at pp. 1158-1159.) Accordingly, appellant submits that this aspect of *Memro* was wrongly decided, and that some direct link must be shown.

In any event, there was no comparable connection between the magazines and the charged crimes in this case. The theory that appellant's ownership of what Ackerman called "child erotica" meant that he intended to engage in lewd or lascivious acts with Maria was far too speculative to support its admission.[64] His magazines suggested, at most, that he had a sexual interest in teenagers, or perhaps the fantasy of adult women *pretending* to be teenagers. They did not, however, demonstrate any sexual interest in prepubescent girls, let alone a motive to engage in a lewd or lascivious act with Maria Piceno. Therefore, it was sheer speculation to conclude that these magazines revealed appellant's hidden motive to commit a lewd act against a child, and they should have been excluded. (See *People v. Babbitt* (1985) 45 Cal.3d 660, 682 [evidence is irrelevant if it produces only speculative inferences].)

The reasoning of the Court in *Memro*, while unconvincing, was at least clear: the defendant's possession of "sexually explicit" depictions of prepubescent males indicated that he was attracted to young boys, that he was probably attracted to the prepubescent male victim in that case, and that he was therefore more likely to have intended to lewdly assault that victim. But whatever inference of motive could be drawn from the evidence in the instant case was far weaker than that in *Memro*, *Clark* and/or *Bales*.

The instant case did not involve either category of evidence admitted in either *Clark* or *Memro*, i.e., depictions of the same type of act (*Clark*) or victim (*Memro*), or of the very person who was molested (*Bales*). In this case, then, the trial court's admission of evidence relating to the magazines was not justified by the analysis in *Memro*, and to uphold that ruling would

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[64]Ackerman referred to the magazines as "child erotica" because they purported to depict teenagers, not children. (11 RT 1847.)

represent an unconstitutional abrogation of the safeguards embodied in Evidence Code section 1101. Accordingly, the trial court abused its discretion in admitting the magazine evidence.

(2) Rental of Videotapes

As noted above, the trial court found that evidence of the videotape rentals was relevant to show appellant's state of mind, to wit, an interest in and/or preoccupation with his sexual passions "at the time in question." (10 RT 1444-1445.) However, the trial court's conclusion was entirely speculative. There was no evidence establishing any correlation between viewing pornographic material and the commission of a sex-related or any other offense. (See *People v. Babbitt*, *supra*, 45 Cal.3d at p. 682.)[65]

Moreover, for the reasons noted in the preceding section, evidence that appellant watched videotapes depicting adult women had no relevance to the charged offenses, because the videotapes were not directly linked to the offenses and did not depict or purport to depict teenagers, let alone prepubescent children. Rather, the videotapes were legal and readily available, and at least three of the films could have been rented by a minor (10 RT 1578). (Cf. *People v. Memro*, *supra*, 11 Cal.4th at pp. 864-865; *People v. Clark*, *supra*, 3 Cal.4th at p. 129.) Again, there was no nexus between the nature or content of the videotapes and the charged offenses.

Finally, to the extent that the videotape rentals were "inextricably tied up with the events of March 27, 1995" (2 CT 310), evidence relating to

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[65] In fact, the trial court's conclusion presupposed that the videotape rentals represented aberrational conduct for appellant, in that he rented them while in the throes of sexual preoccupation. However, this premise was undercut by evidence that appellant regularly rented such videotapes. (12 RT 2084-2085, 2111; 14 RT 2469, 2471, 2521, 2547-2548.)

the date and time of the rentals would have sufficed to establish that appellant was near the Food King around the time Maria was abducted. The nature, titles and content of the videotapes were wholly irrelevant to prove this fact. For that reason, defense counsel expressed his intention to stipulate to the times and date of the videotape rentals. (10 RT 1582.)

The trial court, therefore, abused its discretion in admitting the videotape evidence.

b. The Evidence Should Have Been Excluded Under Evidence Code Section 352

Contrary to the trial court's baseless assumption that the images in appellant's magazines would not compromise the jury's ability to properly consider the evidence (12 RT 1875), research has demonstrated that most people find pornography to be "undoubtedly disturbing, distasteful and immoral." (Servodidio, *The Devaluation of Nonobscene Eroticism as a Form of Expression Protected by the Constitution* (1993) 67 Tul. L. Rev. 1231, 1256-1257.) Indeed, numerous courts have recognized the inflammatory effect of pornography and the tendency of such evidence to outweigh any probative effect. (See e.g., *United States v. Harvey* (2nd Cir. 1993) 991 F.2d 981, 996 [in case involving allegations of child pornography, court "discern[ed] no probativeness [with respect to the adult pornographic evidence] against which to weigh its overwhelmingly prejudicial effect"]; *United States v. Borello* (2nd Cir. 1985) 766 F.2d 46, 60 [in case involving smuggling of pornographic videos, any probative value of pornographic videos and brochure introduced by the prosecution was minimal compared to obvious prejudicial effect on jurors]; *United States v. Nosov* (S.D.N.Y 2002) 221 F.Supp.2d 445, 451 [trial court properly excluded evidence regarding pornographic nature of prosecution

witness's proposed criminal scheme]; *United States v. Gray* (E.D.Va. 1999) 78 F.Supp.2d 524, 532 [joinder of charges of unlawful access to a government computer and possession of child pornography was improper, in light of the inflammatory nature of the pornography].)

Therefore, even if evidence relating to the magazines and/or videotapes was admissible on the issues of motive, intent, or state of mind,[66] it should have been excluded under Evidence Code section 352 because the prejudicial impact of the evidence substantially outweighed its probative value. (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631.)

Three of the five factors set forth in *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405, weighed heavily in favor of exclusion under Evidence Code section 352: (1) the evidence was not material on the issues of intent and motive; (2) appellant was not convicted of any crime in connection with his past alleged conduct, and, in fact, his possession and rental of adult-oriented material was actually lawful; and (3) the uncharged conduct was extremely inflammatory, although admittedly less so than the charged offense. Appellant submits that the absence of the remaining factors considered in *Ewoldt* (i.e., whether the information concerning the uncharged prior conduct came from an independent source and whether the uncharged conduct was remote in time) was inconsequential, especially given the highly speculative inference the prosecution was asking the jury to draw from such exceedingly inflammatory evidence.

It is reasonably likely that the jurors' view of appellant was

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[66] As noted in Section A, *supra*, the trial court ruled that evidence that appellant had rented the videotapes was relevant to show appellant's "state of mind," i.e., his interest in and/or preoccupation with his sexual passions at the time of the offenses. (10 RT 1444-1445)

adversely affected by the evidence that he possessed adult magazines or "child erotica" containing images of young women staged to appear as younger girls. The jury could only have been similarly affected by evidence that appellant had rented the videotapes. For instance, evidence that appellant rented a film titled *Country Cousins* surely stoked the jury's bias against appellant in light of evidence that he had engaged in incestuous conduct. (10 RT 1577; 11 RT 1802-1834.) Moreover, the trial court itself recognized the prejudicial effect of evidence that appellant had rented lawful videotapes, since it believed that it would be a "good idea" to keep out a list of the last ten videotapes – all erotic in nature – that appellant had rented, and which had been inadvertently included in Exhibit 21A. (10 RT 1575, 1582.) Pornography is uniquely prejudicial in that jurors likely feel pressure, both personal and from other jurors, to adopt a particularly condemnatory stance, which can only work to the detriment of the defendant. (See Servodidio, *supra*, 67 Tul. L. Rev. at pp. 1256-1257.)

While there may be some hypothetical case in which admitting evidence that the defendant possessed adult magazines would not "uniquely tend[] to evoke an emotional bias against the defendant as an individual" (see *People v. Coddington* (2000) 23 Cal.4th 529, 588, overruled on another ground in *People v. Price* (2001) 25 Cal.4th 1046), this is not that case, particularly since the disputed evidence had at most minimal probative value. Further, there was a real question not only as to whether the crime involved an intent to violate section 288, subdivision (a), but whether appellant perpetrated the abduction and murder at all. The evidence on both issues was not overwhelming. This prejudicial evidence threatened the reliability of the factfinding process. (See, e.g., *United States v. Berry* (9th Cir. 1980) 627 F.2d 193, 201 ["the defendant is more likely to be prejudiced

by error or misconduct when the government has a weak case"].)

Thus, each of the factors set forth in *People v. Ewoldt*, *supra*, 7 Cal.4th at pp. 404-405, favored exclusion of the evidence. The trial court abused its discretion in admitting it (*People v. Lewis* (2001) 25 Cal.4th 610, 637 [Evid. Code, § 1101, subd. (a)]; *People v. Ashmus* (1991) 54 Cal.3d 932, 973 [Evid. Code, § 352]) and its admission constituted a manifest injustice (Cal. Const., art. VI, § 13; Evid. Code, § 353).

E. The Trial Court's Admission Of The Evidence Under Evidence Code Sections 1101 and 1108 Violated Appellant's Rights Under The State And Federal Constitutions

Evidence of other crimes is inherently, and extremely, prejudicial (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404; *People v. Thompson* (1980) 27 Cal.3d 303, 318), and may violate federal due process (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384-1385; see also *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 775, rev'd on other grounds in *Woodford v. Garceau* (2003) 538 U.S. 202). The Ninth Circuit has held that the admission of irrelevant "other crimes evidence violated due process where: (1) the balance of the prosecution's case against the defendant was 'solely circumstantial;' (2) the other crimes evidence . . . was similar to the [crimes] for which he was on trial; (3) the prosecutor relied on the other crimes evidence at several points during the trial; and (4) the other crimes evidence was 'emotionally charged.'" (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1381-1382, 1385-1386.) As shown, the evidence discussed in the preceding sections constituted irrelevant character evidence. Moreover, under *Garceau* and *McKinney*, its admission violated appellant's Fourteenth Amendment right to due process.

First, aside from the questionable testimony of Mychael Jackson, the

balance of the prosecution's case was comprised of thin circumstantial evidence, particularly the following: (1) evidence that appellant was at the shopping center around the time of the abduction; (2) evidence that, on the evening of March 27, 1995, Mary Lazaro heard what sounded like a child whimpering or sobbing in appellant's bathroom; (3) evidence that appellant had ties to both Lemoore and the Poso Creek area; (4) the discovery at Poso Creek of a shower curtain resembling one appellant had owned; and (5) Special Agent Carole Cacciaroni's testimony regarding her interviews of appellant, especially her testimony regarding his demeanor. As appellant argued in Section III, *supra*, such evidence, even considered together, did not establish beyond a reasonable doubt his guilt of any offense.

Second, although all of the uncharged misconduct was in fact dissimilar to the charged offenses, the inherently inflammatory nature of that evidence likely led the jury to draw specious inferences (e.g., incestuous behavior with a child when appellant was *himself* a child somehow established a sexual interest in children while he was an adult; possession of magazines purporting to depict teenagers somehow suggested a sexual interest in prepubescent children).

Third, as discussed in greater detail in Section F, *infra*, the prosecution relied on the "uncharged misconduct" evidence at numerous points throughout the trial. Not only did the introduction of this evidence make up much of its case in chief, but the prosecution discussed the evidence at various points in its argument. Specifically, the prosecution argued that: the evidence of incest was relevant to intent and motive (16 RT 2744-2745); the evidence relating to appellant's incestuous conduct, possession of magazines, and videotape rentals was relevant to the issue of identity (16 RT 2752, 2755, 2758-2759, 2766); his rental of the videotapes

represented an attempt to "sublimate the urges that he's afraid of" and "keep[] the pain inside" (16 RT 2768-2769, 2856, 2872-2873); and appellant's incestuous conduct and statements to his sister, and his possession of the magazines, demonstrated motive, i.e., a lifelong sexual interest in children (16 RT 2856).

Fourth, as discussed in Sections B through D, *supra*, and Section F, *infra*, there can be no doubt that the evidence was at least "emotionally charged," if not inherently inflammatory.

Accordingly, application of the *McKinney* factors leads to the ineluctable conclusion that admission of the "uncharged misconduct" evidence in this case violated appellant's federal due process rights under the Fourteenth Amendment.

Although appellant's objections were based on Evidence Code sections 352 and 1101, his federal constitutional claims are preserved for review. A state court's procedural or evidentiary ruling is subject to federal review where it has infringed upon a specific federal constitutional provision or has deprived the defendant of the fundamentally fair trial guaranteed by due process. (*Pulley v. Harris* (1984) 465 U.S. 37, 41; *Jammal v. Van de Kamp* (9th Cir.1991) 926 F.2d 918, 919-20). Thus, a defendant is entitled to relief on due process grounds where a state court's decision to admit prior bad acts evidence was arbitrary or so prejudicial that it rendered the trial fundamentally unfair. (*McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-1386; see also *Walter v. Maass* (9th Cir.1995) 45 F.3d 1355, 1357.)

Moreover, as this Court has noted, "no useful purpose is served by declining to consider on appeal a claim that merely restates, under

alternative legal principles, a claim otherwise identical to one that was properly preserved by a timely motion that called upon the trial court to consider the same facts and to apply a legal standard similar to that which would also determine the claim raised on appeal." (*People v. Yeoman* (2003) 31 Cal.4th 93, 117.) Indeed, in *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6, this Court concluded that a trial objection under Evidence Code sections 352 and 1101 preserved a claim that the asserted error violated due process and appellant's Eighth Amendment right to a reliable verdict. Because appellant's federal constitutional claims are identical to his claims based on California decisions and statute, the federal claims are preserved. (*People v. Smith* (2005) 35 Cal.4th 334, 356; *People v. Smith* (2003) 31 Cal.4th 93, 117.)

Finally, this Court recently affirmed that, where a defendant's objection sufficiently alerted the trial court to the nature of his claim, he may raise that claim on appeal. (*People v. Partida* (2005) 37 Cal.4th 428, 433-439.) The defendant in that case argued on appeal that evidence of his gang involvement was inherently prejudicial, and therefore admission of that evidence violated due process. (*Id.* at pp. 433, 437.) This Court concluded that, where the defendant objected at trial that the court erred in admitting certain evidence because it was more prejudicial than probative under Evidence Code section 352, his claim that the trial court's error in overruling the objection violated his due process rights could be raised on appeal. (*Ibid.*)

As in *Partida*, this case involved the admission of inherently prejudicial evidence, and the trial court's admission of that evidence similarly violated due process. Moreover, appellant's objections under Evidence Code sections 1101, 1108 and 352 fully apprised the trial court of

the federal due process and Eighth Amendment reliability grounds of his claim. (*People v. Partida, supra,* 37 Cal.4th at pp. 433-439; *People v. Cole, supra*, 33 Cal.4th at p. 1195, fn. 6.)

