STATE OF CALIFORNIA

GRAY DAVIS, *Governor*

COMMISSION ON STATE MANDATES
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July 22, 2003

Mr. Leonard Kaye
SB 90 Coordinator
County of Los Angeles
500 West Temple Street, Room 603
Los Angeles, California 90012

And Affected Parties and State Agencies (See Enclosed Mailing List)

Re: **Draft Staff Analysis on the Request for Reconsideration and Hearing Date**
Crime Victim's Domestic Violence Incident Reports, **CSM 99-TC-08**
Los Angeles County, Claimant
Penal Code Section 13730 and Family Code Section 6228
Statutes of 1984, Chapter 1609
Statutes of 1995, Chapter 965
Statutes of 1999, Chapter 1022

Dear Mr. Kaye:

The draft staff analysis for the request for reconsideration is enclosed for your review and comment.

Written Comments

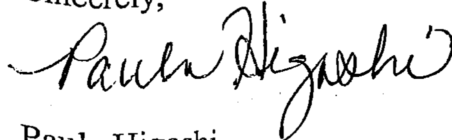
Any party or interested person may file written comments on the draft staff analysis by **August 12, 2003**. You are advised that the Commission's regulations require comments filed with the Commission to be simultaneously served on other interested parties on the mailing list, and to be accompanied by a proof of service on those parties. If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing **September 25, 2003,** at 9:30 a.m. in Room 126 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about September 5, 2003. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

If you have any questions on the above, please contact Camille Shelton at (916) 323-3562.

Sincerely,



Paula Higashi
Executive Director

Enc. Draft Staff Analysis on Request for Reconsideration and supporting authorities
cc. Mr. Robert Miyashiro, Commission Chairperson
Mailing List (current mailing list attached)

J:/mandates/99TC08/Reconsideration - DSA
Hearing: September 25, 2003

DRAFT STAFF ANALYSIS

REQUEST FOR RECONSIDERATION of the Commission's Statement of Decision adopted May 29, 2003

Penal Code Section 13730,
As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965

Family Code Section 6228,
As Added by Statutes 1999, Chapter 1022

***Crime Victims' Domestic Violence Incident Reports* (99-TC-08)**

Commission Chairperson, Requestor

Executive Summary

THE EXECUTIVE SUMMARY WILL BE INSERTED IN THE FINAL STAFF ANALYSIS

STAFF ANALYSIS

Chronology

5/29/03	Commission adopts statement of decision
6/03/03	Commission mails statement of decision to claimant, interested parties, and affected state agencies
6/05/03	Commission chairperson files request for reconsideration
6/13/03	Test-claimant, County of Los Angeles, files comments on request for reconsideration
6/20/03	Commission grants the request for reconsideration by a supermajority of five affirmative votes
7/22/03	Draft staff analysis on request for reconsideration is issued

Background

Government Code section 17559, subdivision (a), grants the Commission, within statutory timeframes, discretion to reconsider a prior final decision. That section states the following:

> The commission may order a reconsideration of all or part of a test claim or incorrect reduction claim on petition of any party. The power to order a reconsideration or amend a test claim decision shall expire 30 days after the statement of decision is delivered or mailed to the claimant. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of the 30-day period, the commission may grant a stay of that expiration for no more than 30 days, solely for the purpose of considering the petition. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.

By regulation, the Commission has provided that any interested party, affected state agency or Commission member may file a petition with the Commission requesting that the Commission reconsider and change a prior final decision to correct an error of law.[1]

On June 20, 2003, the Commission granted this request for reconsideration with a supermajority of five affirmative votes. Thus, a subsequent hearing will be conducted on the merits of the request to determine if the prior final decision is contrary to law and to correct any errors of law.[2] A supermajority of five affirmative votes is required to change a prior final decision.[3]

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[1] California Code of Regulations, title 2, section 1188.4, subdivision (b).

[2] California Code of Regulations, title 2, section 1188.4, subdivision (g).

[3] California Code of Regulations, title 2, section 1188.4, subdivision (g)(2).

The Commission's May 29, 2003 Decision

The Commission partially approved this test claim for the activity of storing domestic violence incident reports and face sheets for five years pursuant to Family Code section 6228, subdivision (e). The Commission concluded the following:

> The Commission concludes that Family Code section 6228, as added by Statutes 1999, chapter 1022, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activity only:
>
> - Storing domestic violence incident reports and face sheets for five years. (Fam. Code, § 6228, subd. (e).)
>
> The Commission further concludes that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

The Commission found that the activity of storing the reports for five years constituted a new program or higher level of service for the following reasons:

> Family Code section 6228, subdivision (e), states that the requirements in section 6228 shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incident report. The claimant contends that subdivision (e) imposes a new program or higher level of service on local law enforcement agencies to store the domestic violence incident report for five years. The Commission agrees.
>
> Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.[4] *But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.*
>
> Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for five years constitutes a new program or higher level of service. (Emphasis added.)

Request for Reconsideration

The request for reconsideration alleges the following error of law:

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[4] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

> The Commission finding that "the state has not previously mandated any record retention requirements on local agencies for information to victims of domestic violence" does not take into consideration prior law, codified in Government Code sections 26202 and 34090, that requires counties and cities to maintain records for two years. Thus, the conclusion, that storage of the domestic violence incident report for five years constitutes a new program or higher level of service, is an error of law.
>
> The statement of decision should be corrected to reflect that local agencies are now required to perform a higher level of service by storing these documents for three additional years only.

Position of the Test-Claimant, County of Los Angeles

The County of Los Angeles does not believe the statement of decision contains an error of law. The County contends that Government Code sections 26202 and 34090 are not relevant to this claim. The County makes the following arguments:

- There is no law prior to the enactment of Family Code section 6228 that required local agencies to store domestic violence incident reports and face sheets in a readily accessible format.
- Government Code sections 26202 and 34090 only discuss when old records can be destroyed, not if or how such records are to be "maintained" or "stored."
- Pursuant to Government Code section 17558.5, documents supporting a reimbursement claim for approved mandates must be kept for three years after the date the actual reimbursement claim is filed or, if no appropriation is made during the fiscal year the reimbursement claim is filed, during the State Controller's audit period of the claim. Thus, local agencies may, in fact, be required to refrain from destroying the records for five, ten, or more years.

Thus, the County contends the conclusion in the statement of decision, that storing the domestic violence incident report and face sheet for five years constitutes a new program or higher level of service, is legally correct.

Discussion

Issue: Does the May 29, 2003 decision, which concludes that storing domestic violence incident reports and face sheets for *five years* is a new program or higher level of service, constitute an error of law?

The statement of decision in this case contains the conclusion that storing domestic violence incident reports and face sheets for five years is a new program or higher level of service. The conclusion was based on the finding that "the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence" and that "record retention policies were left to the discretion of the local agency."

Reconsideration was requested because the statement of decision does not address the prior record retention requirements of Government Code sections 26202 and 34090.

Government Code section 26202, which applies to counties, states in relevant part the following:

> [T]he board may authorize the destruction or disposition of *any record, paper, or document which is more than two years old, which was prepared or received pursuant to state statute* or county charter, and which is not expressly required by law to be filed and preserved if the board determines by four-fifths (4/5) vote that the retention of any such record, paper, or document is no longer necessary or required for county purposes. Such records, papers or documents need not be photographed, reproduced or microfilmed prior to destruction and no copy thereof need be retained. (Emphasis added.)[5]

Government Code section 34090, which applies to cities, similarly states in relevant part the following:

> Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may *destroy any city record, document, instrument, book or paper*, under his charge, without making a copy thereof, after the same is no longer required.
>
> *This section does not authorize destruction of*:
>
> [¶] . . .[¶]
>
> (d) *Records less than two years old*. . . .(Emphasis added.)[6]

The County of Los Angeles contends that Government Code sections 26202 and 34090 are not relevant to this claim. The County argues that there is no law prior to the enactment of Family Code section 6228 that required local agencies to store domestic violence incident reports and face sheets in a readily accessible format.

Staff disagrees with the County and finds that Government Code sections 26202 and 34090 applied to the domestic violence incident report before the enactment of the test claim statute.

In 1981, the Attorney General's Office issued two opinions that defined the records required to be retained by cities pursuant to Government Code section 34090 and Government Code section 6200.[7] Government Code section 6200, which was originally enacted in 1943, imposes criminal sanctions on an official custodian of "any" public record who steals, destroys, or alters public documents. Section 6200 states the following:

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment

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[5] Government Code section 26202 was last amended by Statutes 1963, chapter 1123.

[6] Government Code section 34090 was last amended by Statutes 1975, chapter 356.

[7] 64 Ops. Cal. Atty. Gen. 317 (1981); 64 Ops. Cal. Atty. Gen. 435 (1981).

in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:

(a) Steal, remove, or secrete.

(b) Destroy, mutilate, or deface.

(c) Alter or falsify.

Relying on case law authority, the Attorney General's Office determined that "records" within the meaning of Government Code sections 6200 and 34090 include *all* records that are required to be kept or were made or retained for the purpose of preserving its content for future use.

> . . . a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.[8]

Thus, if a document constitutes a record within this definition, it may not be destroyed except in accordance with the requirements of Government Code section 34090.[9]

Furthermore, staff disagrees with the County's assertion that Government Code section 34090 refers only to the destruction of records and does not impose a duty on agencies to maintain the records. The California Supreme Court in *People v. Memro,* a case addressing the discovery of personnel records of peace officers, found that Government Code section 34090 requires local agencies to *keep* public records for two years:

> Although the defendant calls the circumstances surrounding the records' destruction suspicious because the court's denial of the motion to discover them was a major focus of his appeal from the original judgment and the records were destroyed two months after oral argument in that appeal, the court could reasonably conclude that (1) the evidence showed the records were destroyed according to the provisions of the Government Code – indeed, they were ***kept*** for three years beyond the two-year period after which Government Code section 34090, subdivision (d), permitted their destruction . . . (Emphasis added.)[10]

Based on these authorities, staff finds that before the enactment of the test claim statute, cities were required by Government Code section 34090 to keep domestic violence incident reports for two years. Penal Code section 13730 (as amended by Stats. 1993, ch. 1230) required all law enforcement agencies to prepare the domestic violence incident

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[8] 64 Ops. Atty. Gen. 435, 437 (1981).

[9] *Ibid.*

[10] *People v. Memro* (1996) 11 Cal.4th 786, 831.

report before the enactment of the test claim statute.[11] The domestic violence incident report qualifies as a "record" within the meaning of Government Code sections 6200 and 34090 since it is a document required to be to be kept by law enforcement agencies and was made or retained for the purpose of preserving its content for future use; i.e., possible future criminal investigation and prosecution.

Staff further finds that counties were required by Government Code section 26202 to keep domestic violence incident reports for two years before the enactment of the test claim statute. The plain language of Government Code section 26202 prohibits counties from destroying records, required by state statute to be prepared, if they are less than two years old. As indicated above, Penal Code section 13730, as amended in 1993, required county law enforcement agencies to prepare the domestic violence incident report. Thus, when the test claim statute was enacted in 1999, counties could not destroy domestic violence incident reports that were less than two years old.

Moreover, staff finds that the interpretation by the court of the requirement to keep records pursuant Government Code section 34090 applies equally to Government Code section 26202. Under the rules of statutory construction, when similar words or phrases are used in two statutes they will be construed to have the same meaning.[12] Both Government Code section 26202 and section 34090 refer to "any record, paper, or document" and both prohibit the destruction of records, which are required to be kept by state statute, if they are less than two years old.

Finally, in 1976, the California Supreme Court held that an arrest record is a public record within the scope of Government Code section 6200.[13] Thus, unless otherwise provided by statute, arrest records are required to be kept and can only be destroyed in accordance with Government Code sections 26202 and 34090. Staff finds that the same reasoning applies to domestic violence incident reports. Arrest records are similar to incident reports because both documents are prepared by law enforcement agencies and are retained for the purpose of preserving evidence.

Accordingly, staff finds that the Commission's finding in the statement of decision, that "the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence" and that "record retention policies were left to the discretion of the local agency," is not legally correct. Thus, the conclusion, that storing domestic violence incident reports and face sheets for *five years* is a new program or higher level of service, constitutes an error of law.

Conclusion and Staff Recommendation

Staff concludes that the statement of decision contains an error of law. Staff further recommends that the Commission amend the statement of decision to include the above analysis and to correct the conclusion as follows:

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[11] See, Statement of Decision, pages 9-10.

[12] *Hunstock v. Estate Development Corp.* (1943) 22 Cal.2d 205.

[13] *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863.

The Commission concludes that Family Code section 6228, as added by Statutes 1999, chapter 1022, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activity only:

- Storing domestic violence incident reports and face sheets for three years. (Fam. Code, § 6228, subd. (e).)

A copy of the proposed corrected statement of decision, which includes the above analysis, begins on page 9.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON:	No. 99-TC-08
Penal Code Section 13730, As Added and Amended by Statutes 1984, Chapter 1609, and Statutes 1995, Chapter 965; and Family Code Section 6228, As Added by Statutes 1999, Chapter 1022, Filed on May 15, 2000, by County of Los Angeles, Claimant.	*Crime Victims' Domestic Violence Incident Reports* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Corrected Decision Adopted on ____)*

STATEMENT OF DECISION

On April 24, 2003, the Commission on State Mandates (Commission) heard and decided this test claim during a regularly scheduled hearing. Mr. Leonard Kaye and Sergeant Wayne Bilowit appeared for claimant, County of Los Angeles. Mr. Dirk L. Anderson and Ms. Susan Geanacou appeared on behalf of the Department of Finance.

On September 25, 2003, the Commission reconsidered this test claim during a regularly scheduled hearing. ____________ appeared for claimant, County of Los Angeles. ____________ appeared on behalf of the Department of Finance.