Moreover, to the extent that appellant lawfully possessed the magazines, the trial court violated his First Amendment rights in using them against him. (*Dawson v. Delaware*, *supra*, 503 U.S. at p. 167 [admission of evidence of defendant's membership in a prison gang violated his First Amendment rights where such evidence was not relevant to any issue being decided in the proceeding]; see also *People of Territory of Guam v. Shymanovitz*, *supra*, 157 F.3d at pp. 1159-1160 [disapproving admission of constitutionally protected material which is neither relevant nor "bad act" evidence]; Anderson, *The Freedom to Speak and The Freedom to Listen: The Admissibility of the Criminal Defendant's Taste in Entertainment* (Fall 2004) 83 ORLR 899, 935-944 [recommending, among other things, a more rigorous showing of relevancy with respect to matters of art and entertainment, including pornography].) Admission of the evidence, then, allowed the prosecution to use material which, though lawful, is viewed with contempt, and therefore likely to have created a bias against appellant. (See *People of Territory of Guam v. Shymanovitz, supra,* 157 F.3d at p. 1159.)

F. Each Of These Errors, Alone And In Combination With The Others, Requires Reversal Of The Judgment In Its Entirety

Admission of evidence regarding appellant's incestuous conduct and his apology for that conduct, his statement as to why he had never married, and his possession and rental of adult materials, constituted prejudicial error under both state law and the federal Constitution. As demonstrated below, each of these errors, alone and in combination with the others, requires

reversal of the convictions, special circumstance finding and death sentence.

1. At The Guilt Phase, The Evidence Unfairly Bolstered The Prosecution Case And Undermined Appellant's Defense

At its core, the unchallenged prosecution evidence against appellant amounted to this: appellant was at the Food King Shopping Center around the time Maria was abducted (10 RT 1572, 1576-1577, 1607; 11 RT 1653-1654; 14 RT 2399), and Maria's body was found in Poso Creek, an area familiar to appellant (10 RT 1584-1587, 1589-1591; 11 RT 1833). However, admission of the "uncharged misconduct" evidence blanketed the entire trial with extremely inflammatory, yet wholly irrelevant, information about appellant. This error prejudiced him in several critical ways.

First, given the inherently inflammatory nature of the "uncharged misconduct" evidence, it likely undercut the jury's ability to assess properly the remaining evidence. As defense counsel noted in his closing argument, the investigation of Maria's abduction and homicide was clouded by appellant's past incestuous conduct, his rental of the videotapes, and his possession of the magazines. That is, in light of those facts, everything he did and said was viewed as inculpatory. (16 RT 2782-2788, 2827-2828.)

Appellant's sister testified in detail regarding his incestuous conduct with her, including fondling, exposure, and attempted sexual intercourse, which took place over a period of approximately 14 years. (11 RT 1803-1834.) As appellant has pointed out, incest is universally regarded with deep-seated revulsion. (See Section B at p. 136, *supra.*) For the same reason, the jury would have viewed with similar repugnance appellant's statement that he had never married because he feared he might molest his

own children. (11 RT 1827, 1830.) And, given the widespread disapproval, even condemnation, of pornography, evidence that appellant possessed magazines purportedly featuring teenagers, and routinely (even daily) rented adult videotapes, would have generated a bias against him. (10 RT 1575-1577; 12 RT 2064-2067, 2071-2100, 2104-2106, 2108, 2112, 2115; Section D at pp. 159-160, *supra*.)

Thus, it is likely that the jury's guilt verdicts reflected its desire to punish appellant for who he was or what he had done in the past, even if it did not find beyond a reasonable doubt that he was guilty of the charged offenses. This is precisely why "character" or "propensity" evidence historically has been prohibited. (See, e.g., 1 Wigmore, Evidence, *supra*, § 194, pp. 646-647.)

Second, the "uncharged misconduct" evidence operated to unfairly bolster an otherwise weak prosecution case. As a result of the prejudicial "uncharged misconduct" evidence, the jury was more likely to accept evidence that it might have otherwise discounted as incredible. For instance, because of the "other misconduct" evidence, the jury was more likely to: (1) credit Mychael Jackson's testimony (12 RT 1877-2018), including his bizarre explanation as to how he came to observe appellant abduct Maria and how he later pieced together where he had seen appellant, and his claim that he was not seeking any benefit in exchange for his testimony; (2) disregard evidence regarding Jackson's conviction for fraud and the opinions of his wife and ex-girlfriends that he was untrustworthy (12 RT 1933, 1941-1942; 14 RT 2370-2375, 2377, 2382-2384, 2386-2390, 2392, 2394-2397, 2434-2441); (3), believe the tortured explanations offered by Mary Lazaro and Mary Alliene Smith to explain why they knew it was on March 27, 1995, that Lazaro heard what sounded like someone

whimpering in appellant's apartment, and why they did not report the incident until more than a year and a half later (11 RT 1718-1799); and (4) credit the testimony of Lisa Teays, Lisa Kuehne and Kellie Carrion that Exhibit 4A resembled a shower curtain appellant had owned several years earlier (13 RT 2228-2242, 2250-2279, 2285-2299).

Similarly, the "uncharged misconduct" evidence most likely led the jury to find incriminating evidence that it otherwise would have dismissed as, at most, ambiguous. For instance, because of the "uncharged misconduct" evidence, the jury was more likely to find that: appellant's comments to Mary Smith regarding the news bulletin and fliers, statements he made during his interviews with Agent Cacciaroni, and his demeanor at the time of those events, showed consciousness of guilt (10 RT 1601-1613; 11 RT 1617-1661); and that he had shaved his mustache to avoid detection, not because he had innocently decided to do so (11 RT 1700-1702; 13 RT 2196-2200, 2213, 2215; 14 RT 2473-2474, 2507-2508, 2544-2545). On the other hand, the jury was more likely to disbelieve: appellant's testimony that the events described by Smith had not occurred (14 RT 2477; 15 RT 2621-2622); and his explanation that, during his interviews with Cacciaroni, he had been nervous because he felt like he had been singled out as a suspect and because he had been concerned about Maria's welfare (14 RT 2497-2498, 2553, 2575-2579, 2566-2567, 2569-2570; 15 RT 2597-2598), and that he had not made some of the statements Cacciaroni had attributed to him (14 RT 2580-2582).

Third, admission of the evidence unfairly established elements of the crimes, including appellant's intent in kidnaping Maria, which elements the prosecution would have been unable to establish otherwise. As previously noted, there was no physical evidence of molestation. In fact, aside from

the "uncharged misconduct" evidence, there was no evidence from which the jury could infer that appellant kidnaped Maria with the motive for or intent to commit a lewd or lascivious act in violation of section 288. However, the jury may have found that appellant's conduct with and statements to his sister established the intent element of section 207, subdivision (b), even though the evidence had no tendency in reason to show that, as an adult, he had a sexual interest in prepubescent children, let alone that he acted on such sexual interest in this case.

Similarly, the prosecutor unfairly argued that the evidence relating to appellant's incestuous conduct, possession of magazines, and videotape rentals was relevant to the issue of identity, even though (1) none of that evidence had been admitted for that purpose, (2) the prosecution had specifically advised the court that it would not use the evidence to argue the issue of identity, and (3) it had not objected when the trial court struck language relating to identity from CALJIC No. 2.50. (15 RT 2674-2675; 16 RT 2752, 2755, 2758-2759, 2766.)[67] More important, none of the prior conduct shared such distinctive features with a charged offense that they would support the inference that the same person committed both acts. (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 403.)

In addition, the admission of the magazines led to the particularly prejudicial testimony of prosecution expert Ackerman. Ackerman testified that he did not have any degrees in psychology and was unaware of any studies relating the possession of such magazines to pedophiles or to a sexual interest in children. (12 RT 1870.) The trial court found, and the prosecution agreed, that Ackerman did not purport to be qualified to render

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[67] Again, the trial court had admitted only appellant's statement as to why he had never married as probative of identity. (10 RT 1441-1444.)

an opinion that appellant was a pedophile. (12 RT 1871-1872.) Nevertheless, Ackerman testified that he had never found such magazines in the possession of someone who had not expressed a sexual interest in minor children, and that such magazines are largely read by individuals with such an interest. (12 RT 2093, 2096-2097.) The implication of Ackerman's testimony was plain: because such magazines are read by pedophiles, appellant was necessarily a pedophile. (See *People v. Smith*, *supra*, 35 Cal.4th at p. 353 [psychologist testified that murders such as the one charged in that case are usually committed by a sadistic pedophile; the clear implication of such testimony was that the defendant was in fact a sadistic pedophile].) Indeed, Ackerman's testimony on this point was relevant only to the extent it related to appellant. (*Ibid.*)

Fourth, the "uncharged misconduct" evidence operated to unfairly undermine the defense case. For instance, the jury was less likely to believe appellant's guilt phase defense: that he was completely innocent, and that the abduction and homicide had been committed by someone else, perhaps the perpetrator of the abduction and murder of Angelica Ramirez. (14 RT 2406-2413, 2445-2456; 16 RT 2775-2780.)

Similarly, the jury was less likely to believe appellant's testimony concerning the uncharged misconduct itself. For instance, the very nature of the evidence may have undercut the jury's ability or willingness to accept his testimony that he was not sexually interested in children. (14 RT 2502-2503; 15 RT 2624.) It may have led the jury to reject out of hand his testimony that, contrary to Donna's testimony, during their last incestuous encounter he did not force his way into a locked bathroom and grab her while she was in a towel, nor did she threaten to get her boyfriend to come after him. (11 RT 1822-1823; 14 RT 2587.)

It should also be noted that the prejudicial effects enumerated above operated to lower the prosecution's burden to prove beyond a reasonable doubt that appellant was guilty of the charged offenses. (*Sullivan v. Louisiana* (1993) 508 U.S. 275; *In re Winship* (1970) 397 U.S. 358.)

Notwithstanding the prosecution's failure to prove appellant's guilt beyond a reasonable doubt, any chance appellant had to raise a reasonable doubt as to his guilt of some or all of the charged offenses was severely undermined by the prosecutor's argument regarding the evidence. For instance, the prosecutor, indulging in rank speculation, painted a picture of appellant as a veritable monster:

> He needs the discipline of the extraordinarily harsh law of Washington to force him to sublimate the urges that he's afraid of. And that's why he watches so many videos, that's why he watches so many videos, that's why he's obsessed with the sex . . . because it keeps the pain inside.

(16 RT 2769.) Later, the prosecutor argued:

> Mychael Jackson's testimony is still consistent with the other evidence in the case, the fact that it's Mr. McCurdy who has a motive for the abduction of Maria Piceno. That he molested his own sister for 13 years while she was a prepubescent minor. That he had apologized to his sister and told her that he would never marry because he feared he'd molest his own children. That was in 1991, indicating again, acknowledging himself a sexual interest in minor children.
>
> It's Mr. McCurdy who possessed 30 magazines, and you've got the list of the titles, "Teenager," "Teenage Sperm," magazines which, by the girls depicted in them and the titles, are designed to elicit a youthful appearance of sexual conduct, and that an expert has testified to you, it was pointed out this morning, he himself has seen some of those specific titles and those magazines, ones found in search warrants on people with an express sexual interest in minor children.

(16 RT 2855-2856.) The clear implication of these comments was that appellant was a pedophile (an allegation for which there was no evidentiary basis), and therefore must have abducted and killed Maria. (*People v. Smith*, *supra*, 35 Cal.4th at p. 353.)

The prosecution invited even further improper speculation by arguing that appellant's rental of the videotapes on March 27, 1995, indicated what his state of mind was at the time Maria Piceno was taken. (16 RT 2856.) The prosecutor argued as follows:

> Now, he rented the movies. *This may be the movies that helped him quash those urges, all those demons inside. It didn't work.* He picked up Maria and drove back to Video Zone. Maybe if he gets three more, that will take care of it. He'll be satisfied and he can stop. And he rents three more and that doesn't work. . . .
>
> When you realize how many adult movies he's rented that day, plus abducting Maria Piceno, it becomes very, very clear what is on Gene McCurdy's mind as he's abducting Maria Piceno on March 27th, 1995.

(16 RT 2872-2873, italics added.) Again, there was no properly admitted evidence giving rise to an inference that appellant wrestled with any such "urges" or "demons," let alone urges to sexually molest or assault a child. However, the "uncharged misconduct" evidence to which the prosecutor referred was central to the prosecution's case.

The instructions given in this case did not counteract the prejudice flowing from this evidence. CALJIC 2.50 (12 CT 3447-3448), intended to be a limiting instruction, was of little value because the instruction did not explain how the evidence might tend to show motive or intent.[68] For

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[68]As modified by the trial court, the instruction read as follows:

instance, in *People v. Felix* (1993) 14 Cal.App.4th 997, 1003, 1009, the Court of Appeal held that a jury instruction was erroneous where it instructed the jury to consider a prior conviction only as to identity and not as character evidence, but failed to explain how the evidence might tend to show identity. In so ruling, the Court of Appeal noted that " a proper use of

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> 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 defendant is a person of bad character or that [he] [she] has a disposition to commit crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining whether it tends to show:
>
> . . .
>
> The existence of the intent which is a necessary element of the crime charged;
>
> . . .
>
> A motive for the commission of the crime charged;
>
> . . .
>
> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case.
>
> You are not permitted to consider such evidence for any other purpose.

(12 CT 3447-3448; 16 RT 2672-2675, 2706-2707.)

[the] evidence to show identity tends to elude reason."[69]

Moreover, the jury was given no explanation as to what constituted "[e]vidence of other crimes" within the meaning of that instruction; in contrast, CALJIC 2.50.01, the jury instruction ordinarily given in connection with evidence introduced under Evidence Code section 1108, defines the conduct to which that instruction relates. Indeed, it is reasonably likely that CALJIC 2.50 led the jury to believe erroneously that appellant's rental of the videotapes (which was clearly lawful), possession of adult magazines (which the prosecution could not establish was unlawful), and his lawful statement regarding his never having married constituted evidence of "other crimes." Conversely, if the jury did not consider appellant's lawful conduct in light of CALJIC No. 2.50, it could have considered that evidence for any reason, not just intent and motive.[70]

Under federal standards, reversal of the guilt verdicts and special circumstance finding is required unless the erroneous admission of this evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under state law, reversal of the guilt verdict is required if there is a reasonable probability appellant would have achieved a more favorable result but for the erroneous admission of this evidence.

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[69] As appellant argues in Argument IV, CALJIC 2.50 as given improperly lowered the prosecution's burden of proof.

[70] Similarly, CALJIC 2.71.7 (12 CT 3453) would not have properly guided the jury in their consideration of appellant's apology and statement as to why he had never married. Although the instruction states that "[e]vidence of an oral statement ought to be viewed with caution," the instruction does not explain what they are to exercise caution about. This vague admonition would not overcome the bias created by evidence that appellant apologized for incestuous conduct.

(*People v. Watson* (1956) 46 Cal.2d 818, 836.) Reversal is required in this case under either of those standards.

2. The Evidence Also Prejudiced The Jury's Assessment Of Appellant's Culpability And His Punishment

Even assuming, arguendo, that the erroneous admission of the "uncharged misconduct" evidence does not require reversal of the convictions and special circumstance finding, reversal of the penalty phase is required.

A death verdict must be a reasoned moral response, not one based on emotional, inflammatory speculation. (See *Saffle v. Parks* (1990) 494 U.S. 484, 493 [under the Eighth Amendment, the death penalty must be reasoned moral response rather than emotional one].) The speculation engendered by this evidence violated appellant's substantive due process rights to a fundamentally fair trial and a fair and impartial jury, and to a reliable penalty verdict, in contravention of his rights under the Eighth and Fourteenth Amendments.

Pursuant to CALJIC No. 8.85, the trial court instructed the jury as to the factors it was to consider in determining the penalty to be imposed. Those factors included factor (a), i.e., the circumstances of the crime. (13 CT 3640-3642; 25 RT 3226-3228.) Further, the prosecution argued, "[W]e presented all the evidence about the circumstances of the crime during the trial . . . ." (25 RT 3192.) Because the "uncharged misconduct" evidence had been introduced to establish appellant's motive, intent, and, perhaps, character, in relation to commission of the crimes, the jury would have understood this instruction to mean that it was to consider that evidence

pursuant to factor (a).[71] Yet these supposed "circumstances of the crime" largely amounted to childhood and adolescent incest, lawful speech, and the lawful possession of constitutionally-protected material. Moreover, none of this evidence was actually relevant to any issue in the case, and therefore did not constitute proper "factor (a)" evidence.

As noted above, evidence regarding the incest described profoundly taboo conduct. (Section B, *supra*, at p. 136.) The jury would have viewed appellant's statement to his sister as to why he had never married, and his possession of adult material, with similar condemnation. (See Sections B and C, *supra*, at pp. 135-136, 142.) For the reasons set forth in the previous section, the evidence almost certainly undermined the jury's ability to properly consider the penalty phase evidence. As a result, the jury's death verdict may have reflected a determination that he deserved to die because of who he was or what he had done in the past, not because a proper weighing of the evidence led to that conclusion.

Admission of the "uncharged misconduct" evidence prejudicially undermined appellant's penalty phase defense, which was based largely on the claim that there was "lingering doubt" about his guilt. (25 RT 3206-3209, 3223-3224.) The evidence was devastating to his lingering doubt

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[71] None of this evidence could have been admitted as evidence of the use or attempted use of force or violence under section 190.3, factor (b). First, the prosecution advised the court that it would present no penalty phase evidence other than the victim impact testimony of Maria's mother (17 RT 2902-2903), and its failure to provide notice that it intended to present any evidence under factor (b) barred the prosecution from presenting any evidence under that factor (§ 190.3). And, second, there was no instruction defining factor (b) in the penalty phase instructions. (See 13 CT 3640-3642, 25 RT 3226-3228 [CALJIC No. 8.85].) Factor (c) was also inapplicable because appellant had suffered no prior felony convictions.

argument, both because it seemed to provide evidence that appellant had a motive and/or intent to commit the crime, and because the prejudicial impact of the evidence must have overridden the jury's ability to reconsider the strength of the evidence and "consider any remaining uncertainty as to [appellant's] guilt." (*People v. Morris* (1991) 53 Cal.3d 152, 219.)

The prejudicial effect of this error was compounded by the trial court's error in excluding critical "lingering doubt" evidence. (See Argument VIII, *infra*.)

Under these circumstances, admission of the evidence deprived appellant of his due process right to a fundamentally fair trial (*Pulley v. Harris*, *supra*, 465 U.S. at p. 41; *McKinney v. Rees*, *supra*, 993 F.2d at pp. 1384-1386) and a fair and impartial jury (*Turner v. State of Louisiana* (1965) 379 U.S. 466, 471-472), and the trial court's error in admitting the evidence over appellant's objections had the legal consequence of violating his right to due process (*People v. Partida*, *supra*, 37 Cal.4th at pp. 433-439). The evidence also violated his right to a fair and impartial jury and a reliable penalty verdict. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.)

Under federal standards, reversal of the death judgment is required unless the erroneous admission of this evidence was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Under state law, reversal of the penalty verdict is required if a "reasonable *possibility*" exists that the jury would have returned a life sentence absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 447, italics added.) Reversal is required in this case under either of those standards.

3. The Guilt Verdicts, Special Circumstance Finding, And Penalty Verdict Must Be Reversed

Accordingly, the erroneous admission of this highly prejudicial evidence must be deemed to have been prejudicial both as to the guilt and penalty phases of the trial, and reversal of the guilt verdicts, the special circumstance finding and the death sentence is required.

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IV

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

The guilt phase verdicts, special circumstance finding, and death verdict must be reversed due to structural error, generated by giving CALJIC Nos. 2.50 and 2.50.1. (12 CT 3447-3448 [CALJIC No. 2.50 (1994 rev.) (evidence of other crimes)]; 12 CT 3449 [CALJIC No. 2.50.1 (other crimes need by proven only by a preponderance of the evidence)].)[72] These

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[72] The errors discussed in this argument are cognizable on appeal even though (1) in discussing the wording of CALJIC No. 2.50, defense counsel acceded to the court's decision to strike a paragraph relating to the issue of identity (15 RT 2672-2674), and (2) there is no record that defense counsel objected to any of the instructions discussed in this argument. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights. (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312; *People v. St. Martin* (1970) 1 Cal.3d 524, 531.) Merely acceding to an erroneous instruction does not constitute invited error; nor must a defendant request amplification or modification when the error consists of a breach of the trial court's fundamental instructional duty. (*People v. Smith* (1992) 9 Cal.App.4th 196, 207, fn. 20.) Because the trial court bears the ultimate responsibility for instructing the jury correctly, the request for erroneous instructions will not constitute invited error unless defense counsel both (1) induced the trial court to commit the error, and (2) did so for an express tactical purpose which appears on the record. (*People v. Wickersham* (1982) 32 Cal.3d 307, 332-335, disapproved of on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201; *People v. Perez* (1979) 23 Cal.3d 545, 549, fn. 3.) Here, neither condition for invited error has been met. Significantly, the modification to which defense counsel acceded did not relate to the prosecution's burden of proof and therefore did not contribute

instructions lessened the burden of proof required to convict, in violation of appellant's right to due process. (*In re Winship* (1970) 397 U.S. 358; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) Reversal is automatic where, as here, "structural error" occurs, because the error permeates "[t]he entire conduct of the trial from beginning to end" and "affect[s] the framework within which the trial proceeds." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.)

A. Legal Standards

Where a jury is not properly instructed that a defendant is presumed innocent until proven guilty beyond a reasonable doubt, the defendant is deprived of due process. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280; *People v. Flood* (1998) 18 Cal.4th 470, 479-482.) Any jury instruction that "reduce[s] the level of proof necessary for the Government to carry its burden . . . is plainly inconsistent with the constitutionally rooted presumption of innocence." (*Cool v. United States* (1972) 409 U.S. 100, 104.)

"[T]he essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281, original italics.) Where such an error exists, it is considered structural and thus is not subject to harmless error review. (*Id.* at pp. 280-282.) If a jury instruction is deemed "ambiguous," it will violate due process when a reasonable likelihood exists that the jury has applied the challenged instruction in a manner that violates the Constitution. (*Estelle v. McGuire*

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to the errors discussed in this argument.

(1991) 502 U.S. 62, 72.)

B. CALJIC Nos. 2.50 And 2.50.1 Lowered The Prosecution's Burden of Proof In Appellant's Case

In appellant's case, the trial court instructed the jury pursuant to CALJIC No. 2.50 (1994 rev.), which read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed crimes other than that for which he is on trial. [¶] Such evidence, if believed, was not received and may not be considered by you to prove that the defendant is a person of bad character or that [he] [she] has a disposition to commit crimes. [¶] Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show: [¶] The existence of the intent which is a necessary element of the crime charged; [¶] A motive for the commission of the crime charged; [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider this evidence for any other purpose.

(12 CT 3447-3448; 16 RT 2706-2707.)[73] The jurors were then instructed as follows, pursuant to 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 are 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.

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[73] CALJIC No. 2.50, as read by the trial court, provided in pertinent part that "[s]uch evidence . . . may be considered by you only 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*." (16 RT 2707, italics added.)

(12 CT 3449; 16 RT 2707.) Finally, the "preponderance of the evidence" standard was defined in CALJIC No. 2.50.2. (12 CT 3450; 16 RT 2707-2708.) As demonstrated below, the interplay of CALJIC Nos. 2.50 and 2.50.1 in the instant case prejudicially lowered the prosecution's burden of proof.[74]

In *Gibson v. Ortiz* (9th Cir. 2004) 387 F.3d 812, the Ninth Circuit held that giving CALJIC No. 2.50.01 together with CALJIC No. 2.50.1 (6th ed. 1996) constituted structural error because the instructions permitted the jury to find the defendant guilty of the charged offenses by relying on facts found only by a preponderance of the evidence. There, the defendant was charged with several sexual offenses against his spouse and a child. Evidence of prior uncharged sexual assaults he had allegedly committed against his spouse was admitted under Evidence Code section 1108. For this reason, the trial court instructed the jury pursuant to CALJIC Nos. 2.50.01[75] and 2.50.1.[76] (*Id.* at p. 817.)

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[74] The effect of this error was exacerbated by the fact that other jury instructions given by the trial court also operated to lower the prosecution's burden of proof. (See Argument VII, *infra*.)

[75] At the time of Gibson's trial, CALJIC No. 2.50.01 read in pertinent part:

> Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. . . . If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit the same or similar type sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused.

The jury in *Gibson* "received only a general instruction regarding circumstantial evidence [CALJIC No. 2.01], which required proof beyond a reasonable doubt, and a specific, independent instruction [CALJIC No. 2.50.1] relating to previous sexual abuse and domestic violence, which required only proof by a preponderance of the evidence." (*Id.* at pp. 821-823.) CALJIC No. 2.50.1 carved out of the general reasonable doubt standard a specific exception for other crimes evidence, which carried only a preponderance burden. (*Ibid.*)

The Ninth Circuit held that the interplay of the two instructions allowed the jury to find that the defendant "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, original italics.) The instructions provided "no explanation harmonizing the two

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> Unless you are otherwise instructed, you must not consider this evidence for any other purpose.

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

[76] At the time of Gibson's trial, CALJIC No. 2.50.1, as modified, read as follows:

> Within the meaning of the preceding instructions, the prosecution has the burden of proving by a preponderance of the evidence that a defendant committed sexual offenses and/or domestic violence other than those for which he is on trial. You must not consider this evidence for any purpose unless you find by a preponderance of the evidence that a defendant committed the other sexual offenses and/or domestic violence.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 817-818.)

burdens of proof discussed in the jury instructions." (*Id.* at p. 823.) Therefore, Gibson's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Ibid.*)

Indeed, CALJIC Nos. 2.50.01 and 2.50.1 "told the jury exactly which burden of proof to apply. However, contrary to the Supreme Court's clearly established law, the burden of proof the instructions supplied for the permissive inference was unconstitutional." (*Ibid.*) The inference that CALJIC No. 2.50.01 carved out an exception to the reasonable doubt burden was exacerbated by the prosecutor's argument that the defendant was "[t]hat kind of guy," and therefore he "did in fact commit [the charged sex] crimes." (*Id.* at p. 824.)

Finally, the Ninth Circuit noted that Gibson's jury was instructed *without* the addition of cautionary language that was added to CALJIC No. 2.50.01 in 1999, "to clarify how jurors were required to evaluate the defendant's guilt relating to the charged offense if they found that he had committed a prior sexual offense." (*Id.* at p. 818.)[77]

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[77] The language that was not given in *Gibson*, but was added to CALJIC No. 2.50.01 in 1999, reads:

> However, if you find by a preponderance of the evidence that the defendant committed [a] prior sexual offense[s], that is not sufficient by itself to prove beyond a reasonable doubt that [he] [she] committed the charged crime[s]. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

(*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 818, quoting CALJIC No. 2.50.01

In *People v. Orellano* (2000) 79 Cal.App.4th 179, the Court of Appeal reversed the defendant's convictions based upon a similar analysis. Specifically, the Court of Appeal held that, absent the cautionary language of the 1999 revision to CALJIC No. 2.50.01, CALJIC Nos. 2.50.01, 2.50.1, and 2.50.2 unconstitutionally allowed the jury "to find by a preponderance of the evidence that appellant committed the prior crimes, [and] to infer from such commission of the prior crimes that appellant . . . 'did commit' the charged crimes, without necessarily being convinced beyond a reasonable doubt that appellant committed the charged crimes." (*Id.* at p. 184.) The Court recognized that "there is a reasonable likelihood the jurors were misled by the incomplete instruction. Since we have no way of knowing whether the jury applied the correct burden of proof, the convictions must be reversed." (*Id.* at p. 186, citing *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281.)

Although *Gibson* and *Orellano* involved the interplay of CALJIC Nos. 2.50.01 and 2.50.1, the interplay of CALJIC Nos. 2.50 and 2.50.1 in this case resulted in structural error for essentially the same reasons. As in those cases, the jurors in the instant case were instructed that they could use the other crimes evidence, which needed to be proved only by a preponderance of the evidence, to infer that appellant possessed "the intent which is a necessary element of the crime charged," or a "motive for the commission of the crime charged." (12 CT 3447; 16 RT 2707.) However, the instructions provided no "explanation harmonizing the . . . burdens of proof." (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 823.) Instead, it is reasonably likely that the jury believed that CALJIC No. 2.50.1 carved out

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(7th ed. 1999).)

an exception to the general reasonable doubt standard; at the very least, appellant's jury "was presented with two routes of conviction, one by a constitutionally sufficient standard and one by a constitutionally deficient one." (*Id.* at pp. 823-824.)

Under these circumstances, if the jury found evidence that appellant had committed "other crimes," they were permitted to convict based on a finding by a preponderance of the evidence that: (1) the killing was done with the malice aforethought necessary to sustain a conviction of second degree murder; (2) appellant had the specific intent to commit the crime of kidnaping necessary to sustain a conviction of felony murder and/or to sustain a true finding as to the kidnap-murder special circumstance; (3) that he had a motive to kidnap Maria Piceno; and/or (4) that he kidnaped Maria with the specific intent to commit an act defined in Penal Code section 288. (*Gibson v. Ortiz*, *supra*, 387 F.3d at pp. 822-824; *People v. Orellano*, *supra*, 79 Cal.App.4th at p. 186.)

Even worse, these instructions failed to define "other crimes." Therefore, the jury was free to consider appellant's *lawful* conduct (his rental of adult videotapes, his reason for not getting married and his possession of the adult magazines) as other crimes, and to use such conduct against him. (See Argument III, *supra*.)

The prosecutor's argument in this case was at least as devastating as that of the prosecutor in *Gibson*. (*Gibson v. Ortiz*, *supra*, 387 F.3d at p. 824.) The prosecutor here argued:

> [I]t's Mr. McCurdy who has a motive for the abduction of Maria Piceno. That he molested his own sister for 13 years while she was a prepubescent minor. That he had apologized to his sister and told her that he would never marry because he feared he'd molest his own children. That was in 1991, indicating again, acknowledging himself

a sexual interest in minor children.