At the hearings, testimony was given, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission ____________________, by a ____ vote.

BACKGROUND

This test claim is filed on two statutes: Penal Code section 13730, as added in 1984 (Stats. 1984, ch. 1609) and amended in 1995 (Stats. 1995, ch. 965), and Family Code section 6228, as added in 1999 (Stats. 1999, ch. 1022).

In 1987, the Commission approved a test claim filed by the City of Madera on Penal Code section 13730, as added by Statutes 1984, chapter 1609, as a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution (*Domestic Violence Information*, CSM 4222). The parameters and guidelines for *Domestic Violence Information* authorized reimbursement for local law enforcement agencies for the "costs associated with the development of a Domestic Violence Incident

Report form used to record and report domestic violence calls," and "for the writing of mandated reports which shall include domestic violence reports, incidents or crime reports directly related to the domestic violence incident."

Beginning in fiscal year 1992-93, the Legislature, pursuant to Government Code section 17581, suspended Penal Code section 13730, as added by Statutes 1984, chapter 1609. With the suspension, the Legislature assigned a zero-dollar appropriation to the mandate and made the program optional.

In 1995, the Legislature amended Penal Code section 13730, subdivision (c). (Stats. 1995, ch. 965.) As amended, Penal Code section 13730, subdivision (c)(1)(2), required law enforcement agencies to include in the domestic violence incident report additional information relating to the use of alcohol or controlled substances by the abuser, and any prior domestic violence responses to the same address.

In February 1998, the Commission considered a test claim filed by the County of Los Angeles on the 1995 amendment to Penal Code section 13730 (*Domestic Violence Training and Incident Reporting*, CSM 96-362-01). The Commission concluded that the additional information on the domestic violence incident report was not mandated by the state because the suspension of the statute under Government Code section 17581 made the completion of the incident report itself optional, and the additional information under the test claim statute came into play only after a local agency elected to complete the incident report.

Based on the plain language of the suspension statute (Gov. Code, § 17581), the Commission determined, however, that during window periods when the state operates without a budget, the original suspension of the mandate would not be in effect. Thus, the Commission concluded that for the limited window periods when the state operates without a budget until the Budget Act is chaptered and makes the domestic violence incident reporting program optional under Government Code section 17581, the activities required by the 1995 amendment to Penal Code section 13730 were reimbursable under article XIII B, section 6.

In 1998, Government Code section 17581 was amended to close the gap and continue the suspension of programs during window periods when the state operates without a budget.[14] In 2001, the California Supreme Court upheld Government Code section 17581 as constitutionally valid.[15] The Domestic Violence Information and Incident Reporting programs remained suspended in the 2002 Budget Act.[16]

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[14] Government Code section 17581, subdivision (a), now states the following: "No local agency shall be required to implement or give effect to any statute or executive order, or portion thereof, during any fiscal year *and the for the period immediately following that fiscal year for which the Budget Act has not been enacted for the subsequent fiscal year*. . ." (Emphasis added.)

[15] *Carmel Valley Fire Protection District v. State of California* (2001) 25 Cal.4th 287, 297.

[16] Since the operative date of Family Code section 6228 (January 1, 2000), Penal Code section 13730, as originally added by Statutes 1984, chapter 1609, has been suspended by

Test Claim Statutes

Penal Code section 13730, as added in 1984 and amended in 1995, requires local law enforcement agencies to develop and prepare domestic violence incident reports as specified by statute. Penal Code section 13730 states the following:

> (a) Each law enforcement agency shall develop a system, by January 1, 1986, for recording all domestic violence-related calls for assistance made to the department including whether weapons were involved. All domestic violence-related calls for assistance shall be supported with a written incident report, as described in subdivision (c), identifying the domestic violence incident. Monthly, the total number of domestic violence calls received and the numbers of those cases involving weapons shall be compiled by each law enforcement agency and submitted to the Attorney General.
>
> (b) The Attorney General shall report annually to the Governor, the Legislature, and the public the total number of domestic violence-related calls received by California law enforcement agencies, the number of cases involving weapons, and a breakdown of calls received by agency, city, and county.
>
> (c) Each law enforcement agency shall develop an incident report that includes a domestic violence identification code by January 1, 1986. In all incidents of domestic violence, a report shall be written and shall be identified on the face of the report as a domestic violence incident. A report shall include at least both of the following:
>
> (1) A notation of whether the officer or officers who responded to the domestic violence call observed any signs that the alleged abuser was under the influence of alcohol or a controlled substance.
>
> (2) A notation of whether the officer or officers who responded to the domestic violence call determined if any law enforcement agency has previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

Family Code section 6228 requires state and local law enforcement agencies to provide, without charge, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence upon

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the Legislature pursuant to Government Code section 17581. The Budget Bills suspending Statutes 1984, chapter 1609, are as follows: Statutes 1999, chapter 50, Item 9210-295-0001, Schedule (8), Provision 2; Statutes 2000, chapter 52, Item 9210-295-0001, Schedule (8), Provision 3;
Statutes 2001, chapter 106, Item 9210-295-0001, Schedule (8), Provision 3; and Statutes 2002, chapter 379, Item 9210-295,0001, Schedule (8), Provision 3.

The Governor's Proposed Budget for fiscal year 2003-04 proposes to continue the suspension of the domestic violence incident report.

request within a specified period of time. Family Code section 6228, as added in 1999, states the following:

> (a) State and local law enforcement agencies shall provide, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, upon request. For purposes of this section, "domestic violence" has the definition given in Section 6211.
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> (b) A copy of a domestic violence incident report face sheet shall be made available during regular business hours to a victim of domestic violence no later than 48 hours after being requested by the victim, unless the state or local law enforcement agency informs the victim of the reasons why, for good cause, the domestic violence incident report face sheet is not available, in which case the domestic violence incident report face sheet shall be made available to the victim no later than five working days after the request is made.
>
> (c) A copy of the domestic violence incident report shall be made available during regular business hours to a victim of domestic violence no later than five working days after being requested by a victim, unless the state or local law enforcement agency informs the victim of the reasons why, for good cause, the domestic violence incident report is not available, in which case the domestic violence incident report shall be made available to the victim no later than 10 working days after the request is made.
>
> (d) Persons requesting copies under this section shall present state or local law enforcement with identification at the time a request is made.
>
> (e) This section shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incidence report.
>
> (f) This section shall be known, and may be cited, as the Access to Domestic Violence Reports Act of 1999.

According to the bill analysis prepared by the Assembly Judiciary Committee, section 6228 was added to the Family Code for the following reasons:

> The author notes that victims of domestic violence do not have an expedited method of obtaining police reports under existing law. Currently, victims of domestic violence must write and request that copies of the reports be provided by mail. It often takes between two and three weeks to receive the reports. Such a delay can prejudice victims in their ability to present a case for a temporary restraining order under the Domestic Violence Prevention Act. This bill remedies that problem by requiring law enforcement agencies to provide a copy of the police report to the victim at the time the request is made if the victim personally appears.
>
> The purpose of restraining and protective orders issued under the DVPA [Domestic Violence Prevention Act] is to prevent a recurrence of domestic violence and to ensure a period of separation of the persons involved in the violent situation. According to the author, in the absence

of police reports, victims may have difficulty presenting the court with proof of a past act or acts of abuse and as a result may be denied a necessary restraining order which could serve to save a victim's life or prevent further abuse. By increasing the availability of police reports to victims, this bill improves the likelihood that victims of domestic violence will have the required evidence to secure a needed protective order against an abuser.

In addition to the lack of immediate access to copies of police reports, the author points to the cost of obtaining such copies. For example, in Los Angeles County the fee is $13 per report. These fees become burdensome for victims who need to chronicle several incidents of domestic violence. For some the expense may prove prohibitive.

Claimant's Position

The claimant contends that the test claim legislation imposes a reimbursable state-mandated program upon local law enforcement agencies to prepare domestic violence incident reports, store the reports for five years, and retrieve and copy the reports upon request of the domestic violence victim. The claimant contends that it takes 30 minutes to prepare each report, 10 minutes to store each report, and 15 minutes to retrieve and copy each report upon request by the victim. The claimant states that from January 1, 2000, until June 30, 2000, the County prepared and stored 4,740 reports and retrieved 948 reports for victims of domestic violence. The claimant estimates costs during this six-month time period in the amount of $181,228.

Position of the Department of Finance

The Department of Finance filed comments on June 16, 2000, concluding that Family Code section 6228 results in costs mandated by the state. The Department further states that the nature and extent of the specific required activities can be addressed in the parameters and guidelines developed for the program.

COMMISSION FINDINGS

A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[17] In addition, the required activity or task must constitute a "new program" or create a "higher level of service" over the previously required level of service.[18] The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[19] To determine if the program is new or imposes a higher level of service, the

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[17] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[18] *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3d 830, 835.

[19] *Id.*

analysis must compare the test claim legislation with the legal requirements in effect immediately before the enactment of the test claim legislation.[20] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[21]

This test claim presents the following issues:

- Does the Commission have jurisdiction to retry the issue whether Penal Code section 13730 constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports?
- Is Family Code section 6228 subject to article XIII B, section 6 of the California Constitution?
- Does Family Code section 6228 mandate a new program or higher level of service on local agencies within the meaning of article XIII B, section 6 of the California Constitution?
- Does Family Code section 6228 impose "costs mandated by the state" within the meaning of Government Code sections 17514?

These issues are addressed below.

I. Does the Commission have jurisdiction to retry the issue whether Penal Code section 13730 constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports?

The test claim filed by the claimant includes Penal Code section 13730, as added in 1984 and amended in 1995. The claimant acknowledges the Commission's prior final decisions on Penal Code section 13730, and acknowledges the Legislature's suspension of the program. Nevertheless, the claimant argues that Penal Code section 13730, as well as Family Code section 6228, constitute a reimbursable state-mandated program for the activity of preparing domestic violence incident reports. In comments to the draft staff analysis, the claimant argues as follows:

> Penal Code section 13730 mandates that "domestic violence incident reports" be prepared. This mandate was found to be reimbursable by the Commission. [Footnote omitted.] Therefore, this reporting duty was new, not required under prior incident reporting law.
>
> Now, "domestic violence incident reports" must be prepared–and-provided to domestic violence victims upon their request, without exception, in accordance with Family Code section 6228, and in accordance with Penal Code section 13730, as added by Chapter 1609, Statutes of 1984 and amended by Chapter 965, Statutes of 1995 . . .[22]

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[20] *Lucia Mar Unified School Dist., supra,* 44 Cal.3d 830, 835.

[21] Government Code section 17514; *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1284.

[22] Claimant's comments to draft staff analysis, pages 2-3.

The claimant further contends that "the duty to prepare and provide domestic violence incident reports to domestic violence victims was not made 'optional' under Government Code section 17581." (Emphasis in original)[23]

For the reasons provided below, the Commission finds that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void. In *City and County of San Francisco v. Ang*, the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made, is conclusive of the issues involved in the decision.[24]

These principles are consistent with the purpose behind the statutory scheme and procedures established by the Legislature in Government Code section 17500 and following, which implement article XIII B, section 6 of the California Constitution. As recognized by the California Supreme Court, Government Code section 17500 and following were established for the "express purpose of avoiding multiple proceedings, judicial and administrative, addressing the same claim that a reimbursable state mandate has been created."[25]

Government Code section 17521 defines a test claim as follows: " 'Test claim' means the first claim, including claims joined or consolidated with the first claim, filed with the commission alleging that a particular statute or executive order imposes costs mandated by the state." Government Code section 17553, subdivision (b), requires the Commission to adopt procedures for accepting more than one claim on the same statute or executive order if the subsequent test claim is filed within 90 days of the first claim and consolidated with the first claim. Section 1183, subdivision (c), of the Commission's regulations allow the Commission to consider multiple test claims on the same statute or executive order only if the issues presented are different or the subsequent test claim is filed by a different type of local governmental entity.

Here, the issue presented in this test claim is the same as the issue presented in the prior test claim; i.e., whether preparing a domestic violence incident report is a reimbursable state-mandated activity under article XIII B, section 6 of the California Constitution. The Commission approved CSM 4222, *Domestic Violence Information*, and has authorized

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[23] *Id.* at pages 4-6.

[24] *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697; See also, *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final.

[25] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 333.

reimbursement in the parameters and guidelines for "writing" the domestic violence incident reports as an activity reasonably necessary to comply with the mandated program.[26] Moreover, this test claim was filed more than 90 days after the original test claims on Penal Code section 13730.

Accordingly, the Commission finds that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

The remaining analysis addresses the claimant's request for reimbursement for compliance with Family Code section 6228.

II. Is Family Code Section 6228 Subject to Article XIII B, Section 6 of the California Constitution?

In order for Family Code section 6228 to be subject to article XIII B, section 6 of the California Constitution, the statute must constitute a "program." The California Supreme Court, in the case of *County of Los Angeles* v. *State of California*[27], defined the word "program" within the meaning of article XIII B, section 6 as a program that carries out the governmental function of providing a service to the public, *or* laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state. Only one of these findings is necessary to trigger the applicability of article XIII B, section 6.[28]

The plain language of Family Code section 6228 requires local law enforcement agencies to provide, without charging a fee, one copy of the domestic violence incident report and/or face sheet to victims of domestic violence within a specified time period. As indicated above, the purpose of the legislation is to assist victims in supporting a case for a temporary restraining order against the accused.

The Commission finds that Family Code section 6228 qualifies as a program under article XIII B, section 6. As determined by the Second District Court of Appeal, police protection is a peculiarly governmental function.[29] The requirement to provide a copy of the incident report to the victim supports effective police protection in the area of domestic violence.[30] Moreover, the test claim statute imposes unique requirements on local law enforcement agencies that do not apply generally to all residents and entities in the state.