(16 RT 2855-2856.) As appellant has noted in Argument III, incorporated by reference as if fully set forth herein, the clear implication of this argument was that appellant was a pedophile, an allegation for which there was no evidentiary basis. Further, the prosecutor argued as follows:

> Now, he rented the movies. *This may be the movies that helped him quash those urges, all those demons inside. It didn't work.* He picked up Maria and drove back to Video Zone. Maybe if he gets three more, that will take care of it. He'll be satisfied and he can stop. And he rents three more and that doesn't work. . . .
>
> When you realize how many adult movies he's rented that day, plus abducting Maria Piceno, it becomes very, very clear what is on Gene McCurdy's mind as he's abducting Maria Piceno on March 27th, 1995.

(16 RT 2872-2873, italics added.) Again, there was no evidence that appellant was wrestling with any such "urges" or "demons." In essence, the prosecutor was arguing that because appellant was the "kind of guy" who would commit the uncharged sex crimes, he "did in fact commit [the charged] crimes." (See *Gibson v. Ortiz*, *supra*, 387 F.3d at p. 824.)

Significantly, the jury here was not instructed with the cautionary language added to CALJIC No. 2.50.1 in 1999, two years after appellant's trial:

> If you find other crime[s] were committed by a preponderance of the evidence, you are nevertheless cautioned and reminded that before a defendant can be found guilty of any crime charged [or any included crime] in this trial, the evidence as a whole must persuade you beyond a reasonable doubt that the defendant is guilty of that crime.

This cautionary language might have preserved the constitutionality of

appellant's convictions and the kidnap-murder special circumstance finding. (See *Gibson v. Ortiz, supra*, 387 F.3d at p. 819 [noting that this Court upheld the constitutionality of Evidence Code section 1108 by relying in part upon the cautionary language that was added to CALJIC No. 2.50.01].) However, no such language was included in the instructions given in this case.

C. Appellant's Convictions, Special Circumstance Finding, And Death Judgment Must Be Reversed

In the instant case, the instructions given permitted the jury to find appellant guilty of the charged sexual offenses by merely a preponderance of the evidence, and therefore constituted structural error within the meaning of *Sullivan.* (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 281-282.) *Sullivan* error precludes harmless error review because no verdict within the meaning of the Sixth Amendment has been rendered (*id.* at p. 280), and also because the consequences of the deprivation of the right to a jury trial are "necessarily unquantifiable and indeterminate" (*id.* at pp. 281-282). (See also *Jackson v. Virginia* (1979) 443 U.S. 307, 320, fn. 14 ["Our cases have indicated that failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error"].) A structural error standard is appropriate in this case because, " [t]here being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 280.) Even if the Court should find that this did not constitute structural error, it should find that there was a reasonable likelihood that the jury failed to applied the instructions in a manner that failed to meet the constitutionally required burden of proof. (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72.)

Accordingly, this Court must reverse appellant's convictions, the special circumstance finding, and the penalty verdict.

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V

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

The evidence presented at trial failed to establish that appellant kidnaped Maria Piceno for the purpose of committing an act defined in Penal Code section 288. The conviction of count 2 of the information violated appellant's right to due process pursuant to the Fourteenth Amendment to the federal Constitution and Article I, section 13 of the California Constitution, as well as his rights pursuant to the Eighth Amendment to the federal Constitution and the correlative rights under the California Constitution.

Under *In re Winship* (1970) 397 U.S. 358, 364, the prosecution had the burden of proving each element of the crime of kidnaping for the purpose of committing an act defined in Penal Code section 288, as charged in count 2 of the information. (§ 207, subd. (b).) The appellate standard for reviewing whether the prosecution met this burden is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, italics omitted.) In this case, a rational trier of fact could not have found the elements to have been proven beyond a reasonable doubt.

Penal Code section 207, subdivision (b), provides that

[e]very 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 kidnaping.

Section 288, subdivision (a) states:

> Any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member 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 . . . .

There was no physical evidence that appellant engaged in, attempted to engage in, or even intended to engage in, any lewd or lascivious act within the meaning of section 288. Maria's body was found fully clothed except for a sock and shoe missing from one foot. (10 RT 1587-1588; 13 RT 2130, 2152-2153.) Dr. Bolduc, who conducted the post-mortem examination, found no evidence that she was molested. Although Dr. Bolduc found that the hymen was absent, he conceded that it may have been absent prior to Maria's death or may have opened due to the decomposition of her body. (13 RT 2140-2144, 2153.)[78]

Indeed, the prosecution conceded that it lacked physical evidence relevant to the intent element of section 207, subdivision (b). Between the filing of the complaint and the information, the prosecution dropped the special circumstance allegations that the murder was committed while appellant engaged in the commission and attempted commission of rape (§ 190.2(a)(17)), sodomy (§ 190.2(a)(17)), and lewd and lascivious acts with a child under 14 (§ 190.2(a)(17)). (A CT 1-3; 1 CT 6-7.) Moreover, in an

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[78] In context, it is clear that Dr. Bolduc was suggesting that her hymen could have been missing prior to her *abduction*. (13 RT 2141, 2153.)

offer of proof relating to evidence that appellant had either possessed or rented adult videotapes and magazines, the prosecution noted that "[b]ecause of the absence of physical evidence of molestation the **only** evidence the people can present on the issue of intent for the kidnapping are the 9 pornographic videos as well as the magazines." (2 CT 478, original bold and underscoring; see also 16 RT 2855-2856, 2872-2873.)

The only evidence that the prosecution introduced in attempting to establish appellant's intent to commit a lewd and lascivious act was as follows: that appellant possessed pornographic magazines, some of which depicted females who *may* have been under the age of 18, but who all appeared to be at least in their teens (i.e., pubescent); that appellant had rented adult videotapes on the afternoon of March 27, 1995; that, from age 5 until about age 19, appellant had engaged in incestuous conduct with his sister, Donna; that appellant had later apologized to Donna about the incest; and, that appellant had also told her that he had never married for fear that he would molest his children. (The facts relating to these items of evidence are more fully set forth in Argument III, hereby incorporated by reference as if fully set forth herein.)

Even taken collectively, this evidence did not even come close to establishing beyond a reasonable doubt that appellant intended to violate section 288. As appellant discusses in greater detail in Argument III, evidence relating to his incestuous conduct – almost all of which took place when appellant was a minor, and all of it with a sister just two years younger – completely fails to demonstrate that, as an adult, appellant had any sexual interest in prepubescent girls generally. His possession of magazines depicting physically mature, purported teenagers (not one of whom the prosecution established was an actual minor) demonstrated, at

most, a sexual interest in teenagers, not prepubescent children. And appellant's rental of videotapes expressly depicting *adult* females was even less suggestive of a sexual interest in prepubescent girls. (See Argument III, Section D, *supra*.)

Even if, as the trial court found, this evidence establishes appellant's interest in and/or preoccupation with his sexual passions on the day Maria was abducted (10 RT 1444-1445), it is a "mere modicum" of evidence (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320), and not the substantial, credible, and solid evidence necessary to sustain a conviction (*People v. Bolden* (2002) 29 Cal.4th 515, 553; *People v. Morris* (1988) 46 Cal.3d 1, 19). Sexual *interest* in teenage and adult women is not equivalent to the specific *intent* to molest a child that was required to prove the charge here.

Whether or not this Court agrees that the trial court erred in admitting some or all of this evidence, as argued above (Argument III, *supra*), it should conclude that there was insufficient evidence of an intent to violate section 288. (See *In re Winship*, *supra*, 397 U.S. at p. 364 [conviction based upon insufficient evidence violates defendant's constitutional right to due process of law].) Therefore, this Court should reverse the conviction on count 2 due to the State's failure to adduce sufficient evidence to support a conviction for kidnaping under section 207, subdivision (b). (*Jackson v. Virginia*, *supra*, 443 U.S. at pp. 318-320; *People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Appellant's invalid conviction of section 207, subdivision (b), also requires reversal of appellant's death sentence. That is, the prosecution's use at the penalty phase of the invalid conviction, and the constitutionally-inadmissible evidence upon which that conviction was based, violated appellant's rights to due process and to a reliable penalty determination.

(U.S. Const., Amends. VIII, XIV.)

It is virtually certain that the jury considered the invalid conviction in its penalty phase deliberations. First, the jurors were instructed to consider the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true." (13 CT 3640-3642; 25 RT 3226-3227 [CALJIC No. 8.85]; see also § 190.3, subd. (a).)

Second, the prosecutors relied heavily on the section 207, subdivision (b), conviction in arguing that the jury should impose the death penalty. For instance, one of the prosecutors argued:

> And I suspect, after you consider everything in this room, that you would leave this courtroom with the same opinion that you came in with, that in most case[s] where an eight-year-old has been kidnapped for sexual purposes and murdered, that the killer has earned the death penalty.

(25 RT 3196-3197.) Later, the other prosecutor argued:

> Based upon all that evidence, you found beyond a reasonable doubt that Gene Estel McCurdy kidnapped Maria Piceno for the purposes of sexually molesting her and then murdered her on March 27th, 1995. That's why we are here today.

(25 RT 3213-3214.)

Because appellant's jury had before it evidence that should have been excluded, appellant was denied his right to due process. (*Tuggle v. Netherland* (1995) 516 U.S. 10, 13-14; *id.* at pp. 14-15 (conc. opn. of Scalia, J.); see also *Gardner v. Florida* (1977) 430 U.S. 349, 358 [sentencing process must satisfy the requirements of the Due Process Clause].)

Because appellant's death sentence was imposed in part upon an invalid conviction, appellant was also denied his Eighth Amendment right

to a reliable penalty verdict. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 581, 590 [death sentence imposed in part on improper aggravation, i.e., evidence of a prior conviction that was later reversed, violates the Eighth Amendment].) As this Court has recognized, "the special need for reliability in the death penalty context is undermined whenever a prior conviction (upon which a death penalty judgment is based) is tainted by a fatal fundamental constitutional defect." (*People v. Horton* (1995) 11 Cal.4th 1068, 1135, citing *Johnson v. Mississippi*, *supra*, 486 U.S. 578.) Thus, in *Horton*, this Court reversed the defendant's death sentence, which was based in part on an invalid prior murder conviction. (*Id.* at p. 1140.)

The killing of an eight year old by a man with no criminal record would not have led inevitably to a death penalty. For instance, in *State v. Bibbs* (Tenn.Cr.App. 1991) 806 S.W.2d 786, 787-789, the defendant beat the eleven-year-old victim with a toilet seat and his gun, then threw her from a motel balcony. The defendant's lack of any prior criminal record appeared to be the primary mitigating circumstance and the reason the jury did not find certain aggravating circumstances. As a result, he was sentenced to life imprisonment. The prosecutors in the instant case, however, urged the jury to impose a death sentence by focusing on the kidnaping and appellant's purported intent to commit a lewd and lascivious act, and the jury's consideration of the invalid conviction tainted their death verdict.

Under federal standards, reversal of the death judgment is required because appellant's death verdict, which was based in part upon an invalid conviction, was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Under state law, reversal of the penalty verdict is required because there exists a "reasonable possibility" exists that

the jury would have returned a life sentence absent consideration of the invalid conviction. (*People v. Brown* (1988) 46 Cal.3d 432, 447.) Reversal is required in this case under either of those standards.

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VI

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON FIRST DEGREE FELONY MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH ONE COUNT OF SECOND DEGREE MALICE MURDER IN VIOLATION OF PENAL CODE SECTION 187

The trial court instructed the jury that appellant could be convicted of murder if he unlawfully killed a human being either with malice aforethought or during the commission or attempted commission of a kidnaping. (12 CT 3464-3465, 16 RT 2714-2715 [CALJIC No. 8.10 (1994 rev.)].) The trial court also gave instructions defining malice aforethought (12 CT 3465, 16 RT 2714-2715 [CALJIC No. 8.11]), first degree felony murder (12 CT 3466, 16 RT 2715 [CALJIC No. 8.21]), and unpremeditated second degree murder (12 CT 3467, 16 RT 2715-2716 [CALJIC No. 8.30]). The jury found appellant guilty of one count of murder in the first degree. (12 CT 3414.) The instructions on first degree murder were erroneous,[79] and the resulting conviction of first degree murder must be reversed, because the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[80]

Count 1 of the information alleged that "On or about March 27,

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[79] Although there is no record that defense counsel objected to any of the instructions discussed in this argument, the claimed errors are cognizable on appeal. (See Argument IV, fn. 70, incorporated by reference as if fully set forth herein.)

[80] Appellant is not arguing here that the information was defective. On the contrary, as explained hereafter, count 1 of the information was an entirely correct charge of second degree malice murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crime of first degree felony murder in violation of Penal Code section 189.

1995, in the County of Kings, State of California the said defendant [i.e., appellant] 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.) Both the statutory reference ("Section 187(a) of the Penal Code") and the description of the crime ("did willfully, unlawfully, and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.

Under Penal Code section 187, the statute cited in the information, second degree murder is "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[81] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[82]

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[81] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[82] In 1995, when the murder at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and

This authority makes clear that malice murder is not murder of the first degree.

Because the information charged only second degree malice murder in violation of Penal Code section 187, the trial court lacked jurisdiction to try appellant for first degree murder. A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information charging that specific offense. (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7; *People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of Penal Code section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree,

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> premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 282, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought' (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[83] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

(*People v. Witt*, *supra*, 170 Cal. at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases has been completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder

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[83] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in Penal Code section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in Penal Code section 189. On the contrary, "[s]econd degree murder is a lesser included offense of first degree murder" (*People v. Bradford, supra* 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony murder rule. A crime cannot both include another and be included within it.

need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that Penal Code section 187 was *not* "the statute defining" first degree felony murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe [Penal Code] section 189 as a statutory enactment of the first degree felony murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, fn. omitted.)

Moreover, in rejecting the claim that *People v. Dillon*, *supra*, 34 Cal.3d 441, requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder (see Pen. Code, § 664, subd. (a), referring to "willful, deliberate, and premeditated murder, as defined by Section 189") or murder during the commission of a felony, and *People v. Dillon*, *supra*, 34 Cal.3d at p. 472, expressly held that the first degree felony murder rule was codified in Penal Code section 189. Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not

charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes" (*People v. Nakahara* (2003) 30 Cal.4th 705, 712). First degree murder of any type and second degree malice murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford*, *supra* 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[84]

The greatest difference is the one between second degree malice murder and first degree felony murder. By the express terms of Penal Code section 187, second degree malice murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in relevant respects to Penal Code sections 187 and 189 (*id.* at pp.

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[84] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements for conviction.* This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original italics.)

185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court held that, under the notice and jury trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment*, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, italics added, citation omitted.)[85]

Premeditation and the facts necessary to bring a killing within the first degree felony murder rule (commission or attempted commission of a felony listed in Penal Code section 189, together with the specific intent to commit that crime) are facts which increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (§ 190, subd. (a).) Therefore, those facts should have been charged in the information.

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[85] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7, 15; *DeJonge* v. *State of Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, §§ 7, 15, 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., Amends. VIII, XIV; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder and would not have been death-eligible. (§ 190.2; see *People v. Cooper* (1988) 53 Cal.3d 771, 828.) Therefore, reversal is required.

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VII

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

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; see also *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40, disapproved of on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship, supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.) The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required.[86] Because the instructions violated the United

[86] Although there is no record that defense counsel objected to any of the instructions discussed in this argument, the claimed errors are

States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279-280.)[87]

A. Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.01 and 8.83.1)

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved," and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (12 CT 3458, 16 RT 2711 [CALJIC No. 2.90 (1994 rev.)].) CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(12 CT 3458; 16 RT 2711.)

The jury was given two instructions – CALJIC Nos. 2.01[88] and

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cognizable on appeal for the reason set forth in Argument IV, footnote 70, which is hereby incorporated by reference as if fully set forth herein.

[87] The effect of the errors discussed in this argument were exacerbated by the fact that CALJIC Nos. 2.50 and 2.50.1, as given by the trial court, also operated to lower the prosecution's burden of proof. (See Argument IV, *supra*.)

[88] CALJIC No. 2.01 as read to the jury stated:

> However, 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.

8.83.1[89] –

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.

Also, if the circumstantial evidence as to any particular count is susceptible of two reasonable interpretations, one of which points to the defendant's guilt and the other to his innocence, you must adopt that interpretation which points to the defendant's innocence, and reject that interpretation which points to his guilt.

If, on the other hand, one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(12 CT 3432-3433; 16 RT 2700-2701.)

[89]CALJIC No. 8.83.1, as read to the jury, stated:

The specific intent with which an act is done may be shown by the circumstances surrounding its commission. But you may not find a special circumstance alleged in this case to be true unless the proved surrounding circumstances are not only

(1) consistent with the theory that the defendant had the required specific intent but

(2) cannot be reconciled with any other rational conclusion.

Also, if the evidence as to any such specific intent is susceptible of two reasonable interpretations, one of which points to the existence of the specific intent and the other to

that discussed the relationship between the reasonable doubt requirement and circumstantial evidence by way of CALJIC No. 2.01.

These two instructions, addressing different evidentiary issues in almost identical terms, advised appellant's jury that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (12 CT 3433, 3477-3478; 16 RT 2701, 2720-2721.) These instructions informed the jury that if appellant *reasonably appeared* to be guilty, they were to find him guilty – even if they entertained a reasonable doubt as to his guilt. This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to Due Process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7, 15), trial by jury (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, § 16), and a reliable capital trial (U.S. Const., Amends. VIII, XIV; Cal. Const., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the specific intent necessary

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> the absence of the specific intent[,] you must adopt that interpretation which points to the absence of the specific intent.
>
> If, on the other hand, one interpretation of the evidence as to such specific intent appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(12 CT 3477–3478; 16 RT 2720-2721.)

to find the special circumstance to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstance true based on the appearance of reasonableness: the jurors were told that they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be "reasonable." (12 CT 3433, 3477-3478; 16 RT 2701, 2720-2721.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty . . . ." (original italics)].) Thus, the instructions improperly required conviction and findings of fact necessary to a conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions improperly shifted the burden of proof to appellant, by requiring the jury to find that the prosecution's interpretation of the evidence was correct, and hence that appellant was guilty as charged, if the prosecution's interpretation appeared to be reasonable and appellant did not produce a countervailing reasonable interpretation pointing toward his innocence. (Cf. *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.) The instructions thus created an impermissible mandatory presumption that required the jury to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by presenting the jury with a reasonable

exculpatory interpretation.

"A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts. [Footnote.]" (*Francis v. Franklin* (1985) 471 U.S. 307, 314, italics added.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana*, *supra*,) 442 U.S. at p. 524.)

Here, these instructions plainly told the jury that if only one interpretation of the evidence appeared reasonable, "you *must* accept the reasonable interpretation and reject the unreasonable." (12 CT 3433, 3477-3478, italics added; 16 RT 2701, 2720-2721.) In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to his innocence.

The instructions in this case had the effect of reversing the burden of proof, since it required the jury to find appellant guilty unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. The erroneous instructions were prejudicial with regard to guilt, in that they required the jury to convict appellant if he "reasonably appeared" guilty, even if the jurors still entertained a reasonable doubt of his guilt. This is the equivalent of allowing the jury to convict appellant because he was a likely suspect, rather than because they believed him

guilty beyond a reasonable doubt.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jury's deliberations, since there was virtually no direct evidence other than the highly suspect testimony of Mychael Jackson that appellant was the person who kidnaped and murdered Maria Piceno, or that appellant harbored an intent to commit a lewd and lascivious act with her. This was a prosecution case unusually reliant upon circumstantial evidence, and that evidence, as discussed previously, was flimsy at best. (See Argument III, Section F, *supra.*) As a result, the jury could have accepted the prosecution's account of the incident as a reasonable explanation and therefore found appellant guilty and the kidnaping special circumstance to be true, even without being convinced that the prosecution had met its burden of establishing guilt beyond a reasonable doubt.

Moreover, the focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by suggesting that appellant was required to present, at the very least, a "reasonable" defense to the prosecution case. Of course, "[t]he accused has *no* burden of *proof* or *persuasion*, even as to his defenses." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-1215, italics original, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684, and superceded on another ground in *In re Steele* (2004) 32 Cal.4th 682; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt based on a standard that is less than constitutionally required.

B. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.2, 2.22, 2.27, and 2.51)

The trial court gave five other standard instructions – specifically, CALJIC Nos. 1.00, 2.21.2, 2.22, 2.27, and 2.51 – that magnified the harm arising from the erroneous circumstantial evidence instructions and individually and collectively diluted the constitutionally mandated reasonable doubt standard. (12 CT 3426-3427, 16 RT 2696-2698 [CALJIC No. 1.00 (Respective Duties of Judge and Jury)]; 12 CT 3442, 16 RT 2705 [CALJIC No. 2.21.2 (Witness Willfully False)]; 12 CT 3443, 16 RT 3115 [CALJIC No. 2.22 (Weighing Conflicting Testimony]; 12 CT 3446, 16 RT 2706 [CALJIC No. 2.27 (1991 rev.) (Sufficiency of Testimony of One Witness)]; 12 CT 3447-3448, 16 RT 2706-2707 [CALJIC No. 2.50 (1994 rev.) (Evidence of Other Crimes)]; 12 CT 3451, 16 RT 2708 [CALJIC No. 2.51 (Motive)].) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

Several of the instructions violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether he was guilty or not guilty beyond a reasonable doubt. CALJIC No. 1.00 told the jury that it must not be influenced by pity for or prejudice against the defendant. The instruction also stated that the fact he has been arrested, charged and brought to trial

does not constitute evidence of guilt, and that "you must not infer or assume from any or all of [these circumstances] that he is more likely to be guilty than innocent." (12 CT 3427; 16 RT 2697.) CALJIC No. 2.01, discussed previously in subsection A of this argument, also referred to the jury's choice between "guilt" and "innocence." (12 CT 3432; 16 RT 2701.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (12 CT 3451; 16 RT 2708.) These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant guilty if they believed the evidence did not establish that he was "innocent."[90]

Further, CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced

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[90] As one court has stated:

> We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, original italics.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

by the prosecutor. It also allowed the jury to rely on inferences of motive, from evidence not substantial enough to establish motive beyond a reasonable doubt, as supporting guilt. In this case, the evidence which the prosecution argued was indicative of motive (i.e., evidence regarding appellant's incestuous conduct, his comment that he had never married for fear he would molest his own children, his rental of adult videotapes, and possession of adult magazines) was not only insubstantial, but unduly inflammatory. (See Argument III, *supra*.)

As used in this case, CALJIC No. 2.51 deprived appellant of his federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement of reliability in a capital trial by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama, supra,* 447 U.S. at pp. 637-638 [reliability concerns extend to guilt phase].)

Similarly, CALJIC No. 2.21.2 also lessened the prosecution's burden of proof. That instruction authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony," unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (12 CT 3442, italics added; 16 RT 2705.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a mere "probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is

"somewhat suspect"].)[91] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.) It is reasonably likely that this erroneous instruction contributed to the jury's verdicts, especially given the questionable credibility of prosecution witness Mychael Jackson, and the inconsistencies in the testimony of prosecution witnesses Mary Lazaro and Mary Alliene Smith.

Furthermore, CALJIC No. 2.22 provided as follows:

> You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses. The final test is not in the relative number of witnesses, but in the convincing force of the evidence.

(12 CT 3443; 16 RT 2705.) This instruction specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, is more credible or more convincing than the other. In so

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[91] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was instructed on the general governing principle of reasonable doubt.

doing, the instruction replaced the constitutionally mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2 discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Finally, CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (12 CT 3446; 16 RT 2706), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he cannot be required to establish or prove any "fact." Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no

reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt. The instructions challenged here violated the constitutional rights set forth in Section A of this argument.

C. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Cleveland* (2004) 32 Cal.4th 704, 750-751 [addressing CALJIC Nos 2.22 and 2.51]; *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions, including CALJIC Nos. 2.01 and 8.83.1]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.27, among other instructions)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions, including CALJIC No. 2.01].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. This analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions (see *People v. Jennings*, *supra*, 53 Cal.3d at p. 386) is not what the instructions say. The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the beyond-a-reasonable-doubt standard of proof on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra,* 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is *specific* and the supposedly curative instruction is *general*. [Citation.]" (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, italics original.)

Furthermore, nothing in the challenged instructions, as given in this case, explicitly informed the jury that those instructions were qualified by

the reasonable doubt instruction.[92] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard seven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson* (1992) 3 Cal.4th 926, 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

D. Reversal Is Required

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se.

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[92] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was held not to cure the harm created by the impermissible mandatory presumption (*id.* at p. 504).

(*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.)

Here, that showing cannot be made. The prosecution's case was not strong. The only witness to place appellant with Maria was Mychael Jackson, who was convicted of worker's compensation fraud while appellant's case was pending, and who was a liar according to several witnesses who knew him well. The remainder of the prosecution evidence was essentially comprised of weak circumstantial evidence, some of it exceedingly inflammatory. Given such a state of the evidence, instructions on circumstantial evidence, and how the jury was to consider it, were crucial to the jury's evaluation of the prosecution evidence. Similarly, the jury's strict adherence to the reasonable doubt standard of proof was crucial. That these instructions distorted the jury's consideration and use of circumstantial evidence, and diluted the reasonable doubt requirement, bring the reliability of jury's findings into substantial question.

The dilution of the reasonable doubt requirement by the guilt phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.) Accordingly, the guilt verdicts, special circumstance finding, and death judgment must be reversed.

VIII

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[FILED UNDER SEAL]

IX

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

Throughout the death-qualification portion of the jury voir dire process, the trial court repeatedly departed from the language of Penal Code section 190.3, factor (k), in defining mitigating circumstances, thereby providing jurors with prejudicially misleading definitions of the term. Moreover, in an apparent attempt to clarify the concept of mitigating evidence, the trial court gave examples of mitigation that were so extreme that they undercut, even nullified, the effect of the mitigating evidence offered on appellant's behalf. Therefore, the trial court's instructions violated appellant's constitutional rights to due process, a fair trial and a reliable penalty determination. (U.S. Const., Amends. VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15, 16, 17.)

A. Factual Background

In several instances, the trial court told the jury venire that mitigating circumstances are things about the crime or the defendant which, although not excuses for the crime, make the defendant's commission of the crime more understandable or less culpable. (3 RT 203; 4 RT 506-507; 7 RT 855; 9 RT 1186, 1309-1310.) At other points, the trial court stated that mitigating circumstances: are "things" which "could *reasonably* cause a juror to take into consideration and be a factor in" deciding that the penalty should be life imprisonment without parole rather than death (3 RT 354, italics added); "can be things about the defendant which might have some logical or *reasonable* bearing on what you would determine the proper punishment to be" (4 RT 635, italics added); and "might be things that

might cause a *reasonable* person to believe that the crime is somehow less morally offensive than it otherwise might have been" (7 RT 996-997, italics added).

However, the trial court also gave panel after panel variations on the following purported examples of mitigation: (1) evidence that, 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) evidence that a 22-year-old female defendant had committed an heroic act or "lived an almost heroic life," grown up in an horribly abusive home, or had raised her five siblings on her own; and (3) evidence that a 33-year-old defendant suffered from mental retardation and could barely understand what was happening around him or his legal and moral duties. (3 RT 354-355; 4 RT 506-508, 634-636; 7 RT 854-857, 996-999; 9 RT 1185-1189, 1309-1312, 1418-1424.)[93] All but one of the seated jurors heard these examples: Juror #1 (3 RT 178, 414); Juror #2 (7 RT 841, 894); Juror #3 (4 RT 487, 540); Juror #5 (4 RT 487, 603); Juror #6 (3 RT 178, 392); Juror #7 (7 RT 841, 887); Juror #8 (7 RT 841, 878); Juror #9 (9 RT 1293-1294, 1364); Juror #10 (9 RT 1292, 1324); Juror #11 (7 RT 841, 882); and Juror # 12 (3 RT 178, 356).

As explained below, these instructions were erroneous and prejudicial.[94]

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[93] Appellant's trial pre-dated *Atkins v. Virginia* (2002) 536 U.S. 304, in which the United States Supreme Court held that executions of mentally retarded criminals were "cruel and unusual punishments" prohibited by the Eighth Amendment.

[94] Appellant's failure to object to the trial court's instructions in this regard does not waive the issue, because a trial court has a sua sponte duty to give correct instructions regarding the principles of law essential to the

B. The Trial Court's Instructions Regarding The Definition of Mitigation Were Erroneous

As this Court has noted, "a sentencing jury may 'not be precluded from considering as a mitigating factor, *any aspect of a defendant's character* or record and any of the circumstances of the offense *that the defendant proffers as a basis for a sentence less than death.*'" (*People v. Easley* (1983) 34 Cal.3d 858, 877-878; see also § 190.3, subd. (k); CALJIC No. 8.88 (1989 Rev.) (13 CT 3643-3644).) In *Tennard v. Dretke* (2004) 542 U.S. 274, the United States Supreme Court noted that "'[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" (*Id.* at p. 284, quoting *McKoy v. North Carolina* (1990) 494 U.S. 433, 440-441.) Moreover, a fundamental principle in capital cases is that the Eighth Amendment requirement of reliability in the penalty determination necessitates that the jury consider and give effect to all mitigating circumstances surrounding the individual accused. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 4-8; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.)

A review of the record in this case, however, demonstrates that the trial court's instructions on mitigating evidence were prejudicially misleading because they set forth an unconstitutionally high standard in

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determination of the case, that is, those "closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531; see also Argument IV, fn. 70, hereby incorporated by reference as if fully set forth herein.)

defining "mitigation."[95] Moreover, "there is a reasonable likelihood that the jury [] applied the challenged instruction[s] in a way that prevent[ed] the consideration of constitutionally relevant evidence." (*Boyde v. California* (1990) 494 U.S. 370, 380.)