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[26] California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(4).

[27] *County of Los Angeles, supra,* 43 Cal.3d 46, 56.

[28] *Carmel Valley Fire Protection District v. State of California* (1987) 190 Cal.App.3d 521, 537.

[29] *Id.*

[30] *Ante,* pp. 6-7 (bill analysis of Assembly Judiciary Committee, dated September 10, 1999).

Accordingly, the Commission finds that Family Code section 6228 is subject to article XIII B, section 6 of the California Constitution.

III. Does Family Code Section 6228 Mandate a New Program or Higher Level of Service on Local Law Enforcement Agencies?

The claimant alleges that Family Code section 6228 mandates a new program or higher level of service within the meaning of article XIII B, section 6, for the activities of preparing, storing, retrieving, and copying domestic violence incident reports upon request of the victim.

Family Code Section 6228 Does Not Mandate a New Program or Higher Level of Service on Local Law Enforcement Agencies to Prepare a Report or a Face Sheet

First, the plain language of Family Code section 6228 does not mandate or require local law enforcement agencies to prepare a domestic violence incident report or a face sheet. Rather, the express language of the statute states that local law enforcement agencies "shall *provide*, without charging a fee, one copy of all domestic violence incident report face sheets, one copy of all domestic violence incident reports, or both, to a victim of domestic violence, upon request." (Emphasis added.)

The claimant acknowledges that Family Code section 6228 does not expressly require the local agency to prepare a report. The claimant argues, however, that preparation of a report under Family Code section 6228 is an "implied mandate" because, otherwise, victims would be requesting non-existent reports.[31] The Commission disagrees.

Pursuant to the rules of statutory construction, courts and administrative agencies are required, when the statutory language is plain, to enforce the statute according to its terms. The California Supreme Court explained that:

> In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. [Citations omitted][32]

In this regard, courts and administrative agencies may not disregard or enlarge the plain provisions of a statute, nor may they go beyond the meaning of the words used when the words are clear and unambiguous. Thus, courts and administrative agencies are prohibited from writing into a statute, by implication, express requirements that the Legislature itself has not seen fit to place in the statute.[33] This prohibition is based on the fact that the California Constitution vests the Legislature, and not the Commission, with policymaking authority. As a result, the Commission has been instructed by the courts to

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[31] Claimant's test claim filing, page 10; Claimant's comments on draft staff analysis, pages 1, 7-10.

[32] *Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.

[33] *Whitcomb v. California Employment Commission* (1944) 24 Cal.2d 753, 757; In re *Rudy L.* (1994) 29 Cal.App.4th 1007, 1011.

construe the meaning and effect of statutes analyzed under article XIII B, section 6 strictly:

> A strict construction of section 6 is in keeping with the rules of constitutional interpretation, which require that constitutional limitations and restrictions on legislative power "are to be construed strictly, and are not to be extended to include matters not covered by the language used." … "Under our form of government, policymaking authority is vested in the Legislature and neither arguments as to the wisdom of an enactment nor questions as to the motivation of the Legislature can serve to invalidate particular legislation." [Citations omitted.] Under these principles, there is no basis for applying section 6 as an equitable remedy to cure the perceived unfairness resulting from political decisions on funding policies."[34]

Legislative history of Family Code section 6228 further supports the conclusion that the Legislature, through the test claim statute, did not require local agencies to prepare an incident report. Rather, legislative history indicates that local agencies were required under prior law to prepare an incident report. The analyses of the bill that enacted Family Code section 6228 all state that under prior law, a victim of domestic violence could request in writing that a copy of the report be provided by mail.[35] The analysis prepared by the Assembly Appropriations Committee dated September 1, 1999, further states that "[a]ccording to the California State Sheriff's Association, reports are currently available for distribution within 3-12 working days," and that "agencies currently charge a fee of $5-$15 per report."

Moreover, preparing a domestic violence incident report does not constitute a new program or higher level of service because preparation of the report is required under prior law. Penal Code section 13730, *as amended in 1993* (Stats. 1993, ch. 1230), added the requirement that "[a]ll domestic violence-related calls for assistance *shall be supported with a written incident report*, as described in subdivision (c), identifying the domestic violence incident." (Emphasis added.) The claimant did not include the 1993 amendment to Penal Code section 13730 in this test claim. In addition, the 1993 amendment to Penal Code section 13730 has not been included in the Legislature's suspension of Penal Code section 13730, as originally added in 1984, since neither the Legislature, the Commission, nor the courts, have made the determination that the 1993 statute constitutes a reimbursable state-mandated program under article XIII B, section 6 of the California Constitution.[36] Thus, the activity of preparing the domestic violence

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[34] *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1816-1817.

[35] Bill Analysis of Assembly Judiciary Committee, dated September 10, 1999; Senate Floor Analysis dated September 8, 1999; Bill Analysis by the Assembly Appropriations Committee, dated September 1, 1999.

[36] Government Code section 17581, subdivision (a)(1), requires that the statute or executive order proposed for suspension must first be "determined by the Legislature, the commission, or any court to mandate a new program or higher level of service requiring

incident report is an activity currently required by prior law through the 1993 amendment to Penal Code section 13730.

Accordingly, the Commission finds that Family Code section 6228 does not mandate a new program or higher level of service on local agencies to prepare a domestic violence incident report or a face sheet and, thus, reimbursement is not required for this activity under article XIII B, section 6 of the California Constitution.

Family Code Section 6228 Does Not Impose a New Program or Higher Level of Service for the Activities of Providing, Retrieving, and Copying Information Related to a Domestic Violence Incident.

Family Code section 6228 expressly requires local law enforcement agencies to perform the following activities:

- Provide one copy of all domestic violence incident report face sheets to the victim, free of charge, within 48 hours after the request is made. If, however, the law enforcement agency informs the victim of the reasons why, for good cause, the face sheet is not available within that time frame, the law enforcement agency shall make the face sheet available to the victim no later than five working days after the request is made.
- Provide one copy of all domestic violence incident reports to the victim, free of charge, within five working days after the request is made. If, however, the law enforcement agency informs the victim of the reasons why, for good cause, the incident report is not available within that time frame, the law enforcement agency shall make the incident report available to the victim no later than ten working days after the request is made.
- The requirements in section 6228 shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incident report.

The Commission finds that the claimed activities of "retrieving" and "copying" information related to a domestic violence incident do not constitute a new program or higher level of service. Since 1981, Government Code section 6254, subdivision (f), of the California Public Records Act has required local law enforcement agencies to disclose and provide records of incidents reported to and responded by law enforcement agencies to the victims of an incident.[37] Government Code section 6254, subdivision (f), states in relevant part the following:

> [S]tate and local law enforcement agencies shall disclose the names and addresses of the persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the

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reimbursement of local agencies pursuant to Section 6 of Article XIII B of the California Constitution."

[37] Government Code section 6254 was added by Statutes 1981, chapter 684. Section 6254 was derived from former section 6254, which was originally added in 1968 (Stats. 1968, ch. 1473).

> date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident . . . .

Except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation, law enforcement agencies are required to disclose and provide to the victim the following information:

- The full name and occupation of every individual arrested by the agency; the individual's physical description; the time and date of arrest; the factual circumstances surrounding the arrest; the time and manner of release or the location where the individual is currently being held; and all charges the individual is being held upon;[38] and
- The time, substance, and location of all complaints or requests for assistance received by the agency; the time and nature of the response; the time, date, and location of the occurrence; the time and date of the report; the name and age of the victim; the factual circumstances surrounding the crime or incident; and a general description of any injuries, property, or weapons involved.[39]

Although the general public is denied access to the information listed above, parties involved in an incident who have a proper interest in the subject matter are entitled to such records.[40] The disclosure of a domestic violence incident report under Government Code section 6254, subdivision (f), of the Public Records Act is proper.[41]

Furthermore, the information required to be disclosed to victims under Government Code section 6254, subdivision (f), satisfies the purpose of the test claim statute. As indicated in the legislative history, the purpose of the test claim statute is to assist victims of domestic violence in obtaining restraining and protective orders under the Domestic Violence Prevention Act. Pursuant to Family Code section 6300 of the Domestic Violence Prevention Act, a protective order may be issued to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse. The Commission finds that the disclosure of information describing the factual circumstances surrounding the incident pursuant to Government Code section 6254, subdivision (f), is evidence that can support a victim's request for a protective order under Family Code section 6300.

Finally, the Commission acknowledges that the requirements under the test claim statute and the requirements under the Public Records Act are different in two respects. First, unlike the test claim statute, the Public Records Act does not specifically mandate when law enforcement agencies are required to disclose the information to victims. Rather,

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[38] Government Code section 6254, subdivision (f)(1).

[39] Government Code section 6254, subdivision (f)(2).

[40] *Vallejos v. California Highway Patrol* (1979) 89 Cal.App.3d 781, 786.

[41] *Baugh v. CBS, Inc.* (1993) 828 F.Supp. 745, 755.

Government Code section 6253, subdivision (b), requires the local agency to make the records "promptly available." Under the test claim statute, law enforcement agencies are required to provide the domestic violence incident report face sheets within 48 hours or, for good cause, no later than five working days from the date the request was made. The test claim statute further requires law enforcement agencies to provide the domestic violence incident report within five working days or, for good cause, no later than ten working days from the date the request was made. While the time requirement imposed by Family Code section 6228 is specific, the activities of providing, retrieving, and copying information related to a domestic violence incident are not new and, thus, do not constitute a new program or higher level of service.

Second, unlike the test claim statute, the Public Records Act authorizes local agencies to charge a fee "covering the direct costs of duplication of the documentation, or a statutory fee, if applicable."[42] The test claim statute, on the other hand, requires local law enforcement agencies to provide the information to victims free of charge.

Although the test claim statute may result in additional costs to local agencies because of the exclusion of the fee authority, those costs are not reimbursable under article XIII B, section 6. The California Supreme Court has ruled that evidence of additional costs alone does not automatically equate to a reimbursable state-mandated program under section 6. Rather, the additional costs must result from a new program or higher level of service. In *County of Los Angeles v. State of California*, the Supreme Court stated:

> If the Legislature had intended to continue to equate "increased level of service" with "additional costs," then the provision would be circular: "costs mandated by the state" are defined as "increased costs" due to an "increased level of service," which, in turn, would be defined as "additional costs." We decline to accept such an interpretation. Under the repealed provision, "additional costs" may have been deemed tantamount to an "increased level of service," but not under the post-1975 statutory scheme [after article XIII B, section 6 was adopted].[43]

The Supreme Court affirmed this principle in *Lucia Mar Unified School District v. Honig*:

> We recognize that, as is made indisputably clear from the language of the constitutional provision, local entities are not entitled to reimbursement for all increased costs mandated by state law, but only those costs resulting from a new program or an increased level of service imposed upon them by the state.[44]

As indicated above, the state has not mandated a new program or higher level of service to provide, retrieve, and copy information relating to a domestic violence incident to the victim. Moreover, the First District Court of Appeal, in the *County of Sonoma* case,

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[42] Government Code section 6253, subdivision (b).

[43] *County of Los Angeles, supra,* 43 Cal.3d at pages 55-56.

[44] *Lucia Mar Unified School District v. Honig, supra,* 44 Cal.3d at page 835; see also, *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

concluded that article XIII B, section 6 does not extend "to include concepts such as lost revenue."[45, 46]

Accordingly, the Commission finds that the activities of providing, retrieving, and copying information related to a domestic violence incident do not constitute a new program or higher level of service.

Family Code Section 6228 Does Not Impose a New Program or Higher Level of Service for the Activity of Informing the Victim of the Reasons Why, For Good Cause, the Incident Report and Face Sheet are not Available within the Statutory Time Limits.

Family Code section 6228, subdivision (b), states that the domestic violence incident report face sheet shall be made available to a victim no later than 48 hours after the request, unless the law enforcement agency informs the victim of the reasons why, for good cause, the face sheet is not available within 48 hours. Under these circumstances, the law enforcement agency is required to provide the face sheet to the victim within five working days after the request is made.

Family Code section 6228, subdivision (c), contains a similar provision. Subdivision (c) states that the domestic violence incident report shall be made available to a victim no later than five working days after the request, unless the law enforcement agency informs the victim of the reasons why, for good cause, the incident report is not available within five working days. Under these circumstances, the law enforcement agency is required to provide the incident report to the victim within ten working days after the request is made.

The Commission finds that the activity of informing the victim of the reasons why, for good cause, the incident report and the face sheet are not available within the statutory time limits does not constitute a new program or higher level of service.

Since 1981, Government Code section 6253 of the Public Records Act has required law enforcement agencies to perform the same activity. Subdivision (c) of Government Code section 6253 states that each agency is required to determine whether a request for public records seeks copies of disclosable public records in the possession of the agency and

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[45] *County of Sonoma, supra,* 84 Cal.App.4th at page 1285.

[46] In comments to the draft staff analysis, the claimant cites analyses prepared by the Department of Finance, Legislative Counsel, and the Assembly Appropriations Committee on the test claim statute that indicate the lost revenues may be reimbursable to support its contention that Family Code section 6228 imposes a reimbursable state-mandated program (pp. 11-14).

But, these analyses are not determinative of the mandate issue. The statutory scheme in Government Code section 17500 et seq. contemplates that the Commission, as a quasi-judicial body, has the sole and exclusive authority to adjudicate whether a state mandate exists. (*City of San Jose, supra,* 45 Cal.App.4th 1802, 1817-1818, quoting *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, and *Kinlaw v. State of California, supra*, 54 Cal.3d at p. 333.) Moreover, as indicated in the analysis, the conclusion that the activities of providing, retrieving, and copying do not constitute a new program or higher level of service is supported by case law.

notify the person making the request of the determination and the reasons of the determination within ten days of the request. Government Code section 6253, subdivision (c), further provides that the time limit may be extended if the agency notifies the person making the request, by written notice, of the reasons for the extension.[47]

Although the time limits defined in Government Code section 6253 and Family Code section 6228 are different, the activity of informing the victim of the reasons why, for good cause, the incident report and face sheet are not available within the statutory time limits is not new and, thus, does not constitute a new program or higher level of service.