As noted above, the trial court advised the jury venire in several instances that mitigating circumstances are "things" about the crime or the defendant which, although not excuses for the crime, make the defendant's commission of the crime more understandable or less culpable. (3 RT 203; 4 RT 506-507; 7 RT 855; 9 RT 1186, 1309-1310.) These definitions were essentially consistent with the language of section 190.3, factor (k). Moreover, to the extent the trial court suggested that mitigation "'is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value'" (*Tennard v. Dretke*, *supra*, 542 U.S. at p. 284), its explanation of relevant mitigation was accurate. Had the trial court stopped there, arguably its extemporaneous remarks would not have constituted any error.[96] (See *People v. Dunkle*, *supra*, 36 Cal.4th at pp. 925-926; *People v. Edwards* (1991) 54 Cal.3d 787, 840 [trial court's instruction defining aggravation as "bad evidence" and mitigation as "good evidence" was incomplete but not inaccurate, and therefore not erroneous].)

However, the trial court went on to repeatedly depart from the

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[95] Erroneous instruction during voir dire is deemed instructional error. (See, e.g., *People v. Dunkle* (2005) 36 Cal.4th 861, 929; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172.)

[96] In Argument XII, however, appellant challenges the constitutionality of CALJIC No. 8.88, which was also given in this case.

language of section 190.3, factor (k), and effectively preclude the jury from considering the mitigating evidence presented by appellant. Specifically, the trial court's examples of mitigating circumstances operated impermissibly to "set the bar" too high. Each of the court's examples involved an extreme circumstance: a man who had lived a love-filled, productive and crime-free life into his 70's; a young woman who had performed an heroic act or "lived an almost heroic life," or had grown up in a horribly abusive home; and, a middle-aged man so severely mentally retarded that he can barely understand what is happening around him. (3 RT 354-355; 4 RT 506-508, 634-636; 7 RT 854-857, 996-999; 9 RT 1185-1189, 1309-1312; 10 RT 1418-1424.) Although the trial court acknowledged that its examples were extreme or somewhat extreme (3 RT 355; 4 RT 508, 636; 7 RT 857, 999; 9 RT 1189, 1312), it made no effort to more accurately define mitigation.

The trial court further misled the jury regarding the nature of mitigation when it said that mitigating circumstances "can be things . . . which might have some logical or reasonable bearing on what you would determine the proper punishment to be." (4 RT 635.) This definition however, is true of both mitigating *and* aggravating evidence. It is reasonably likely that this instruction confused the jurors, and prevented them from reliably and properly evaluating appellant's mitigating evidence presented at appellant's penalty phase. (See *Brown v. Sanders* (2006) 126 S.Ct. 884, 891 [due process requires that a defendant's death sentence be set aside if an eligibility factor permits the jury to draw an adverse inference from conduct which should militate in favor of a lesser penalty]; *Zant v. Stephens* (1983) 462 U.S. 862, 885 [federal due process prohibits a state from treating as aggravation evidence which is truly mitigating]; *People v.*

Davenport (1986) 41 Cal.3d 247, 289.) For instance, the jury may have interpreted this instruction as meaning that evidence offered in mitigation could be considered as aggravation, i.e., supported a judgment that the "proper punishment" was death.

Appellant had a right to a jury that was properly instructed as to the meaning of the term "mitigating circumstances." Without a proper definition, the jury in appellant's case could only have applied the inaccurate definitions given during jury selection. Thus, the jury could not have correctly determined the appropriate penalty because their weighing of the aggravating and mitigating factors was substantially distorted.

In appellant's case, the mitigation presented included evidence of financial hardships endured by his family (25 RT 3136-3139, 3142), the positive role that appellant played within his family (25 RT 3140-3142, 3144-3150), and the fact that his family members continued to care for him (25 RT 3146-3153). All of this evidence qualified as mitigation under section 190.3. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604). However, if the jurors applied the trial court's definition of mitigation, none of appellant's penalty phase evidence was given mitigating effect. Because each of the hypothetical defendants presented in the trial court's examples was so extreme, it is reasonably likely that the jury believed that they could not consider evidence presented by appellant as mitigating unless it was similarly dramatic. In other words, it is reasonably likely that the jury believed that the trial court's examples defined "reasonableness" within the meaning of *Tennard v. Dretke*, *supra*, 542 U.S. at p. 284, and *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 440-441. (See *Coleman v. Calderon* (9th Cir. 2000) 210 F.3d 1047, 1051.) The prosecutors' closing arguments exacerbated the impact of the misleading instructions by referring

dismissively to the testimony of appellant's mother (25 RT 3197-3198), and by arguing that there was nothing "stellar" about him (25 RT 3214). (See *Coleman v. Calderon*, *supra*, 210 F.3d at p. 1051.)

Under these circumstances, there is a reasonable likelihood that the trial court's definition seriously misled the jurors as to what constituted mitigating evidence, and effectively precluded them from giving effect to the evidence presented by appellant in his penalty trial. Of course, it must be presumed that the jury followed the trial court's instructions. (*People v. Hardy* (1992) 2 Cal.4th 86, 208.) Because these instructions were given so early in the trial proceedings, they are likely to have colored the jurors' perceptions of both appellant and the nature of mitigating evidence throughout the entire trial.

This error was not cured by any other instructions given by the trial court. CALJIC No. 8.88 informed the jury that "[a] mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (13 CT 3643.) However, it is reasonably likely that the jury still believed, based on the trial court's earlier comments, that any such "fact, condition or event" had to be as extreme as the trial court's examples even to be considered.

Consequently, the trial court's instructions, which were repeated throughout voir dire, violated appellant's constitutional rights to due process, a fair trial, and a reliable penalty determination, as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their state constitutional analogues.

As a result of the ambiguous jury instructions, it is likely that the jury discounted or rejected the mitigating evidence presented by appellant. If the jury had had a proper understanding of mitigating evidence, it is likely that it would have sentenced appellant to life imprisonment without parole, not death, especially given that the aggravating evidence in this case was not overwhelming, Other than the circumstances of the crime, the only aggravation was the testimony of Maria's mother. (25 RT 3129-3141.)

Under federal standards, reversal of the death judgment is required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Under state law, reversal of the penalty verdict is required if a "reasonable *possibility*" exists that the jury would have returned a life sentence absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 447, italics added). Reversal is required in this case under either of those standards.

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

The California death penalty statute and the instructions given in this case assign no burden of proof with regard to the jury's choice between the sentences of life without possibility of parole and death.[97] They delineate no burden of proof with respect to either the preliminary findings that a jury must make before it may impose a death sentence or the ultimate sentencing decision. And neither the statute nor the instructions require jury unanimity as to the existence of aggravating factors. As shown below, these critical omissions in the California capital sentencing scheme run afoul of the Fifth, Sixth, Eighth, and Fourteenth Amendments.[98]

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[97] Appellant did not waive the claims included in this argument by failing to raise them at trial. This Court has repeatedly held that a constitutional challenge to a statute can be raised for the first time on appeal. (*People v. Hines* (1997) 15 Cal.4th 997, 1061; *People v. Vera* (1997) 15 Cal.4th 269, 276; *People v. Valladoli* (1996) 13 Cal.4th 590, 606.) Moreover, as noted in Argument IV, footnote 70, hereby incorporated by reference as if fully set forth herein, instructional errors are reviewable even without objection if they affect a defendant's substantial rights.

[98] Appellant is aware that this Court has recently declared that "routine" or "generic" arguments will be deemed "fairly presented even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*People v. Schmeck* (2005) 37 Cal.4th 240, 304.) However, because appellant does not know whether the federal courts will likewise deem such claims "fairly presented," the "generic" claims in this brief may be more expansive than those contemplated by this Court.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty, As Required By The Sixth Amendment

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, reversed on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[99]

Here, the jury was specifically instructed that no burden of proof was required in determining penalty. The jury was told that the "[y]ou are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances." (25 RT 3228-3229; 13 CT 3644.)

The failure to assign a burden of proof renders the California death

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[99] There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of unadjudicated violent criminal activity (§ 190.3, subd. (b)) must be proved beyond a reasonable doubt. Appellant discusses the defects in section 190.3, subdivision (b), below.

penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774.) This Court's reasoning, however, has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona*, (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing

between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Id.* at p. 476.) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 490.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*.

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[100] The Court

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[100] Justice Scalia distinctively distilled the holding: "[A]ll facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia

observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

In *Blakely*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 299.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington*, *supra*, 542 U.S. at pp. 303-304, italics original.)

Twenty-seven states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the

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J.).)

prosecution,[101] and two additional states have related provisions.[102] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding

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[101] See Ala. Code § 13A-5-45(e) (West 2005); Ariz. Rev. Stat. Ann. § 13-703(B) (West 2005); *State v. Ring* (Ariz. 2003) 65 P.3d 915, 924, 926; Ark. Code Ann. § 5-4-603(a)(1) (West 2005); Colo. Rev. Stat. Ann. § 18-1.3-1201(1)(d) (West 2005); Del. Code Ann. tit. 11, § 4209(d)(1) (West 2005); Ga. Code Ann. § 17-10-30(c) (West 2005); Idaho Code § 19-2515(3)(b) (West 2005); 720 Il. Comp. Stat. Ann. §§ 5/9-1(f), (g) (West 2005); Ind. Code Ann. § 35-50-2-9(a) (West 2005); Ky. Rev. Stat. Ann. § 532.025(3) (West 2005); La. Stat. Ann. – Code Crim. Proc., Art. 905.3 (West 2005); Md. Code, Crim. Law § 2-303(g)(1) (West 2005); Miss. Code Ann. § 99-19-103 (West 2005); *State v. Stewart* (Neb. 1977) 250 N.W.2d 849, 863, overruled on another ground in *State v. Palmer* (1986) 399 N.W.2d 706; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888, overruled on another ground in *State v. Reeves* (1990) 453 N.W.2d 359; Nev. Rev. Stat. Ann. § 175.554(4) (West 2005); N.J.S.A. 2C:11-3c(2)(a) (West 2005); N.M. Stat. Ann. § 31-20A-3 (West 2005); Ohio Rev. Code §§ 2929.04(A) (West 2006); Okla. Stat. Ann. tit. 21, § 701.11 (West 2005); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (West 2005); S.C. Code Ann. §§ 16-3-20(A), (C) (West 2005); S.D. Codified Laws Ann. § 23A-27A-5 (West 2005); Tenn. Code Ann. § 39-13-204(f)(1) (West 2005); Tex. Crim. Proc. Code Ann. § 37.071(2)(c) (West 2005); Utah Code Ann. 1953 § 76-3-207(5)(b) (West 2005); Va. Code Ann. § 19.2-264.4(C) (West 2005); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(i) (West 2005).

[102] Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 2006).) Connecticut requires that the prosecution prove the existence of penalty phase aggravating factors, but specifies no burden. (Conn. Gen. Stat. Ann. §§ 53a-46a(c) (West 2006).)

need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and ... not factual," and therefore "not susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, do require factfinding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[103] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 192), which was read to appellant's jury, "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (25 RT 3228, 13 CT 3642 [CALJIC No. 8.88 (1989 rev.)].)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors

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[103] This Court has acknowledged that factfinding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, *normative* determination about the penalty appropriate for the particular defendant . . . ." (*People v. Brown* (1988) 46 Cal.3d 432, 448, italics original.)

substantially outweigh mitigating factors.[104] These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[105]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2, subd. (a)), *Apprendi* does not apply. After *Ring*, this Court repeated the same analysis. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase [] the penalty for a crime beyond the prescribed statutory maximum' [citation], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43, 126.)

In the face of the United States Supreme Court's recent decisions,

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[104] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'[fn. omitted] we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

[105] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra*, 40 Cal.3d at 541.)

this holding is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494, fn. 19.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) As Justice Breyer points out in explaining the holding in *Blakely*, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.), italics original.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that: (1) aggravation exists; (2) aggravation outweighs mitigation; and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "'authorizes a

maximum penalty of death only in a formal sense.'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.)). They thus trigger *Blakely-Ring-Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that factfinding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. This Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14.) The Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' [*Tuilaepa v. California* (1994) 512 U.S. 967, 972.] No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, italics added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase

instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Ariz. 2003) 65 P.3d 915, 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 258-262; *Woldt v. People* (Colo. 2003) 64 P.3d 256, 263; *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460-461.)[106]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself, the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were only illustrative and not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must

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[106] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 [noting that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency, since both findings are essential predicates for a sentence of death].

inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely v. Washington*, *supra*, 542 U.S. at p. 305.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[107]

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[107] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of . . . moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.)

In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman*, *supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is very like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain error

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring,* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal. 4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding of aggravating circumstances beyond a reasonable doubt by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily

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standard, or whether such awards could be reviewed de novo. Although the Court found that the ultimate amount was a moral decision that should be reviewed de novo, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the United States Constitution.

> apparent." [citation]. The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey*, *supra*, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is 'unique in both its severity and its finality'"].) As the high court stated in *Ring*, "Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.) Moreover, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Id.* at p. 609.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Fifth, Sixth, Eighth, and

Fourteenth Amendments to the United States Constitution.

B. The Statute and Instructions Fail To Require That The Jury Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty, Violating Appellant's Rights Under Due Process And The Eighth Amendment

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases, the burden is rooted in the due process clause of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases, "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14, 16.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment as well as the Eighth

Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors,: i.e., the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. (*Santosky v. Kramer* (1982) 455 U.S. 745, 754-755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding" (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 754), it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself. Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship*, *supra*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 345 [commitment as mentally disordered sex

offender]; *People v. Thomas* (1977) 19 Cal.3d 630, 637 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 231 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 754), the Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [Citation.] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the

subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 762.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond a reasonable doubt burden of proof requirement to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, italics added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the

appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed *factual* issues" (*People v. Superior Court* (*Mitchell*) (1993) 5 Cal.4th 1229, 1236, italics original), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood

that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher standard and found in favor of the defendant. (See *Proffitt v. Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if

the mitigating factors outweigh the aggravating circumstances (see § 190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e), requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[108]

A fact could not be established – i.e., a factfinder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the State of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420, subd. (b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for

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[108] As discussed below, the United States Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments. In addition, providing greater protection to noncapital than to capital defendants violates the Fourteenth Amendment rights to due process and equal protection, and the Eighth Amendment right to be free from cruel and unusual punishment. (See, e.g., *Mills v. Maryland*, *supra,* 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking a defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 260), and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the very same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to

the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279-280.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation at the penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 279-280.)