Storing the Domestic Violence Incident Report and Face Sheet for Five Years Constitutes a New Program or Higher Level of Service.

Family Code section 6228, subdivision (e), states that the requirements in section 6228 shall apply to requests for face sheets or reports made within five years from the date of completion of the domestic violence incident report. The claimant contends that subdivision (e) imposes a new program or higher level of service on local law enforcement agencies to store the domestic violence incident report for five years. ~~The Commission agrees.~~ The County also argues that there is no law prior to the enactment of Family Code section 6228 that required local agencies to store domestic violence incident reports and face sheets in a readily accessible format.

~~Under prior law, local law enforcement agencies are required to provide daily reports of misdemeanor and felony offenses, and a monthly report on domestic violence calls, to the Attorney General and the Department of Justice.~~[48] ~~But, the state has not previously mandated any record retention requirements on local agencies for information provided to victims of domestic violence. Record retention policies were left to the discretion of the local agency.~~

For the reasons provided below, the Commission finds that Family Code section 6228, subdivision (e), imposes a new program or higher level of service on local law enforcement agencies to store the domestic violence incident report for three years only.

Before the enactment of the test claim statute, the Government Code imposed a two-year record retention requirement on local agencies. Government Code section 26202, which applies to counties, states in relevant part the following:

> [T]he board may authorize the destruction or disposition of *any record, paper, or document which is more than two years old*, which was prepared or received pursuant to state statute or county charter, and which is not expressly required by law to be filed and preserved if the board determines by four-fifths (4/5) vote that the retention of any such record, paper, or document is no longer necessary or required for county purposes. Such

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[47] This activity derives from Government Code section 6256.1, which was added by Statutes 1981, chapter 968. In 1998, section 6256.1 was repealed and renumbered section 6253.

[48] Penal Code section 11107 (added by Stats. 1953, ch. 1385); Penal Code section 13730 (added by Stats. 1984, ch. 1609). As indicated above, Penal Code section 13730 has been suspended by the Legislature.

> records, papers or documents need not be photographed, reproduced or microfilmed prior to destruction and no copy thereof need be retained. (Emphasis added.)[49]

Government Code section 34090, which applies to cities, similarly states in relevant part the following:

> Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may *destroy any city record, document, instrument, book or paper*, under his charge, without making a copy thereof, after the same is no longer required.
>
> *This section does not authorize destruction of:*
>
> [¶] . . .[¶]
>
> (d) *Records less than two years old*. . . .(Emphasis added.)[50]

Criminal sanctions are imposed on the custodian of records pursuant to Government Code section 6200 if the records are destroyed. That section states the following:

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to day any of the following:
>
> (d) Steal, remove, or secrete.
>
> (e) Destroy, mutilate, or deface.
>
> (f) Alter or falsify.

In 1981, the Attorney General's Office issued two opinions that defined the records required to be retained by cities pursuant to Government Code section 34090 and Government Code section 6200.[51] Government Code section 6200, which was originally enacted in 1943, imposes criminal sanctions on an official custodian of "any" public record who steals, destroys, or alters public documents. Section 6200 states the following:

> Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his or her hands for any purpose, is punishable by imprisonment in the state prison for two, three, or four years if, as to the whole or any part of the record, map, book, paper, or proceeding, the officer willfully does or permits any other person to do any of the following:

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[49] Government Code section 26202 was last amended by Statutes 1963, chapter 1123.

[50] Government Code section 34090 was last amended by Statutes 1975, chapter 356.

[51] 64 Ops. Cal. Atty. Gen. 317 (1981); 64 Ops. Cal. Atty. Gen. 435 (1981).

(g) Steal, remove, or secrete.

(h) Destroy, mutilate, or deface.

(i) Alter or falsify.

Relying on case law authority, the Attorney General's Office determined that "records" within the meaning of Government Code sections 6200 and 34090 include *all* records that are required to be kept or were made or retained for the purpose of preserving its content for future use.

> . . . a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.[52]

Thus, if a document constitutes a record within this definition, it may not be destroyed except in accordance with the requirements of Government Code section 34090.[53]

Furthermore, the Commission disagrees with the County's assertion that Government Code section 34090 refers only to the destruction of records and does not impose a duty on agencies to maintain the records. The California Supreme Court in *People v. Memro*, a case addressing the discovery of personnel records of peace officers, found that Government Code section 34090 requires local agencies to *keep* public records for two years:

> Although the defendant calls the circumstances surrounding the records' destruction suspicious because the court's denial of the motion to discover them was a major focus of his appeal from the original judgment and the records were destroyed two months after oral argument in that appeal, the court could reasonably conclude that (1) the evidence showed the records were destroyed according to the provisions of the Government Code – indeed, they were ***kept*** for three years beyond the two-year period after which Government Code section 34090, subdivision (d), permitted their destruction . . . (Emphasis added.)[54]

Based on these authorities, the Commission finds that before the enactment of the test claim statute, cities were required by Government Code section 34090 to keep domestic violence incident reports for two years. Penal Code section 13730 (as amended by Stats. 1993, ch. 1230) required all law enforcement agencies to prepare the domestic violence incident report before the enactment of the test claim statute.[55] The domestic violence incident report qualifies as a "record" within the meaning of Government Code sections

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[52] 64 Ops. Atty. Gen. 435, 437 (1981).

[53] *Ibid.*

[54] *People v. Memro* (1996) 11 Cal.4th 786, 831.

[55] See, Statement of Decision, pages 9-10.

6200 and 34090 since it is a document required to be to be kept by law enforcement agencies and was made or retained for the purpose of preserving its content for future use; i.e., possible future criminal investigation and prosecution.

The Commission further finds that counties were required by Government Code section 26202 to keep domestic violence incident reports for two years before the enactment of the test claim statute. The plain language of Government Code section 26202 prohibits counties from destroying records, required by state statute to be prepared, if they are less than two years old. As indicated above, Penal Code section 13730, as amended in 1993, required county law enforcement agencies to prepare the domestic violence incident report. Thus, when the test claim statute was enacted in 1999, counties could not destroy domestic violence incident reports that were less than two years old.

Moreover, the Commission finds that the interpretation by the court of the requirement to keep records pursuant Government Code section 34090 applies equally to Government Code section 26202. Under the rules of statutory construction, when similar words or phrases are used in two statutes they will be construed to have the same meaning.[56] Both Government Code section 26202 and section 34090 refer to "any record, paper, or document" and both prohibit the destruction of records, which are required to be kept by state statute, if they are less than two years old.

Finally, in 1976, the California Supreme Court held that an arrest record is a public record within the scope of Government Code section 6200.[57] Thus, unless otherwise provided by statute, arrest records are required to be kept and can only be destroyed in accordance with Government Code sections 26202 and 34090. The Commission finds that the same reasoning applies to domestic violence incident reports. Arrest records are similar to incident reports because both documents are prepared by law enforcement agencies and are retained for the purpose of preserving evidence.

Accordingly, the Commission finds that storing the domestic violence incident report and face sheet for ~~five~~ three years constitutes a new program or higher level of service.

Thus, the Commission must continue its inquiry to determine if storing the domestic violence incident report results in increased costs mandated by the state.

IV. Does Family Code Section 6228 Impose Costs Mandated by the State Within the Meaning of Government Code Section 17514?

Government Code section 17514 defines "costs mandated by the state" as any increased cost a local agency is required to incur as a result of a statute that mandates a new program or higher level of service. The claimant states that it incurred $24,856 to store domestic violence incident reports from January 1, 2000, to June 30, 2000[58] and that none of the exceptions to finding a reimbursable state-mandated program under Government Code section 17556 apply here.

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[56] *Hunstock v. Estate Development Corp.* (1943) 22 Cal.2d 205.

[57] *Loder v. Municipal Court* (1976) 17 Cal.3d 859, 863.

[58] Schedule 1 attached to Test Claim Filing.

The Commission finds that the requirement to store domestic violence incident reports pursuant to Family Code section 6228, subdivision (e), results in costs mandated by the state under Government Code section 17514, and that none of the exceptions under Government Code section 17556 apply to this activity.

CONCLUSION

The Commission concludes that Family Code section 6228, as added by Statutes 1999, chapter 1022, mandates a new program or higher level of service for local law enforcement agencies within the meaning of article XIII B, section 6 of the California Constitution, and imposes costs mandated by the state pursuant to Government Code section 17514 for the following activity only:

- Storing domestic violence incident reports and face sheets for ~~five~~ three years. (Fam. Code, § 6228, subd. (e).)

The Commission further concludes that it does not have jurisdiction to retry the issue whether Penal Code section 13730, as added in 1984 and amended in 1995, constitutes a reimbursable state-mandated program for the activity of preparing domestic violence incident reports.

Office of the Attorney General
State of California

*1 Opinion No. 80-908
May 29, 1981

THE HONORABLE RICHARD LEHMAN
MEMBER OF THE CALIFORNIA ASSEMBLY

THE HONORABLE RICHARD LEHMAN, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on a question we have phrased as follows:

When may tape ecordings of radio and telephone calls to the police department be destroyed where the purpose of the tapes is to have a record of accident reports, the times of police and ambulance responses, and for use in internal affairs investigations?

CONCLUSION

Tape recordings of radio and telephone calls to the police department made to have a record of accident reports, the times of police and ambulance responses and for use in internal affairs investigations are made for the purpose of preserving their informational content for future reference and therefore may not be destroyed until: (1) they are at least two years old, and (2) destruction is authorized both by resolution of the city council and by the written consent of the city attorney.

ANALYSIS

We are advised that many California police departments make tape recordings of the messages received and transmitted by department radios and telephones though no law requires cuh recording. We are asked when such recordings may be destroyed.

Two statutes govern the destruction of city records and a careful analysis of their provisons is necessary to respond to the question. Government Code section 6200 provides:

'Every officer having the custody of any record, map, or book, or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the State prison not less than one nor more than 14 years.'

Government Code section 34090 provides:

'Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may destroy any city record, document, instrument, book or paper, under

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his charge, without making a copy thereof, after the same is no longer required.

'This section does not authorize the destruction of:

'(a) Records affecting the title to real property or liens thereon.

'(b) Court records.

'(c) Records required to be kept by statute.

'(d) Records less than two years old.

'(e) The minutes, ordinances, or resolutions of the legislative body or of a city board or commission.

'This section shall not be construed as limiting or qualifying in any manner the authority provied in Section 34090.5 for the destruction of records, documents, instruments, books and papers in accordance with the procedure therein prescribed.'

*2 We recently had occasion to consider whether tape recordings of city council meetings made by the city clerk to facilitate preparation of the minutes were 'records' within the meaning of sections 6200 and 34090. We concluded they were not in an opinion published in 64 Ops.Cal.Atty.Gen. ---- [Opn. No. 80-1006]. In that opinion we concluded:

'To summarize, we conclude that a 'record' within the meaning of sections 6200 and 6201, as interpreted by judicial decisions, is properly defined as a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.'

Turning to the tape recordings referred to in the question, we must look not only to the informational content of the recordings but also to the purpose for which they were made and the manner of their use to determine whether they are public records within the meaning of section 6200. If they are such pulbic records they may not be destroyed except in accordance with the requirements of the statute, section 34090 in the case of city records. The mode prescribed is the measure of the power. (57 Ops.Cal.Atty.Gen. 307, 310 (1974); People v. Zamora (1980) 28 Cal.3d 88, 98.)

We are advised that the purpose of making the tape recording of the police telephone and radio calls contemplated in the request was to have a record of accident reports, the times of police and ambulance responses to such reports and for use in internal affairs investigations. Such recordings clearly contain information which is convenient if not necessary to the discharge of official duty.

It also appears that the recordings were both prepared and retained by public officers or employees for the purpose of preserving the informational content of the telephone and radio communications with the police department for future reference. Their purpose was to constitute the record of certain events and not merely to facilitate the preparation of a written record as in the case of the tape recordings of city council meetings in our opinion referred to above. We conclude that such tape recordings are public records within the meaning of section 6200 and may not be destroyed except as provided by section 34090. Section 34090 provides that such records may not be destroyed if they are less than two years old and not thereafter unless their destruction is authorized by both a resolution of the city council and the written consent of the city attorney.

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64 Ops. Cal. Atty. Gen. 435, 1981 WL 126766 (Cal.A.G.)

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Office of the Attorney General
State of California

*1 Opinion No. 80-1006
April 17, 1981

THE HONORABLE BRUCE YOUNG
MEMBER OF THE CALIFORNIA ASSEMBLY

THE HONORABLE BRUCE YOUNG, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on a question we have phrased as follows:

Where the city clerk makes an authorized tape recording of a city council meeting to facilitate the preparation of the minutes: (a) does the public have the right to inspect the tape or (b) receive copies of the tape and (c) when may such tape be destroyed?

CONCLUSION

Where the city clerk makes an authorized tape recording of a city council meeting to facilitate the preparation of the minutes: (a) any person has a right to inspect the tape which includes the right to listen to the tape on equipment provided by the city, (b) any person has a right to receive a copy of the tape which includes the right to buy a duplicate copy from the city or to make a duplicate copy on his own equipment but does not include the right to have a written transcript made, and (c) the tape recording may be destroyed at any time if the purpose for which it was made and retained was solely to facilitate the preparation of the minutes of the meeting but if the tape was made or retained for the additional purpose of preserving its informational content for public reference it may not be lawfully destroyed except as expressly authorized by state law.

ANALYSIS

Our research has revealed no statutory requirement that city council meetings be tape recorded. The statute providing for records of city council meetings in general law cities is section 40801 [FN1] which provides as follows:

'The city clerk shall keep an accurate record of the proceeding of the legislative body and the board of equalization in books bearing appropriate titles and devoted exclusively to such purposes, respectively. The books shall have a comprehensive general index.'

No doubt a tape recording of the city council meeting would be of great assistance to the city clerk in the preparation of the record required by section 40801. While such recording may not be done surreptitiously (see 62 Ops.Cal.Atty.Gen. 292) we know of no reason why a city council may not authorize the tape recording of its meetings. The request for this opinion indicates that the tape recordings which prompted the request were prepared pursuant to a resolution

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of the city council directing the city clerk to make the tape recordings to facilitate the preparation of the minutes.

The public's right to inspect and receive copies of records of public agencies is governed by the California Public Records Act ('the Act') set forth in section 6250 et seq. Section 6252 of the Act provides:

'As used in this chapter:

'(a) 'State agency' means every state office, officer, department, division, bureau, board, and commission or other state agency, except those agencies provided for in Article IV (except Section 20 thereof) or Article VI of the California Constitution.

*2 '(b) 'Local agency' includes a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof; or other local public agency.

'(c) 'Person' includes any natural person, corporation, partnership, firm, or association.

'(d) Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. 'Public records' in the custody of or maintained by the Governor's office means any writing prepared on or after January 6, 1975.

'(e) 'Writing' means handwriting, typewriting, printing, photostating, photographing, and every other means of recording upon any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, magnetic or punched cards, discs, drums, and other documents.'

All cities, whether general law or chartered, are governed by the Act. (§ 6252(b), supra.) Any 'writing' containing information relating to the conduct of the public's business prepared, owned, used or retained by the city regardless of physical form or characteristics is a public record under the Act. (§ 6252(d), supra.) Any means of recording, including magnetic tape, is a 'writing' within the meaning of the Act. (§ 6252(e), supra.) It is therefore clear that a tape recording of a city council meeting prepared by the city clerk to facilitate the preparation of the minutes of the meeting is a public record within the meaning of and governed by the Act.

Next we must examine section 6254 of the Act which provides in relevant part:

'Except as provided in Section 6254.7 [relating to data on sources of air pollution] nothing in this chapter shall be construed to require disclosure of records that are any of the following:

'(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

'.........

'(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege. . . .'

A tape recording of a city council meeting prepared solely to facilitate the preparation of the minutes may well constitute notes or intra-agency memoranda

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within the meaning of section 6254(a). To escape disclosure under section 6254(a), however, they (1) must not be retained in the ordinary course of business and (2) the public interest in withholding such records must clearly outweigh the public interest in disclosure. We can conceive of no legitimate public interest to be served by withholding the tape recordings of a public meeting of a city council. Section 54950 of the Ralph M. Brown Act declares that councils such as city councils exist to aid in the conduct of the people's business and it is the intent of the law that their actions be taken openly and that their deliberation be conducted openly. Similarly section 6250 declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. Absent some statute providing confidentiality for certain kinds of matters conducted at city council meetings we conclude that there is no public interest in withholding the tape recording of a city council meeting which outweighs the public interest in their disclosure. Thus, the tape recordings of the public sessions of a city council meeting are not exempted from disclosure by section 6254(a) of the Act.

*3 Under section 6254(k) public records are not subject to disclosure if their disclosure is exempted by state law. Section 54957.2 provides:

'The legislative body of a local agency may, by ordinance or resolution, designate a clerk or other officer or employee of the local agency who shall then attend each executive session of the legislative body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7, Title 1), and shall be kept confidential. The minute book shall be available only to members of the legislative body or, if a violation of this chapter is alleged to have occurred at an executive session, to a court of general jurisdiction wherein the local agency lies. Such minute book may, but need not, consist of a recording of the executive session.'

Thus, tape recording of executive sessions of a city council meeting are exempted from the disclosure provisions of the Act by sections 6254(k) and 54957.2.

The right to inspect a public record is established by section 6253 of the Act which provides:

'Public records are open to inspection at all times during the office hours of the state or local agency and every citizen has a right to inspect any public record, except as hereafter provided. Every agency may adopt regulations stating the procedures to be followed when making its records available in accordance with this section.'

While inspection of a writing normally reveals its informational content, a visual inspection of a tape recording does not. In 57 Ops.Cal.Atty.Gen. 307, 311 (1974) we considered whether the right to inspect a microfilmed public record included the right to view the same through a microfilm 'reader' provided by the public agency. We concluded that it did observing that otherwise 'the public would have to bring their own mechanical device to get access to the information in the record' and this obviously was not the legislative intent. We reiterate the underlying rationale for that conclusion, that a person's right to inspect a public record includes the right to gain access to the informational content of such record without having to provide the mechanical equipment necessary to gain such access. We conclude that a person's right to inspect a tape recording of a public session of a city council meeting, includes the right to listen to the tape using

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equipment provided by the city.

The right to obtain a copy of a public record is governed by sections 6256 and 6257 which provide:

Section 6256. 'Any person may receive a copy of any identifiable public record or copy thereof. Upon request, an exact copy shall be provided unless impracticable to do so. Computer data shall be provided in a form determined by the agency.'

Section 6257. 'A request for a copy of an identifiable public record or information produced therefrom, or a certified copy of such record, shall be accompanied by payment of a reasonable fee or deposit established by the state or local agency, or the prescribed statutory fee, where applicable.'

*4 Section 6256 expressly provides that the right to receive a copy of a public record includes the right to be provided with an 'exact copy' unless this is impractical. An exact copy of a tape recording is a duplicate tape with the same information recorded thereon. Whether the city must provide such a duplicate tape on payment of the requisite fee depends on whether it is practical for the city to do so. This is a question of fact in each case. The availability of equipment, facilities and personnel to make such a duplicate would be important factors to determine practicality. If the person requesting the copy provides his own equipment to record the sound while he listens to the original tape a practical means of providing the exact copy is thus provided. We conclude that the right to receive a copy of a tape recording which is a public record includes the right either to be provided with a duplicate copy of the tape provided by the public agency on payment of the requisite fee where this is practical or to record the sound on equipment provided by the requester while the original tape is being played in response to a request to inspect the tape where it is impractical for the city to provide such duplicate.

Nothing in the California Public Records Act or any other law of which we are aware requires a public agency to transform a public record in one form into a record or copy in an entirely different form on the request of the person requesting a copy. There is no duty imposed by law on the city clerk to transcribe the tape recording of a city council meeting into a written record of every word spoken at such meeting. Under section 40801 the clerk's duty is to 'keep an accurate record of the proceeding' of the legislative body in books devoted exclusively to such purposes. This does not require a verbatim account. Minutes recording the substance of the proceedings is all that section 40801 requires. (Cf. § 54957.2.) We conclude that the right to inspect a tape recording which is a public record does not include the right to purchase a transcript of the tape.

Where, however, the city prepares a transcript of the tape recording for other purposes, such a transcript may become an independent public record under the provisions of the California Public Records Act. In such case a person would have a right to receive a copy of such transcript under section 6256 on payment of the requisite fee.

We should note that both the right to inspect and to receive copies of public records under the Act are subject to an implied rule of reason. The custodian of public records may impose regulations necessary to protect the safety of the records against theft, mutilation or accidental damage, to prevent inspection from interfering with the orderly function of his office and its employees, and

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generally to avoid chaos in record archives. (Bruce v. Gregory (1967) 65 Cal.2d 666, 676.) The same rule of reasonableness also applies to the right to receive copies. While access to all public records must be provided public agencies may impose reasonable restrictions on general requests for voluminous classes of documents restricting copies to specific requests for copies of specific documents. (Rosenthal v. Hansen (1973) 34 Cal.App.3d 754, 761.)

*5 When may a tape recording of a city council meeting made by the city clerk to facilitate the preparation of the minutes be destroyed? Nothing in the Public Records Act purports to govern the destruction of records. As stated in Los Angeles Police Dept. v. Superior Court (1977) 65 Cal.App.3d 661, 668:

'[The] Act itself does not undertake to prescribe what type of information a public agency may gather, nor to designate the type of records such an agency may keep, nor to provide a method of correcting such records. Its sole function is to provide for disclosure.'

The destruction of public records is governed by a much older statute, namely sections 6200 and 6201 (formerly Pen. Code, § 113) which provide:

Section 6200

'Every officer having the custody of any record, map, or book or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of stealing, willfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, map, book, paper, or proceeding, or who permits any other person to do so, is punishable by imprisonment in the state prison for two, three, or four years.'

Section 6201

'Every person not an officer referred to in Section 6200, who is guilty of any of the acts specified in that section, is punishable by imprisonment in the state prison, or in a county jail not exceeding one year, or by a fine not exceeding one hundred dollars ($100), or by both such fine and imprisonment.'

Exceptions to this prohibition against the destruction of public records have been enacted which authorize certain public agencies to destroy public records in specified circumstances. The staute applicable to cities is section 34090 which provides as follows:

'Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may destroy any city record, document, instrument, book or paper, under his charge, without making a copy thereof, after the same is no longer required.

'This section does not authorize the destruction of:

'(a) Records affecting the title to real property or liens thereon.

'(b) Court records.

'(c) Records required to be kept by statute.

'(d) Records less than two years old.

'(e) The minutes, ordinances, or resolutions of the legislative body or of a city board or commission.

'This section shall not be construed as limiting or qualifying in any manner the authority provided in Section 34090.5 for the destruction of records, documents, instruments, books and papers in accordance with the procedure therein prescribed.' [FN2]

We must first determine whether the tape recordings of city council meetings made

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by the city clerk are public records within the meaning of these statutes. Normally, when similar words or phrases are used in two statutes in para materia they will be construed to have the same meaning. (Hunstock v. Estate Development Corp. (1943) 22 Cal.2d 205.) This rule of construction is inapplicable however where the Legislature has indicated that the words or phrases used in the two statutes have different meanings. A number of cases hereinafter referred to have interpreted the word 'record' as it is used in sections 6200 and 6201. These cases preceded the enactment of the Public Records Act in 1968. We believe it is significant that the definitions contained in section 6252 of the Act, spra, including the definition of 'public records' are limited in their application by the introductory phrase 'as used in this chapter: . . .' (Emhasis added.) Thus the Legislature expressly chose not to adopt the meaning of the word 'record' as it was used in sections 6200 and 6201 and interpreted by the cases. At the same time the Legislature also made it clear that the statutory definition of 'public records' in the Act was not intended to change the interpretation of those words used in other statutes.

*6 To ascertain the meaning of the word 'record' as it is used in sections 6200 and 6201 we must apply the same rules of statutory construction used by the courts. The applicable rules were summarized in Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222, 230 as follows:

'We begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent the court turns first to the words themselves for the answer. We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. If possible, significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose; a construction making some words surplusage is to be avoided. When used in a statute words must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.' (Citations and quotations omitted.)

The word 'record' is not defined in sections 6200, 6201, or 34090. The dictionary defines the noun 'record' as something that serves to record and the verb 'record' to make an objective lasting indication of in some mechanical or automatic way. The noun is more specifically defined as something to which sound has been transferred by mechanical, usually electronic means and so registered as to be capable of subsequent reproduction by a specially designed instrument. (Webster's Third New Internat. Dict., p. 1898.) We have found no case which defines 'city record' as those words are used in section 34090. A number of cases have defined the word 'record' as it is used in sections 6200 and 6201. In People v. Tomalty (1910) 14 Cal.App. 224, 231, the court, in construing Penal Code section 113 (now § 6200) stated:

'In order that an entry or record of the official acts of a public officer shall be a public record it is not necessary that such record be expressly required by law to be kept, but it is sufficient if it be necessary or convenient to the discharge of his official duty. 'Any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record' (citation).' (Emphases added.)

The Tomalty case has been cited with approval in People v. Shaw (1941) 17 Cal.2d

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778, 811; People v. Pearson (1952) 111 Cal.App.2d 9, 18; and Loder v. Municipal Court (1976) 17 Cal.3d 859, 863-864. The Person case amplified the Tomalty definition of public record with these words:

'A paper written by a public official in the performance of his duties or in recording the efforts of himself and those under his command or written plans of future work is a public record and is properly in the keeping of the office.' (Emphasis added.)

*7 People v. Olson (1965) 232 Cal.App.2d 480, 486 provided further definition of public records as used in section 6200 (and Pen. Code, § 799, the statute of limitations referring thereto) stating:

The mere fact that a writing is in the possession of a public officer or a public agency does not make it a public record.' (Citing cases.)

'A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference.' (Citing cases.)

In an attempt to synthesize a definition of the word 'record' as it is used in sections 6200 and 6201 from the ordinary import of the word as revealed by the dictionary and the judicial interpretations cited above, we commence with the thing which is the physical substance of the record. A thing which serves as an objective lasting indication of a writing, event or other information is a record thereof under the broader dictionary definitions. We note that section 6200 is directed at 'any record.' (Emphasis added.) We believe the use of the word 'any' evidences a legislative intention to include every kind of thing which could serve as a record regardless of its physical form.

However, not every thing which could serve as a record is covered by sections 6200 and 6201. Looking to the words used in section 6200 we see that only those records which are in the custody of an officer are covered by that section. The words 'filed or deposited in any public office' indicate that the officers referred to therein are public officers.