D. The Instructions Violated The Sixth, Eighth, And Fourteenth Amendments By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not

required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633.)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious, and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)[109]

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[109] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Hildwin v. Florida*, *supra*, 490 U.S. at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[110]

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (dis. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for

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(See, e.g., *Den. ex dem. Murray v. Hoboken Land & Imp. Co.* (1855) 59 U.S. (18 How.) 272, 276-277; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[110] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 265.) Appellant raises this issue to preserve his rights to further review.

reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.[111]

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16, of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases. For example, in cases where a criminal defendant has

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[111] The federal death penalty statute provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (West 2005); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2005); Del. Code Ann., tit. 11, § 4209(c)(3)(b.1) (West 2005); Idaho Code, § 19-2515(3)(b) (West 2005); 720 Il. Comp. Stat. Ann. § 5/9-1(g) (West 2005); La. Code Crim. Proc. Ann. art. 905.6 (West 2005): MD Code, Criminal Law, § 2-303(i)(3) (West 2005); Miss. Code Ann. § 99-19-103 (West 2005); Neb. Rev. Stat., § 29-2520(4)(f) (West 2005); N.H. Rev. Stat. Ann. § 630:5(IV) (West 2005); N.M. Stat. Ann. § 31-20A-3 (West 2005); Okla. Stat. Ann. tit. 21, § 701.11 (West 2005); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (West 2005); S.C. Code Ann. § 16-3-20(C) (West 2005); Tenn. Code Ann. § 39-13-204(g) (West 2005); Tex. Crim. Proc. Code Ann. § 37.071(d) (West 2005); Utah Code Ann. 1953 § 76-3-207(5)(a) (West 2005).)

been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., §§ 1158, 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994) – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the Supreme Court interpreted 21 U.S.C. § 848, subdivision (a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been

> involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, or did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did not do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79; *People v. Hayes*, *supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the findings of one or more aggravating circumstances and that the aggravating circumstances outweigh mitigating

circumstances are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. The Instructions Violated The Sixth, Eighth, And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The trial court failed to instruct the jury on the standard of proof regarding mitigating circumstances (that is, that the defendant bears no particular burden to prove mitigating factors and that the jury was not required unanimously to agree on the existence of mitigation). This failure impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case. . . ." (*Boyde v. California* (1990) 494 U.S. 370, 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

As the Eighth Circuit has recognized, "*Lockett* makes it clear that the defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer is

permitted to consider it." (*Lashley v. Armontrout* (8th Cir. 1992) 957 F.2d 1495, 1501, rev'd on other grounds in *Delo v. Lashley* (1993) 507 U.S. 272.) However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.) The likelihood that the jury employed the reasonable doubt standard was heightened here because they were given an instruction specifying which of the guilt phase jury instructions they were *not* to consider in their penalty deliberations, and CALJIC 2.90 was not among them (26 RT 3225; 13 CT 3648). (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) ["Although the average layperson may not be familiar with the Latin phrase *inclusio unius est exclusio alterius*, the deductive concept is commonly understood."]; *Keams v. Tempe Technical Institute, Inc.* (9th Cir. 1994) 39 F.3d 222, 225 [The maxim *expressio unius est exclusio alteris* is a rule "of interpretation, based on how language is ordinarily used."].)

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina*, *supra*, 494 U.S. at pp. 442-443.) Thus, had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be warranted. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at pp. 374-375.) Because there is a reasonable likelihood that the jury erroneously did believe that unanimity was required, reversal is also required here.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the equal protection and due process clauses of the Fourteenth Amendment.

In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection, and a reliable capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments as well as his corresponding rights under article I, sections 7, 17, and 24, of the California Constitution.

F. The Penalty Jury Should Have Been Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence.

Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley*, *supra*, 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7, 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. VIII, XIV; Cal. Const., art. I, § 17), and his right to the equal protection of the laws (U.S. Const., Amend. XIV; Cal. Const., art. I, § 7).

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, reasoning that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at 190.) However, as the other subsections of this argument, as well as Arguments XI through XIV, demonstrate, this state's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the

penalty phase. Therefore, his death sentence must be reversed.

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XI

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

The jury was instructed on Penal Code section 190.3 pursuant to CALJIC No. 8.85 (13 CT 3640-3642; 25 RT 3226-3227), the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole, and CALJIC No. 8.88 (13 CT 3643-3645; 25 RT 3228-3229), the standard instruction regarding the weighing of aggravating and mitigating factors.[112] For the reasons discussed below, these instructions, together with the application of the statutory sentencing factors, render appellant's death sentence unconstitutional.[113]

A. The Instruction Regarding Factor (a) And Its Application Violated Appellant's Constitutional Rights

Penal Code section 190.3, subdivision (a), violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all

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[112] Because CALJIC No. 8.85, as given in this case, did not include factor (b) of section 190.3, factors (c) through (k) were listed as (b) through (j). (13 CT 3640-3642; 25 RT 3226-3227.)

[113] Although appellant did not object to the instructional errors discussed in this argument, the argument is cognizable on appeal. Instructional errors are reviewable even without objection if they affect a defendant's substantial rights (§§ 1259, 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312). (See Argument IV, fn. 70, incorporated by reference as if fully set forth herein.)

features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

The purpose of section 190.3, according to its language and according to interpretations by both this Court and the United States Supreme Court, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Subdivision (a) of section 190.3 permits a jury deciding whether a defendant will live or die to consider the "circumstances of the crime." Accordingly, the jury in this case was instructed to consider and take into account as factor (a), "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (13 CT 3640; 25 RT 3226.)

In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this factor, concluding that – at least in the abstract – it had a "common-sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

An analysis of how prosecutors actually use section 190.3, subdivision (a), shows that they have subverted the essence of the Supreme Court's judgment. In fact, the extraordinarily disparate use of the circumstances of the crime factor shows beyond question that whatever "common-sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision-making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural

safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state's capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. Factor (a) has been used in ways so arbitrary and contradictory as to violate both due process of law and the guarantee of fair and reliable sentencing.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a), other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of religion" (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582), sought to conceal evidence several weeks after the crime (*People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10), threatened witnesses after his arrest (*People v. Hardy* (1992) 2 Cal.4th 86, 204), or disposed of the victim's body in a manner precluding its recovery (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35).

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even

circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances to be aggravating under that factor.

Furthermore, these examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide (e.g., age of the victim, method of killing, motive, time of the killing, location of the killing) – into aggravating factors that they argue to the jury as factors weighing on death's side of the scale.[114]

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, however shocking they may be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363

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[114] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See Argument X, *supra*.)

[discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].)

That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

B. The Failure To Delete Inapplicable Sentencing Factors Violated Appellant's Constitutional Rights

A number of the factors listed in CALJIC No. 8.85 were inapplicable to the facts of this case. (See § 190.3, subds. (e), (f), (g), and (j).) Yet, the trial court did not delete those inapplicable factors from the instruction. (13 CT 3640-3641; 25 RT 3226-3227.)[115] Including these irrelevant factors in the statutory list introduced confusion, capriciousness and unreliability into the capital decision-making process, in violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Appellant recognizes that this Court has rejected similar contentions previously (see, e.g., *People v. Carpenter* (1999) 21 Cal.4th 1016, 1064), but he requests reconsideration for the reasons given below. In addition, appellant raises the issue to preserve it for federal review.

Including inapplicable statutory sentencing factors was harmful in a number of ways. First, only factors (a), (b), and (c) may lawfully be considered in aggravation. (See *People v. Gurule* (2002) 28 Cal.4th 557, 660; *People v. Montiel* (1993) 5 Cal.4th 877, 944-945.) However, the "whether or not" formulation used in CALJIC No. 8.85 given in this case

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[115]As appellant notes in footnote 112, *supra*, the trial court deleted reference to factor (b) from the instruction. (13 CT 3640-3642; T 3226-3227.)

suggested that the jury could consider the inapplicable factors for or against appellant. Moreover, instructing the jury on irrelevant matters dilutes the jury's focus, distracts its attention from the task at hand and introduces confusion into the process. Such irrelevant instructions also create a grave risk that the death penalty will be imposed on the basis of inapplicable factors. Finally, failing to delete factors for which there was no evidence at all inevitably denigrated the mitigation evidence which was presented. The jury was effectively invited to sentence appellant to death because there was evidence in mitigation for "only" two or three factors, whereas there was either evidence in aggravation or no evidence at all with respect to all the rest.

In no other area of criminal law is the jury instructed on matters unsupported by the evidence. Indeed, this Court has said that trial courts have a "duty to screen out factually invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1131.) The failure to screen out inapplicable factors here required the jurors to make an ad hoc determination on the legal question of relevancy and undermined the reliability of the sentencing process. (Cf. *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331-1332.)

The inclusion of inapplicable factors also deprived appellant of his right to an individualized sentencing determination based on permissible factors relating to him and to the crime, artificially inflated the weight of the aggravating factors and undermined the right to heightened reliability in the penalty determination, all in violation of the Sixth, Eighth, and Fourteenth Amendments. (See *Ford v. Wainwright* (1986) 477 U.S. 399, 411, 414; *Beck v. Alabama* (1980) 447 U.S. 625, 637.) Reversal of appellant's death

judgment is required.

C. The Trial Court's Failure To Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded The Fair, Reliable, And Evenhanded Application Of The Death Penalty

In accordance with customary state court practice, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the evidence. Yet, as a matter of state law, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h) and (j) – was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance as to which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to any of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of nonexistent and/or irrational aggravating factors, which precluded the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.)

It is likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely

that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

The impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer, and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance, which is prohibited under *People v. Davenport* (1985) 41 Cal.3d 247, 289-290.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants appearing before different juries will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action,'" (*Tuilaepa v. California*, *supra*, 512 U.S. at p. 973, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189) and help ensure that the death penalty is evenhandedly applied (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112).

D. Restrictive Adjectives Used In The List Of Potential Mitigating Factors Impermissibly Impeded the Jurors' Consideration Of Mitigation

The inclusion in the list of potential mitigating factors read to appellant's jury of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), and tying such factors to commission of the crime improperly created a qualitative threshold as well as an inappropriate nexus requirement for the consideration of mitigation, which acted as a barrier to its consideration, in violation of the Sixth, Eighth, and Fourteenth Amendments. (*Tennard v. Dretke* (2004) 542 U.S. 274, 287-289; *Mills v. Maryland* (1988) 486 U.S. 367, 374-375; *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606.)

E. The Failure To Require The Jury To Make Written Findings Regarding The Aggravating Factors Violated Appellant's Constitutional Rights

The instructions given in this case did not require the jury to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.)

California juries have total, unrestricted discretion on how to weigh aggravating and mitigating circumstances. (*Tuilaepa v. California*, *supra*, 512 U.S. at pp. 979-980.) There can be, therefore, no meaningful appellate review unless they make written findings regarding those factors, because otherwise it is impossible to "reconstruct the findings of the state trier of

fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316, overruled on another ground in *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1, 5.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the State's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258, 269.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Ibid.*) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to noncapital than to capital

defendants violates the equal protection clause of the Fourteenth Amendment (see *Ring v. Arizona* (2002) 536 U.S. 584, 589; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland*, *supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly implemented state procedure. (*Id.* at p. 383, fn. 15.) The mere fact that a capital sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79) does not mean its basis cannot be articulated in written findings.

The importance of written findings is recognized throughout this country. Of the 38 post-*Furman* state capital sentencing systems, 26 require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. 20 of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[116]

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[116] See Ala. Code §§ 13A-5-46(f), -47(d) (West 2005); A.R.S. § 13-703.01(E) (West 2006); Ark. Code Ann. § 5-4-603(a) (West 2005); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 2006); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3)(a) (West 2005); Ga. Code Ann. § 17-10-30(c) (West 2005); Idaho Code § 19-2515(8) (West 2005); Ky. Rev. Stat. Ann. § 532.025(3) (West 2005); L.S.A.-C.Cr.P., Art. 905.7 (West 2005); MD Code, Criminal Law, § 2-303(i) (West 2005); Miss. Code Ann. § 99-19-103 (West 2005); Mont. Code Ann. § 46-18-306 (West 2005);

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under *Ring* and provides no instruction or other mechanism to even encourage the jury to engage in such a collective factfinding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

Neb. Rev. Stat. § 29-2522 (West 2004); Nev. Rev. Stat. Ann. § 175.554(4) (West 2004); N.H. Rev. Stat. Ann. § 630:5(IV) (West 2005); N.J.S.A. 2C:11-3(c)(2)(f)(3) (West 2005); N.M. Stat. Ann. § 31-20A-3 (West 2005); Okla. Stat. Ann. tit. 21, § 701.11 (West 2005); 42 Pa. Cons. Stat. Ann. § 9711(f) (West 2005); S.C. Code Ann. § 16-3-20(C) (West 2005); S.D. Codified Laws Ann. § 23A-27A-5 (West 2005); Tenn. Code Ann. § 39-13-204(g)(2) (West 2005); Texas C.C.P. Art. 37.071(c) (West 2004); Va. Code Ann. § 19.2-264.4(D) (West 2005); Wyo. Stat. § 6-2-102(e)(i) (West 2005).

F. Even If The Absence Of Procedural Safeguards Does Not Render California's Death Penalty Scheme Inadequate To Ensure Reliable Capital Sentencing, Denying Capital Defendants The Review Afforded to Defendants In Other Jurisdictions Violates Equal Protection

The United States Supreme Court repeatedly has asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in factfinding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732.) Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the due process clause itself, the right to life is the basis of all other rights . . . . It encompasses, in a sense, 'the right to have rights'. . . . " (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 102.)

A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*Skinner v. Oklahoma* (1942) 316 U.S. 535, 541; *People v. Olivas*, *supra*, 17 Cal.3d at pp. 243-244.) The State cannot meet that burden here.

This Court has said that the fact that a death sentence reflects community standards justifies denying capital defendants the "disparate sentence" review provided all other convicted felons. But that fact cannot justify depriving capital defendants of this procedural right because that type of review is routinely provided in virtually every state that applies the

death penalty, as well as by the federal courts, in considering whether evolving community standards no longer permit the imposition of the death penalty in a particular case. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304, 311-312.)

Nor can the fact that a death sentence reflects community standards justify refusing to require written jury findings, or accepting a verdict that may not be based on a unanimous agreement that particular aggravating factors are true. (*Blakely v. Washington* (2004) 542 U.S. 296, 301-302; *Ring v. Arizona, supra*, 536 U.S. at p. 589.)[117] These procedural protections are especially important in meeting the acute need for reliability and accurate factfinding in death sentencing proceedings; withholding them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented, and cannot withstand the close scrutiny that should apply when a fundamental interest is affected.

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[117] Although *Ring* hinged on the Court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 588.) Moreover, "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Id.* at p. 609.)

XII

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

The trial court's concluding instruction in this case, CALJIC No. 8.88 (1989 rev.), provided as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on [the] defendant.
>
> After having heard all of the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of any weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by

considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.

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.

You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree.

Any verdict that you reach must be dated and signed by the foreperson on a form that will be provided and then you shall return with it to this courtroom.

(13 CT 3643-3645; 25 RT 3228-3229.)

This instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., Amend. XIV), to a fair trial by jury (U.S. Const., Amends. VI, XIV), and to a reliable penalty determination (U.S. Const., Amends. VI, VIII, XIV), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

A. The Instruction Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (13 CT 3644; 25 RT 3229.) "So substantial," however, is an impermissibly vague phrase which bestowed intolerably broad discretion on the sentencing jury.