Further limitations on the scope of the 'records' covered by sections 6200 and 6201 are derived from the definition of public records announced in People v. Tomalty, supra, 14 Cal.App. 224. In that case the court stated that 'any record required by law to be kept by an officer, or which he keeps as necessary or convenient to the discharge of his official duty, is a public record.' We see in this language alternative requirements. If a law requires the record to be kept it is a 'record' without more, within the meaning of sections 6200 and 6201. But even if there is no such law it may still be a public record under the Tomalty definition. That definition provides a two pronged test, the first directed at the informational content of the record, and the second at the conduct of the officer with respect to the record. With respect to informational content Tomalty requires that the record must be necessary or convenient to the discharge of the officer's official duties. With respect to the officer's conduct, Tomalty requires that he 'keep' the record.

The 'keeping' requirement of Tomalty, for records not required by law to be kept, requires further analysis. It suggests that things which could serve as records which were not meant to be kept by the officer in whose custody they are would not be public records under the Tomalty definition. Such things as pencilled drafts,

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stenographic notes and the like come to mind. We think it unlikely that the Legislature intended to make the destruction of such things a felony when it enacted sections 6200 and 6201. We believe the Legislature had in mind those records which are made or retained as a memorial of their informational content for public reference. This is suggested by the following language in the Tomalty case:

*8 'The purpose of our statute seems to be to protect the public archives from destruction, mutilation, alteration and falsification, and not to conclude or affect private rights. This is apparent by the omission, as an ingredient of the offense, of any fraudulent purpose or intent to injure anyone.'

We think it is also suggested by the language from People v. Olson, supra, 232 Cal.App.2d 480 that:

'A public record, strictly speaking, is one made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference.'

The means used to prepare preliminary memoranda can be as varied as the means used to preserve the contents of a final document. The only essential differences are the purposes for which they are prepared or retained and the manner of their use. Thus, to determine whether a thing is a public record under the Tomalty definition we must look not to its physical nature but rather to its informational content, the purpose for which it was prepared or retained, and the manner of its use. We conclude that for a thing, not required by law to be kept, to be a record within the meaning of sections 6200 and 6201 it must have been made or retained by the public officer for the purpose of preserving its informational content for future reference. We believe this requirement was implicit in the use of the verb 'keep' in the Tomalty definition, and thus represents not a change in, but only a more specific articulation of that definition.

To summarize, we conclude that a 'record' within the meaning of sections 6200 and 6201, as interpreted by judicial decisions, is properly defined as a thing which constitutes an objective lasting indication of a writing, event or other information, which is in the custody of a public officer and is kept either (1) because a law requires it to be kept or (2) because it is necessary or convenient to the discharge of the public officer's duties and was made or retained for the purpose of preserving its informational content for future reference.

Applying this definition of record to the tape recording of city council meetings by the city clerk to facilitate the preparation of the minutes we have no doubt that such a tape recording is a thing which constitutes an objective lasting indication of an event which is in the custody of a public officer. As we noted at the outset, we know of no law which requires such tape recordings to be made or kept. We have also noted that a tape recording of a city council meeting would be a convenient aid in the discharge of the city clerk's duty to prepare the minutes of the city council meeting. What is not clear however in the request for this opinion is whether the tape recording of the city council meeting was made and retained solely for the purpose of preparing the minutes or whether it was made or retained for the additional purpose of preserving its informational content for public reference. This is a question of fact which cannot be resolved in this opinion. We must therefore state our conclusion in the alternative. If the purpose for which the tape recording of the city council meeting was made and retained is solely to assist the city clerk in the preparation of the minutes of the city council meeting it is not a 'record' within the meaning of sections 6200 and 6201.

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On the other hand, if the tape recording was made or retained for the additional purpose of preserving its informational content for public reference it is a 'record' within the meaning of section 6200 and 6201.

*9 If a tape recording is a 'record' within the meaning of sections 6200 and 6201 it may lawfully be destroyed only if and in the manner expressly authorized by state law. Section 34090 provides such authority in the case of cities. The mode prescribed is the measure of the power. (Peopel v. Zamora (1980) 28 Cal.3d 88, 98.)

With respect to charter cities we note that article XI, section 5(a), provides:

'It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.'

Whether a charter city is subject to the state laws governing the destruction of public records depends on whether that subject is a 'municipal affair.' This question was considered and resolved in the negative in the case of In re Shaw (1939) 32 Cal.App.2d 84. In that case the defendants had been convicted of violating Penal Code section 113 and sought their release on habeas corpus claiming that Penal Code section 113 had been superseded by a provision in the Los Angeles city charter. The court denied the writ stating at page 86:

'This contention is not well founded for the reason that the acts here charged for many years have been denounced by the laws of the State of California and designated as a felony, and it cannot now be said that the commission of such acts is strictly and solely a municipal affair of the city of Los Angeles.

'The people of the state are primarily interested in the prevention of such crimes as are here charged, and the fact that the freeholders' charter of the city of Los Angeles designates some parts of the acts charged in the indictments as a misdemeanor only, cannot save the petitioners from a prosecution for the commission of the felony charged under the state law.'

We conclude that a tape recording of a city council meeting by a city clerk may lawfully be destroyed at any time if the purpose for which it was made and retained was solely to facilitate the preparation of the minutes of the meeting. If the tape was made or retained for the additional purpose of preserving its informational content for public reference it may not lawfully be destroyed except as expressly authorized by state law.

GEORGE DEUKMEJIAN

Attorney General

JACK R. WINKLER

Assistant Attorney General

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[FN1]. Section references are to the Government Code unless otherwise indicated.

[FN2]. Section 34090.5 provides for the destruction of original records after photographic copies suitable for permanent storage have been made.

64 Ops. Cal. Atty. Gen. 317, 1981 WL 126747 (Cal.A.G.)

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Supreme Court of California,
In Bank.

The PEOPLE, Plaintiff and Respondent,
v.
Harold Ray MEMRO, Defendant and Appellant.

No. S004770

Nov. 30, 1995.
As Modified on Denial of Rehearing Feb. 14, 1996.

Defendant was convicted in the Superior Court, Los Angeles County, No. A 445665, John A. Torribio, J., of first and second-degree murder. Appeal was automatic. The Supreme Court, Mosk, J., held that: (1) trial court could excuse prospective jurors on its own motion; (2) reprosecution did not violate double jeopardy; (3) confession was voluntary; (4) jailhouse informant was not government agent; (5) failure to preserve evidence and denial of sanction did not violate due process; (6) probable cause existed for arrest; (7) denial of severance motion was not abuse of discretion; (8) defendant was not entitled to substitute counsel; (9) photographs of magazines portraying youths were admissible; (10) defendant was not entitled to instructions on alleged lesser included offenses; (11) prosecutor did not comment on failure to testify; (12) prosecutor could argue during penalty phase that life imprisonment without possibility of parole was legally not worse than death; (13) prior violent conduct could be described as cruel or inhuman bodily injury on child; (14) defendant was not entitled to instruction on lingering doubt; and (15) trial court should not have considered probation report in ruling on motion to modify verdict.

Affirmed.

Kennard, J., concurred and filed opinion in which Werdegar, J., concurred.

West Headnotes

[1] Jury 108
230k108 Most Cited Cases

Trial court could, on its own motion, excuse for cause prospective jurors who indicated that they did not believe in death penalty and would refuse to convict of first-degree murder in order to avoid penalty phase; ability to follow law and oaths at guilt phase could be found to be substantially impaired.

[2] Jury 108
230k108 Most Cited Cases

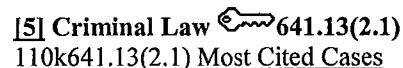
Jurors must be excused if their views on capital punishment would prevent or substantially impair performance of their duties in accordance with instructions and their oath.

[3] Jury 142
230k142 Most Cited Cases

Failure to object does not waive right to challenge decision to excuse prospective juror for views on death penalty.

[4] Jury 142
230k142 Most Cited Cases

Failure to object to decision to excuse prospective juror because of views on death penalty suggests defense attorney's concurrence in court's assessment of each venireperson's firm and sincere expression of inability to impose death penalty.


[5] Criminal Law 641.13(2.1)
110k641.13(2.1) Most Cited Cases

Attorneys did not render ineffective assistance by failing to question prospective jurors who, in response to court questions, indicated opposition to death penalty or provided basis for finding substantial impairment of ability to follow the law; questioning by counsel would have superfluous, and defendant was not prejudiced since questioning would not have changed court's decision to exclude prospective jurors. U.S.C.A. Const.Amend. 6.

[6] Double Jeopardy 107.1
135Hk107.1 Most Cited Cases

Finding that felony-murder special circumstance was not true in capital murder prosecution was not double jeopardy bar to reprosecution for first-degree murder on theory of felony-murder or premeditation. U.S.C.A. Const.Amend. 5; West's Ann.Cal. Const. Art. 1, § 15; West's Ann.Cal.Penal Code § § 189, 288; St.1977, c. 316, § 9(c)(3).

[7] Judgment 751

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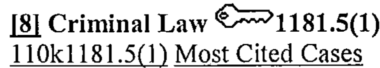
228k751 Most Cited Cases

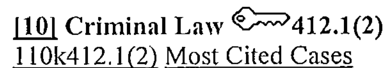
Even if collateral estoppel applied to further proceedings in same litigation, finding that felony-murder special circumstance was not true in capital murder prosecution would not bar reprosecution for first-degree murder on theory of felony-murder or premeditation; it would at most bar relitigation of special circumstance. West's Ann.Cal.Penal Code § § 189, 288; St.1977, c. 316, § 9(c)(3).


[8] Criminal Law 1181.5(1)
110k1181.5(1) Most Cited Cases

Remanding case without delimiting scope of permissible charges after reversal of capital murder conviction did not violate constitutional rights under Fifth, Sixth, Eighth, and Fourteenth Amendments; defendant did not seek rehearing or modification of decision on ground complained of, and felony-murder was not realleged as special circumstance. U.S.C.A. Const.Amends. 5, 6, 8, 14; West's Ann.Cal.Penal Code § § 189, 288; St.1977, c. 316, § 9(c)(3).

[9] Criminal Law 531(3)
110k531(3) Most Cited Cases

Police testimony that defendant was not threatened, was offered no inducement, and waived rights to counsel and silence supported voluntariness of confession beyond reasonable doubt, even though defendant testified that police officer asked defendant if he thought he could win fight against muscular officer in room during questioning, commented on muscular officer's ferociousness, and promised decision not to file charges in exchange for cooperation and even though defense witnesses testified about police brutality toward arrestees particularly during interrogation. U.S.C.A. Const.Amend. 5.


[10] Criminal Law 412.1(2)
110k412.1(2) Most Cited Cases

[10] Criminal Law 412.2(1)
110k412.2(1) Most Cited Cases

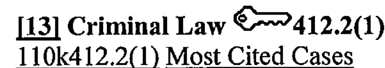
Evidence supported conclusion that jailhouse informant was not acting as "government agent" when defendant revealed that statements to police were voluntary, and, thus, admitting informant's testimony about defendant's revelation did not violate Sixth Amendment right to counsel, even though informant had history of testifying for government and may have been seeking lenience from parole board; informant testified for selfish goals, and promise of safety during incarceration was made after informant obtained defendant's statements. U.S.C.A. Const.Amend. 6.

[11] Criminal Law 412.2(1)
110k412.2(1) Most Cited Cases

"Government agent" whose testimony about indicted defendant's incriminating and deliberately elicited statements violates Sixth Amendment right to counsel includes jailhouse informant whom state has hired to obtain incriminating statements, even if they are made voluntarily and without solicitation. U.S.C.A. Const.Amend. 6.

[12] Criminal Law 1153(1)
110k1153(1) Most Cited Cases

Allowing jailhouse informant's testimony to be introduced presents essentially factual question reviewed for abuse of discretion.


[13] Criminal Law 412.2(1)
110k412.2(1) Most Cited Cases

History of testifying for government does not automatically make informant "state agent" whose testimony about indicted defendant's incriminating and deliberately elicited statements violates Sixth Amendment right to counsel; no constitutional question arises unless informant is agent of state when eliciting the statements that would be subject of later testimony. U.S.C.A. Const.Amend. 6.

[14] Constitutional Law 268(5)
92k268(5) Most Cited Cases

[14] Criminal Law 700(9)
110k700(9) Most Cited Cases

Defendant failed to show bad faith in police department's failure to preserve evidence consisting of personnel records of interrogators who allegedly coerced confession, and, thus, destruction of them did not violate due process; although records were destroyed two months after oral argument in appeal concerning motion for discovery, they were kept three years beyond two-year statutory period for preservation. U.S.C.A. Const.Amends. 5, 14; West's Ann.Cal.Gov.Code § 34090(d).

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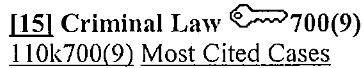
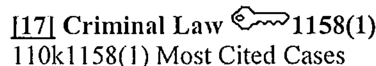
[15] Constitutional Law 268(5)
92k268(5) Most Cited Cases


[15] Criminal Law 700(9)
110k700(9) Most Cited Cases

Trial court's refusal to impose sanction for police department's failure to preserve evidence consisting of personnel records of interrogators who allegedly coerced confession was not abuse of discretion or violation of due process; although records were destroyed two months after oral argument in appeal concerning motion for discovery, they were kept three years beyond two- year statutory period for preservation, and court could conclude that department did not realize possibility of need for records after court in prior trial denied discovery motion. U.S.C.A. Const.Amends. 5, 14; West's Ann.Cal.Gov.Code § 34090(d).

[16] Criminal Law 1153(1)
110k1153(1) Most Cited Cases

Deferential standard applied to review of trial court's decision to consider secondary evidence of records sought by defendant, but destroyed by police department.


[17] Criminal Law 1158(1)
110k1158(1) Most Cited Cases

Trial court's inquiry whether evidence was destroyed in good faith or bad faith is essentially factual; therefore, proper standard of review is substantial evidence.

[18] Criminal Law 700(9)
110k700(9) Most Cited Cases

Defendant had burden to show bad faith in police department's failure to preserve evidence consisting of personnel records of interrogators who allegedly coerced confession.

[19] Criminal Law 627.6(6)
110k627.6(6) Most Cited Cases

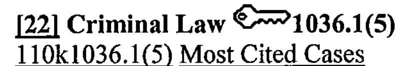
Defendant was not entitled to discovery of personnel records of partners of police officers who interrogated him and allegedly coerced confession, even though partners trained with the interrogators; trial court could find insufficient connection between training sessions or other activities in which officers had mutually participated and circumstances surrounding interrogation.

[20] Criminal Law 627.6(6)
110k627.6(6) Most Cited Cases

Trial courts are granted wide discretion when ruling on motion to discover personnel records of police officers who trained or otherwise had substantial contacts with interrogating officers that allegedly coerced confession.

[21] Criminal Law 412.2(5)
110k412.2(5) Most Cited Cases

Defendant's request to sweep interrogation room for concealed electronic recording devices just before confession did not indicate failure to make knowing and intelligent waiver of rights to silence and counsel, since any mistaken belief by defendant that he could talk privately without statements being used against him was abandoned when defendant acceded to police officer's statement that other officers would have to return for resumption of interrogation. U.S.C.A. Const.Amends. 5, 6.


[22] Criminal Law 1036.1(5)
110k1036.1(5) Most Cited Cases

Defendant failed to preserve issues regarding admissibility of confessions by failing to raise issues before trial court.

[23] Criminal Law 1166(10.10)
110k1166(10.10) Most Cited Cases

Any intentional interference with right to counsel by seizing and then losing defendant's notes and annotated transcripts from prior trial did not prejudice defendant and did not entitle him to dismissal of information; case against defendant centered on detailed confessions, court could refuse to believe that defendant would forget about witness casting doubt on authenticity of confessions, no attorney-client communications were revealed, and prosecutor stated that no information from the records was known to prosecution or police. U.S.C.A. Const.Amend. 6.

[24] Criminal Law 1148
110k1148 Most Cited Cases

Denial of motion to dismiss information in furtherance of justice is reviewed for abuse of discretion. West's Ann.Cal.Penal Code § 1385.

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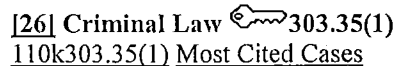
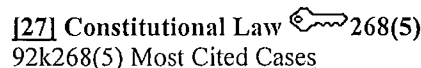
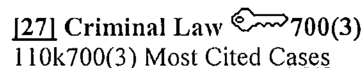
[25] **Criminal Law 1158(1)**
110k1158(1) Most Cited Cases

Underlying basis for ruling that facts do or do not support claim of state interference with right to counsel is reviewed for substantial evidence. U.S.C.A. Const.Amend. 6.

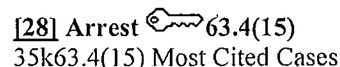

[26] **Criminal Law 303.35(1)**
110k303.35(1) Most Cited Cases

Accepting offers of proof, rather than hearing testimony of witnesses, in ruling on motion to dismiss for seizure of defense papers did not violate defendant's constitutional rights in capital murder prosecution; no disputed material issues of fact were shown, and trial court adopted state of record favorable to defendant. U.S.C.A. Const.Amends. 5, 6, 8, 14.


[27] **Constitutional Law 268(5)**
92k268(5) Most Cited Cases


[27] **Criminal Law 700(3)**
110k700(3) Most Cited Cases

Undisclosed police records pointing to other suspects in murders were not material in capital murder prosecution based on defendant's detailed confessions, and, thus, failure to disclose the records did not violate due process as interpreted by *Brady* ; no reasonable probability existed that outcome would have differed if records had been disclosed. U.S.C.A. Const.Amends. 5, 14.


[28] **Arrest 63.4(15)**
35k63.4(15) Most Cited Cases

Defendant's conflicting statements as to whereabouts of child victim near time he vanished and defendant's admission to being in victim's company at about time he vanished provided probable cause and reasonable cause for warrantless arrest for kidnapping; inconsistent statements as to whereabouts had no discernable innocent meaning and strongly indicated consciousness of guilt. U.S.C.A. Const.Amend. 4; West's Ann.Cal.Penal Code § 836, subd. 3 (1991).

[29] **Criminal Law 665(1)**
110k665(1) Most Cited Cases

Police officers could be permitted to remain during hearing on suppression motion; defendant's only basis for excluding them was speculative and meritless contention that presence of all officers prejudiced opportunity to cross-examine officers effectively and to prove invalidity of arrest.

[30] **Criminal Law 394.6(5)**
110k394.6(5) Most Cited Cases

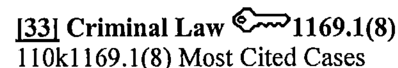
Evidence supported conclusion that defendant failed to show denial of opportunity to present all available evidence at original hearing on suppression motion, and, thus, defendant was not entitled to de novo hearing following reversal of prior conviction. West's Ann.Cal.Penal Code § 1538.5.

[31] **Criminal Law 1158(4)**
110k1158(4) Most Cited Cases

Question of opportunity for full determination of suppression motion's merits at prior trial is essentially factual, and Supreme Court reviews for substantial evidence trial court's implicit ruling that there was such an opportunity. West's Ann.Cal.Penal Code § 1538.5.

[32] **Criminal Law 641.13(2.1)**
110k641.13(2.1) Most Cited Cases

Attorney seeking de novo hearing on suppression motion after reversal of prior conviction did not render ineffective assistance by failing to raise matter of one-hour discrepancy in police report; although police officer, in arresting defendant, listed perception that defendant was last person known to have seen child victim, defendant's inconsistent statements alone provoked strong suspicion that he had committed offense. U.S.C.A. Const.Amend. 6.


[33] **Criminal Law 1169.1(8)**
110k1169.1(8) Most Cited Cases

Any illegality in searching defendant's apartment allegedly without his consent was harmless in capital murder prosecution; although physical evidence recovered from apartment served to confirm certain details of defendant's confession, confessions amounted to almost whole of prosecution's case, and state proved guilt by overwhelming evidence.

[34] **Criminal Law 1158(4)**
110k1158(4) Most Cited Cases

When reviewing ruling on unsuccessful motion to exclude evidence, Supreme Court defers to trial

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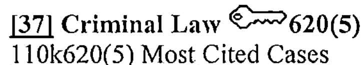
court's factual findings, upholding them if they are supported by substantial evidence, but Court then independently reviews court's determination that search did not violate Fourth Amendment. U.S.C.A. Const.Amend. 4.

[35] Criminal Law **620(6)**
110k620(6) Most Cited Cases

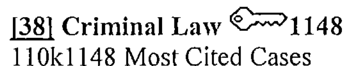
Defendant was not entitled to severance of counts alleging first and second- degree murder of children from count alleging first-degree murder of child two years later; in prior trial defendant had relied on psychiatric defense, prosecution could introduce evidence of one killing to rebut that anticipated defense, prosecution's theory was that defendant's modus operandi was to seek out boys to fulfill sexual desires, and trial court did not abuse discretion in finding no cross-admissibility consideration favoring severance. West's Ann.Cal.Penal Code § § 954, 1538.5; West's Ann.Cal.Evid.Code § 1101(b).

[36] Criminal Law **620(5)**
110k620(5) Most Cited Cases

Sandoval criteria for ruling on severance motion should not be misunderstood as being equally significant; any inference of prejudice is dispelled if there is cross-admissibility so that evidence of each charge would be admissible in separate trial on the others. West's Ann.Cal.Penal Code § 954.1; West's Ann.Cal.Evid.Code § 1101.

[37] Criminal Law  **620(5)**
110k620(5) Most Cited Cases

Cross-admissibility suffices to negate prejudice from denial of severance, but it is not needed for that purpose. West's Ann.Cal.Penal Code § 954.1; West's Ann.Cal.Evid.Code § 1101.

[38] Criminal Law  **1148**
110k1148 Most Cited Cases

Ruling on denial of motion for severance is reviewed for abuse of discretion.

[39] Courts **26**
106k26 Most Cited Cases

Court abuses discretion when its ruling falls outside bounds of reason.

[40] Criminal Law **1137(8)**
110k1137(8) Most Cited Cases

Defendant waived any claim of error, when, at resumed session almost three weeks after initial hearing on motion to reconsider, he stated that, because prosecution already had relevant materials, he no longer required closed hearing.

[41] Criminal Law **1192**
110k1192 Most Cited Cases

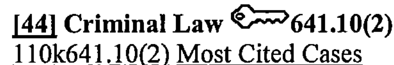
Trial court did not abuse discretion by granting continuances, rather than dismissing capital murder charges, after remittitur; nothing indicated that attorney's need to serve other clients prompted request for continuances. West's Ann.Cal.Penal Code § 1382.

[42] Criminal Law **1192**
110k1192 Most Cited Cases

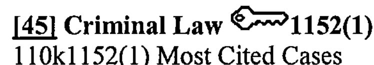
Decision to grant continuances extending 60-day period for speedy trial after filing of remittitur in trial court is reviewed for abuse of discretion. West's Ann.Cal.Penal Code § 1382.

[43] Criminal Law **641.3(4)**
110k641.3(4) Most Cited Cases

Sixth Amendment did not require independent counsel for hearings on motions to dismiss charges and to remove counsel. U.S.C.A. Const.Amend. 6.

[44] Criminal Law  **641.10(2)**
110k641.10(2) Most Cited Cases

Attorney's concession during closing argument that defendant killed victim and defendant's view that he did not like his lawyers and did not think highly of them did not entitle defendant to substitution of appointed attorneys in capital murder prosecution; defendant's confession would have made any argument that he did not kill victim wholly unpersuasive, and counsel were wise to maintain credibility with jury by acknowledging the obvious. U.S.C.A. Const.Amend. 6.

[45] Criminal Law  **1152(1)**
110k1152(1) Most Cited Cases

Rulings on *Marsden* motion for appointment of new counsel are reviewed for abuse of discretion.

[46] Constitutional Law **268.1(5)**

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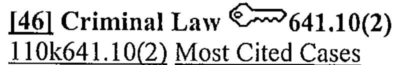
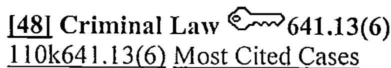
92k268.1(5) Most Cited Cases


[46] **Criminal Law 641.10(2)**
110k641.10(2) Most Cited Cases

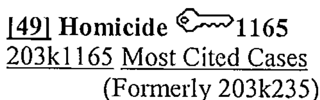
Trial court's refusal to appoint independent counsel to help defendant prosecute *Marsden* claims for substitution of appointed attorneys did not violate due process or right to effective assistance of counsel; trial court was required to do no more than listen to and evaluate defendant's claim that counsel were failing to perform adequately. U.S.C.A. Const.Amends. 5, 6, 14.

[47] **Criminal Law 1037.1(1)**
110k1037.1(1) Most Cited Cases

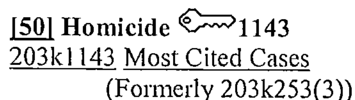
Claim that police department failure to preserve photographs undermined right to fair trial was not preserved since defendant was satisfied with stipulation of photographs' content and significance.


[48] **Criminal Law 641.13(6)**
110k641.13(6) Most Cited Cases

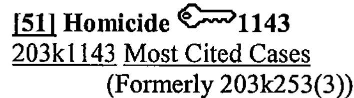
Attorney did not render ineffective assistance by stipulating to content and significance of photographs lost by police department, i.e., that witness identified individuals other than defendant as having been at crime scene with victims on night they were killed. U.S.C.A. Const.Amend. 6.


[49] **Homicide 1165**
203k1165 Most Cited Cases
(Formerly 203k235)

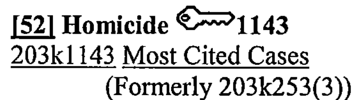
Evidence supported finding of attempted or actual lewd or lascivious acts with child under age 14 and, therefore, supported conviction for first-degree murder on felony-murder theory; defendant confessed that he lured victim to his apartment to photograph him in the nude, jury could infer that defendant disrobed victim while alive with lewd or lascivious intent, and jury received evidence of defendant's sexual interest in youths, including pornographic magazines and photographs featuring young boys in the nude. West's Ann.Cal.Penal Code § § 189, 288.


[50] **Homicide 1143**
203k1143 Most Cited Cases
(Formerly 203k253(3))

Evidence in prosecution for first-degree murder supported conclusion that defendant acted with premeditation and deliberation in fatally cutting child victim's throat from behind to prevent him from identifying defendant as killer of victim's friend; bodies were found 178 feet apart, and defendant had to run from friend's position to that of victim. West's Ann.Cal.Penal Code § § 187, 189; CALJIC 2.91.


[51] **Homicide 1143**
203k1143 Most Cited Cases
(Formerly 203k253(3))

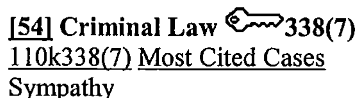
Evidence in prosecution for first-degree murder supported conclusion that defendant acted with premeditation and deliberation in fatally strangling child victim after tying his hands with masking tape; jury could have concluded that deeds required reelection and consumed some time and that victim was killed to prevent him from later identifying defendant as captor and sexual exploiter. West's Ann.Cal.Penal Code § § 187, 189.


[52] **Homicide 1143**
203k1143 Most Cited Cases
(Formerly 203k253(3))

Method of killing alone can sometimes support conclusion that evidence suffices for finding of premeditated, deliberate murder. West's Ann.Cal.Penal Code § § 187, 189.

[53] **Criminal Law 438(2)**
110k438(2) Most Cited Cases

Photographs of young boys and pornographic magazines containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult were admissible to show intent to molest young boy in prosecution for first-degree murder on felony-murder theory; although photographs were not sexually explicit in the abstract, jury could infer from them that defendant had sexual attraction to young boys and intended to act on it. West's Ann.Cal.Evid.Code § 1101(b); West's Ann.Cal.Penal Code § § 187, 189.