To pass constitutional muster, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death penalty sentencing scheme must adequately inform the jurors of "what they must find to impose the death penalty . . . ." (*Id.* at pp. 361-362.) A death penalty scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth and Fourteenth Amendments. (*Ibid.*)

The phrase "so substantial" violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* [(1972) 408 U.S. 238]." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes

vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. (*Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391-392.) In *Arnold*, the Court held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations]." (*Id.* at p. 391; see also *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

In analyzing the word "substantial," the Georgia Supreme Court concluded in *Arnold*:

> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(*Arnold v. State*, *supra*, 224 S.E.2d at 392.)[118]

Appellant acknowledges that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux*'s summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s

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[118] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

analysis. Although *Breaux*, *Arnold*, and this case, like all cases, are of course factually different, those differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenhandedly by a jury." (*Arnold v. State*, *supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S.

222, 235-236.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII, XIV), the death judgment must be reversed.

B. The Instruction Failed To Inform The Jurors That The Central Determination Is Whether the Death Penalty Is The Appropriate Punishment

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown* (1985) 40 Cal.3d 512, 541, reversed on another ground in *California v. Brown* (1987) 479 U.S. 538 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962-963.) However, the instruction under CALJIC 8.88 did not make clear this standard of appropriateness. By telling the jurors that they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of

"appropriate." *Merriam-Webster's Collegiate Dictionary* (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. (*Id.* at p. 1328.) By contrast, "appropriate" is defined as "especially suitable or compatible." (*Id.* at p. 57.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is far different than the finding the jury is actually required to make: that death is an "especially suitable," fit and proper punishment, i.e., that it is appropriate.

It is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

CALJIC 8.88 was also defective because it implied that death was the *only* available sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances . . . ." However, it is clear under California law that a penalty jury may always return a verdict of life without possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown*, *supra*, 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed mitigation. The failure to properly instruct the jury on this crucial point deprived appellant of his right to have the jury given proper information concerning its sentencing discretion (*People v. Easley* (1983) 34 Cal.3d 858, 884), deprived appellant of an important procedural protection that California law affords capital defendants in violation of due process, and made the resulting verdict unreliable in violation of the Eighth and Fourteenth Amendments.

In sum, the crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII, XIV) and denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

C. The Instruction Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence of Life Without The Possibility Of Parole

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances." (Pen. Code, § 190.3.)[119] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 376-377.)

This mandatory language is not included in the instruction pursuant to CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

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[119] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown*, *supra*, 40 Cal.3d at p. 544, fn. 17.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282, italics original.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760, 763; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid overemphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[120]

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[120] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, 473, fn. 6, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein,

People v. Moore, *supra*, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the . . . instructions . . . do not incorrectly state the law . . ., but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows . . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*Id.* at pp. 526-527.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, *Moore* is squarely on point.

The State and the Accused: Balance of Advantage in Criminal Procedure (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the due process clause "does speak to the balance of forces between the accused and his accuser," the Court held that "in the absence of a strong showing of state interests to the contrary" (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474), there "must be a two-way street" as between the prosecution and the defense (*id.* at p. 474). Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

It is well settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465, abrogated on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 91; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Moreover, the instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the equal protection clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const. art. I, §§ 7, 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.C.S.D. 1977) 438 F.Supp. 455, 469-470, *aff'd* (8th Cir. 1978) 573 F.2d 1027, 1028; *cf. Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

D. Conclusion

The trial court's main sentencing instruction, CALJIC No. 8.88, together with CALJIC 8.85, discussed in Argument XI, failed to comply with the requirements of the due process and equal protection clauses of the Fourteenth Amendment, the Sixth Amendment right to a jury trial, and the cruel and unusual punishment clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XIII

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

The United States Supreme Court has lauded proportionality review as a method of protecting against arbitrariness in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Proffitt v. Florida* (1976) 428 U.S. 242, 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death

penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51, 104 S.Ct. 871, 879-880, 79 L.Ed.2d 29 (1984), the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.*, at 53, 104 S.Ct. at 881, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris.*

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).) The time has come for *Pulley v. Harris* to be reevaluated since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).)[121] Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[122]

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[121] Appellant does not challenge the narrowing effect of California's special circumstances in this automatic appeal because that factual question depends on an empirical showing that must wait for a petition for writ of habeas corpus. (See Shatz & Rivkind, *The California Death Penalty Scheme: Requiem for Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1317-1318.)

[122] See Ala. Code § 13A-5-53(b)(3) (West 2004); Del. Code Ann. tit. 11, § 4209(g)(2) (West 2003); GA ST 17-10-35(c)(3) (West 2004); Idaho Code § 19-2827(c)(3) (West 2004); Ky. Rev. Stat. Ann. § 532.075(3)(c)

The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the *Pulley* Court had in mind when it said that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Even assuming, for purposes of this argument, that the scope of California's special circumstances is not so broad as to render the scheme unconstitutional, the open-ended nature of the aggravating and mitigating factors – especially the circumstances of the offense factor delineated in section 190.3, subdivision (a) – and the discretionary nature of the sentencing instruction under CALJIC No. 8.88 grant a jury unrestricted (or nearly unrestricted) freedom in making the death-sentencing decision. (See *Tuilaepa v. California*, *supra*, 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.).)

California's authorization of the death penalty for felony murder

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(West 2004); 8 LSA- R.S. 905.9.1(1)(c) (West 2004); Miss. Code Ann. § 99-19-105(3)(c) (West 2004); Mont. Code Ann. § 46-18-310(1)(C) (West 2003); Neb. Rev. Stat. §§ 29-2521.01, 29-2521.03, 29-2522(3) (West 2004); N.R.S. 177.055(2)(d) (West 2002); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (West 2004); N.M. Stat. Ann. § 31-20A-4(C)(4) (West 2004); N.C. Gen. Stat. § 15A-2000(d)(2) (West 2004); [Ohio] R.C. § 2929.05(A) (West 2004); S.C. Code Ann. § 16-3-25(C)(3) (West 2003); SDCL § 23A-27A-12(3) (West 2004); T. C. A. § 39-13-206(c)(1)(D) (West 2004); Va. Code Ann. § 17.1-313(c)(2) (West 2004); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 2004).

See also *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants*, *supra*, 250 N.W.2d at p. 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

simpliciter works synergistically with its far-reaching and flexible sentencing factors and unfettered jury discretion at the selection stage to infuse the state capital sentencing scheme with flagrant arbitrariness. Section 190.2 immunizes few kinds of first degree murderers from death eligibility, and section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital sentencing scheme lacks other safeguards as discussed in Arguments X through XII, which are incorporated by reference here. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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XIV

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW

The United States is one of the few nations that regularly uses the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 846-848 (dis. opn. of Harrison, J.).) And, as the Supreme Court of Canada has explained:

> Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran.

(*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth

Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Roper v. Simmons* (2005) 543 U.S. 551, 559-560; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the supremacy clause of the federal Constitution. (U.S. Const. art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[123] The United States Court of Appeals for the Eleventh Circuit has

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[123] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (*See* 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (*see* Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (*see* 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty. (See Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582.)

held that, when the United States Senate ratified the ICCPR, "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment," in violation of Article VII of the ICCPR. He recognizes that this Court previously has rejected international law claims directed at the death penalty in California. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 511; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779; see also *id.* at pp. 780-781 (conc. opn. of Mosk, J.).) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, appellant requests that the Court reconsider and, in the context of this case, find his death sentence violates international law.

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason – as opposed to its use as a regular punishment for ordinary crimes – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830-831.) Indeed, *all* nations of Western Europe – plus Canada, Australia, and New Zealand – have abolished the death penalty. Amnesty International,

"The Death Penalty: List of Abolitionist and Retentionist Countries" (as of February 2006) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[124]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries 1; *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment," as defined in the Constitution, is not limited to whatever violated the standards of decency that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the

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[124] Many other countries including almost all Eastern European, Central American, and South American nations, as well as South Africa and Liberia, also have abolished the death penalty either completely or for ordinary crimes. *See* Amnesty International's "List of Abolitionist and Retentionist Countries."

progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world – including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual"].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112-113 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence should be set aside.

XVI

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

Even if this Court should find that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of both guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *People v. Hill* (1998) 17 Cal.4th 800, 844-848 [reversing entire judgment in capital case due to cumulative error]; see also *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [addressing claim that cumulative errors so infected "the trial with unfairness as to make the resulting conviction a denial of due process"].) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The Ninth Circuit Court of Appeals has pointed out that, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the

defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) The Court's observation is uniquely applicable to this case, given not only the sheer number of substantial errors, but the way in which those errors operated *synergistically* to deny appellant his state and federal constitutional rights. (See Arguments I through XIV, each of which is hereby incorporated by reference as if fully set forth herein.)

First, appellant simply could not have had a fair trial in Kings County considering, for example, the nature of the charged offenses, prejudicial and extensive publicity about the case, and the backdrop of hysteria in the community flowing from the abductions and murders of three little girls (including Maria) within a relatively short span of time. Accordingly, the trial court erred in denying appellant's motion for a change of venue. (Argument I, *supra*.)

Second, the trial court permitted the prosecution to fill evidentiary gaps as to critical issues – such as appellant's intent, motive, and, perhaps, propensity to commit a charged offense[125] – with extremely inflammatory yet wholly irrelevant evidence regarding: (1) incestuous conduct with his sister, which was remote in time (i.e., had occurred roughly 16 to 30 years prior to the charged offenses), involved a sister close to him in age, and occurred mostly when he was a minor (i.e., as young as five years old); (2) his statement that he had never married for fear he would molest his children, which demonstrated, at most, a preoccupation with incest; (3) his *lawful* rental of adult videotapes featuring *adult* females; and (4) his

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[125] As to the evidence initially admitted under Evidence Code section 1108, the trial court itself seemed confused as to the purpose or purposes for which it was being admitted. (Argument III, *supra*; see also 10 RT 1438-1441; 12 CT 3447-3448; 15 RT 2672-2675; 16 RT 2706-2707; G RT (Apr. 22, 1997, proceedings) 26.)

possession of adult magazines, none of which featured prepubescent children (and none of which featured females conclusively shown to be underage).

Each of these categories of evidence was not only irrelevant, but raised the long-recognized dangers generated by character evidence, particularly the risk that appellant would be convicted for who he was or what he had done in the past, even if the jury believed the prosecution had failed to establish his guilt of the charged offenses. Surely, moreover, the cumulative effect of this evidence was to overwhelm the jury's ability to properly evaluate the evidence and reach a proper, reliable verdict in both the guilt and penalty phases of appellant's trial. The weakness of the prosecution's case was bolstered still further by erroneous instructions and prejudicial evidence which lightened the burden of the prosecution and made it easier for the jury to convict him. (Argument IV, *supra*.)

Third, the prosecution's case that appellant was the perpetrator rested largely on the suspect credibility of Mychael Jackson, who (1) faced, and was ultimately convicted of, a felony fraud charge while the instant case was pending, and (2) whose untrustworthiness was established by four witnesses. Moreover, in the absence of the inflammatory evidence relating to appellant's past incestuous conduct and possession or rental of adult material, the jury may well have discounted Jackson's testimony; with the admission of that evidence, the jury likely ignored Jackson's lack of credibility. Conversely, the erroneous admission of Jackson's testimony made it more likely that the jury would dismiss appellant's defense evidence, namely, evidence of numerous similarities between the crimes against Angelica Ramirez and those against Maria. This defense was introduced to raise a reasonable doubt of appellant's guilt by suggesting that

whoever killed Angelica Ramirez (a crime of which appellant was demonstrably innocent) likely committed the offenses against Maria as well.

Notwithstanding the prejudicial effect of the guilt phase errors on the penalty phase, a number of serious penalty phase-related errors occurred as well. For instance, the trial court's misleading examples of mitigating evidence, stated repeatedly during jury selection and in the presence of numerous prospective jurors, who then actually sat on appellant's jury, could only have tainted the jury's evaluation of the penalty phase evidence. In addition, these statements, which effectively amounted to jury instructions, informed the jury's perception of appellant, and under what circumstances he was deserving of life imprisonment without parole rather than death, during the course of the entire trial. (Argument IX, *supra.*)

In addition, the trial court's exclusion of critical "lingering doubt" evidence denied appellant's right to present mitigating evidence at the penalty phase. The weakness of the prosecution's case at guilt must have left some lingering doubt as to appellant's guilt, or the extent of it, in the jurors' minds. Indeed, had the jury heard the proffered "lingering doubt" evidence, it is likely the jury simply would not have voted to impose the death penalty. (Argument VIII, *supra.*)

Any of the guilt phase errors, standing alone, was sufficient to undermine the prosecution's case and the reliability of the jury's ultimate verdict, and none can properly be found harmless beyond a reasonable doubt. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278-282, *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Taken separately or in combination, the errors and violations of appellant's constitutional rights deprived appellant of a fair trial, due process and a reliable determination of guilt.

(U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585; *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 330-331; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The cumulative effect of the errors in this case so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process (U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7, 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643), and appellant's conviction, therefore, must be reversed. (See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace*, *supra*, 848 F.2d at p. 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversing guilt and penalty phases of capital case for cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

The fundamentally flawed verdicts further contributed to an unreliable determination of penalty by the jury. (U.S. Const., Amends. V, VI, VIII, XIV; Cal. Const., art. I, §§ 7, 15-17; *Johnson v. Mississippi*, *supra*, 486 U.S. at p. 590; *Stringer v. Black* (1992) 503 U.S. 222, 230-232; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Gardner v. Florida* (1977) 430 U.S. 349, 357-358; *Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 330-331; *Silva v. Woodford* (9th Cir. 2002) 279 F.3d 825, 849; *People v. Brown*, *supra*, 46 Cal.3d at p. 448.)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial:

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137, overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, and disapproved of on another ground in *People v. Daniels* (1991) 52 Cal.3d 815, 866; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

The case in aggravation presented at the penalty phase was not so overwhelming compared to the evidence in mitigation that the death penalty was a foregone conclusion. Appellant had no prior criminal record, and the only aggravation presented and argued was evidence relating to the circumstances of the crime and to impact on the victims. However, the prejudicial effect of the foregoing errors, singly and in combination, were reasonably likely to have a continued prejudicial effect upon the jury's consideration of the evidence presented at penalty, as well as upon the jury's ultimate decision to return a sentence of death. Thus, aside from the unreliability of the guilt verdicts and special circumstance finding due to the errors at the guilt phase, those errors introduced further unreliability into the penalty phase and the penalty decision.

Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions, special circumstance finding, and death sentence.

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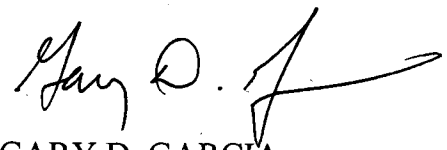
CONCLUSION

For all the reasons stated above, the judgment in this case must be reversed.

DATED: April 5, 2006

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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(Cal. Rules of Court, rule 36(b)(2))

I, GARY D. GARCIA, am the Deputy State Public Defender assigned to represent appellant GENE ESTEL McCURDY in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 88,778 words in length.

GARY D. GARCIA
Attorney for Appellant

DECLARATION OF SERVICE

Re: People V. GENE ESTEL McCURDY

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

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

APPELLANT'S APPELLANT'S OPENING BRIEF

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Each said envelope was then, on April 5, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on April 5, 2006, at San Francisco, California.

Glenice D. Fuller
DECLARANT