[54] **Criminal Law 338(7)**
110k338(7) Most Cited Cases
Sympathy

Probative value of photographs of young boys and pornographic magazines containing sexually explicit stories, photographs, and drawings of males ranging in age from prepubescent to young adult outweighed

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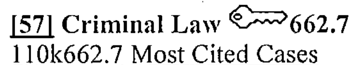
prejudicial effect in prosecution for first-degree murder on felony-murder theory; evidence showed intent to molest young boy. West's Ann.Cal.Evid.Code § 352.

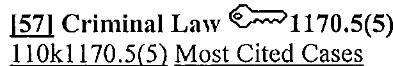
[55] **Criminal Law 438(6)**
110k438(6) Most Cited Cases

Prejudicial effect of photographs of murder victims at crime scenes in coroner's office was outweighed by probative value to show malice and circumstances surrounding homicides. West's Ann.Cal.Evid.Code § 352.

[56] **Criminal Law 438(7)**
110k438(7) Most Cited Cases

Court enjoys broad discretion in deciding whether prejudice from autopsy photograph substantially outweighs probative value. West's Ann.Cal.Evid.Code § 352.


[57] **Criminal Law 662.7**
110k662.7 Most Cited Cases


[57] **Criminal Law 1170.5(5)**
110k1170.5(5) Most Cited Cases

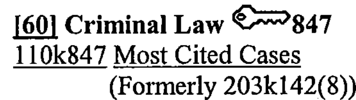
Refusal to permit cross-examination of child murder victim's parent about how much older victim's friends were did not prejudice defendant or violate confrontation clause in murder prosecution; although defendant claimed that inquiry into the area would have revealed other persons who might have been with victim on night of murders, the proposed impeachment was purely speculative. U.S.C.A. Const.Amend. 6.

[58] **Criminal Law 814(3)**
110k814(3) Most Cited Cases

In absence of witness identifying defendant as the killer, evidence suggesting that he might have been the killer did not entitle him to instruction that jury must be satisfied beyond a reasonable doubt of accuracy of identification of defendant as person who committed the offense. CALJIC 2.91.

[59] **Criminal Law 814(1)**
110k814(1) Most Cited Cases

Party is not entitled to instruction on theory for which there is no supporting evidence.


[60] **Criminal Law 847**
110k847 Most Cited Cases
(Formerly 203k142(8))

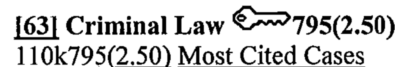
Defendant in prosecution for first-degree murder waived claim of surprise when prosecution sought instruction on felony-murder theory, where defendant did not move to reopen taking of evidence to present defense against the theory.

[61] **Criminal Law 641.13(2.1)**
110k641.13(2.1) Most Cited Cases

Attorneys did not render deficient performance and, therefore, did not render ineffective assistance, by failing to move to reopen case to challenge felony-murder theory for first-degree murder; it was plain to parties that prosecution was proceeding on theory of felony-murder. U.S.C.A. Const.Amend. 6.

[62] **Criminal Law 872.5**
110k872.5 Most Cited Cases

Defendant was not entitled to unanimous verdict as to particular manner in which felony-murder occurred and, therefore, was not entitled to unanimous verdict on nature of lewd or lascivious act committed or attempted against murder victim under age 14. West's Ann.Cal.Penal Code § § 189, 288.


[63] **Criminal Law 795(2.50)**
110k795(2.50) Most Cited Cases

Defendant in prosecution for first-degree murder on theory of felony-murder by actual or attempted lewd or lascivious act with victim under age 14 was not entitled to instruction on allegedly lesser included offense of misdemeanor child molestation; defendant confessed to bringing victim to his apartment to take nude pictures of him and admitted disrobing him although he stated that he did so after victim's death, and defendant interpreted evidence as not establishing any criminally lewd act or act of criminal annoyance, and there was no evidence that it would absolve defendant of lewd or lascivious act, but would not absolve him of misdemeanor child molestation. West's Ann.Cal.Penal Code § 288; § 647a (1981).

[64] **Criminal Law 795(2.1)**
110k795(2.1) Most Cited Cases

Defendant is entitled to instruction on lesser-included offense only if there is evidence which, if accepted

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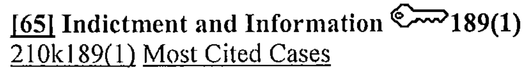
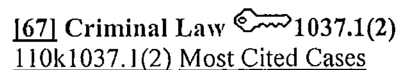
by trier of fact, would absolve defendant from guilt of greater offense, but not lesser. West's Ann.Cal.Penal Code § 647a (1981).


[65] Indictment and Information 189(1)
210k189(1) Most Cited Cases

Contributing to delinquency of minor is not lesser-included offense of performing lewd or lascivious act with child under 14. West's Ann.Cal.Penal Code § § 272, 288(a).

[66] Criminal Law 721(3)
110k721(3) Most Cited Cases

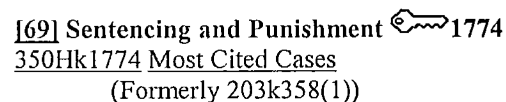
Prosecutor's closing argument that defendant would have mentioned possible accomplice noted in newspaper articles, if he were falsely confessing based on the articles, was not comment on failure to testify; rather, it was comment on discrepancies between newspaper accounts and defendant's confession. U.S.C.A. Const.Amend. 5.


[67] Criminal Law 1037.1(2)
110k1037.1(2) Most Cited Cases

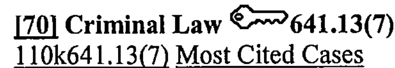
Defendant did not preserve challenge to prosecutor's closing argument as comment on failure to testify since defendant did not assign misconduct to remark one prosecutor made and there was no reason to believe that any harm could not have cured. U.S.C.A. Const.Amend. 5.

[68] Jury 24
230k24 Most Cited Cases

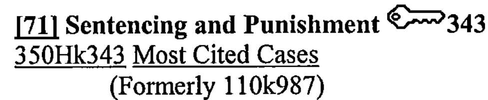
Prosecution had state constitutional right to jury trial in penalty phase of capital murder prosecution. West's Ann.Cal. Const. Art. 1, § 16; West's Ann.Cal.Penal Code § 190.4(c).


[69] Sentencing and Punishment 1774
350Hk1774 Most Cited Cases
(Formerly 203k358(1))

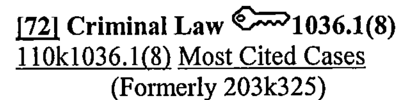
Defendant had no Eighth Amendment right to bench trial in penalty phase of capital murder prosecution joined with two nonmurder charges, even though defendant claimed that evidence relating to the killings would be highly inflammatory and would reveal inconsistent defenses, where the circumstances did not entitle defendant to severance of the charges. U.S.C.A. Const.Amend. 8.


[70] Criminal Law 641.13(7)
110k641.13(7) Most Cited Cases

Attorneys did not render ineffective assistance by presenting evidence in mitigation in penalty phase of capital murder prosecution, despite defendant's desire for death penalty. U.S.C.A. Const.Amend. 6; West's Ann.Cal. Const. Art. 1, § 15.


[71] Sentencing and Punishment 343
350Hk343 Most Cited Cases
(Formerly 110k987)

Constitutional right to be personally present with counsel was not violated by attorneys' refusal to aid defendant in quest to stop witnesses from testifying in mitigation in penalty phase of capital murder prosecution. West's Ann.Cal. Const. Art. 1, § 15.


[72] Criminal Law 1036.1(8)
110k1036.1(8) Most Cited Cases
(Formerly 203k325)

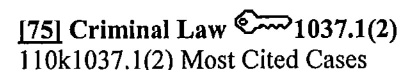
In penalty phase of capital murder prosecution, defendant failed to preserve challenge to evidence of prior attack, even though defendant successfully moved to exclude evidence of prior conviction for the attack.

[73] Criminal Law 1137(2)
110k1137(2) Most Cited Cases

Defendant's testimony that he wanted death penalty invited any error arising from the testimony in penalty phase of capital murder prosecution.

[74] Criminal Law 1036.2
110k1036.2 Most Cited Cases

Failure to object was fatal to challenge to cross-examination of defendant about whether he planned to appeal capital murder conviction and whether he anticipated quicker and more direct access to Supreme Court if given death penalty; since there was no suggestion of appellate correction of erroneous verdict, danger that jury would feel lesser sense of responsibility for death penalty was minimal.


[75] Criminal Law 1037.1(2)
110k1037.1(2) Most Cited Cases

By failing to assign misconduct, defendant did not preserve challenge to prosecutor's penalty phase

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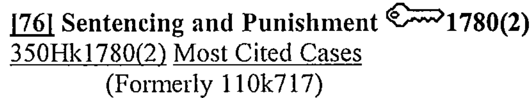
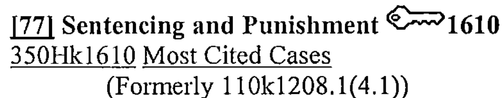
closing argument that life imprisonment without parole was not legally worse than death and that, if sentenced to life without possibility of parole, defendant would not sit around and contemplate his crimes; there was no reason to believe that admonition would not have cured any harm.



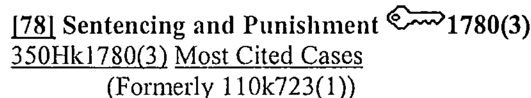
[76] Sentencing and Punishment 1780(2)
350Hk1780(2) Most Cited Cases
(Formerly 110k717)

Prosecutor could state during penalty phase of closing argument that life imprisonment without possibility of parole was legally not worse than death. West's Ann.Cal.Mil. & Vet.Code § 1672(a); West's Ann.Cal.Penal Code § § 128, 190.2(a), 190.3, 190.4(b).



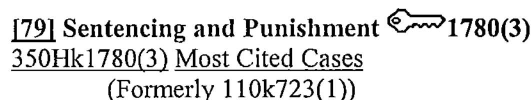
[77] Sentencing and Punishment 1610
350Hk1610 Most Cited Cases
(Formerly 110k1208.1(4.1))

Life imprisonment without possibility of parole is not worse than death as a legal matter. West's Ann.Cal.Mil. & Vet.Code § 1672(a); West's Ann.Cal.Penal Code § § 128, 190.2(a), 190.3, 190.4(b).



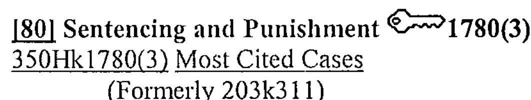
[78] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 110k723(1))

Defining prior violent criminal conduct as cruel or inhuman bodily injury on child, rather than assault, did not unduly inflame trier of fact or violate Eighth Amendment in penalty phase of capital murder prosecution; there was substantial evidence that the prior conduct was cruel or inhuman bodily injury on child. U.S.C.A. Const.Amend. 8; West's Ann.Cal.Penal Code § § 245(a)(1), 273d.



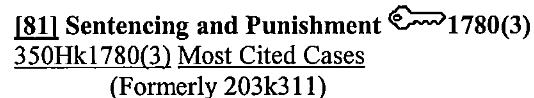
[79] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 110k723(1))

Providing definition of offense supported by substantial evidence cannot unduly inflame trier of fact in penalty phase of capital case. U.S.C.A. Const.Amend. 8.



[80] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

Lack of sua sponte instruction that jury must consider defendant's background as well as character of record in penalty phase of capital murder prosecution did not violate Eighth Amendment since jury was instructed to take into account any other circumstance which extenuates gravity of crime, even though it is not legal excuse of crime, and any sympathetic or other aspect of defendant's character or record as basis for sentence less than death. U.S.C.A. Const.Amend. 8; West's Ann.Cal.Penal Code § 190.3(k).

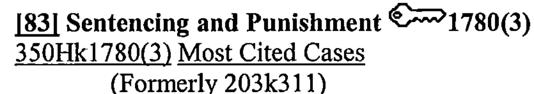


[81] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

Trial court had no sua sponte obligation to instruct on consequences of deadlock in penalty phase of capital murder prosecution.

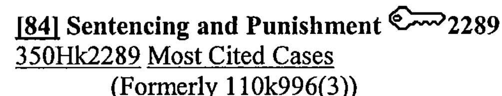
[82] Courts 97(1)
106k97(1) Most Cited Cases

Federal circuit court opinions do not bind California Supreme Court, but may serve as persuasive authority.



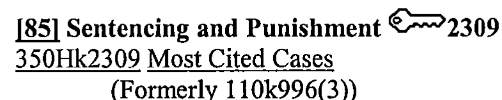
[83] Sentencing and Punishment 1780(3)
350Hk1780(3) Most Cited Cases
(Formerly 203k311)

Defendant was not entitled to instruction on lingering doubt as factor in mitigation in penalty phase of capital murder prosecution, since instruction to consider any other circumstance extenuating gravity of crime adequately supported presentation of evidence for argument that lingering doubt militated against death penalty. U.S.C.A. Const.Amend. 8; West's Ann.Cal.Penal Code § 190.3(k).



[84] Sentencing and Punishment 2289
350Hk2289 Most Cited Cases
(Formerly 110k996(3))

Trial court deciding motion for modification of death penalty could infer from defendant's demeanor as he testified at penalty phase that any remorse was short lived. West's Ann.Cal.Penal Code § § 190.3(k), 190.4(e).



[85] Sentencing and Punishment 2309
350Hk2309 Most Cited Cases
(Formerly 110k996(3))

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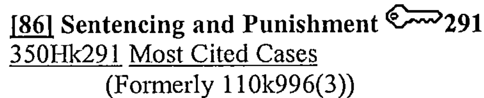
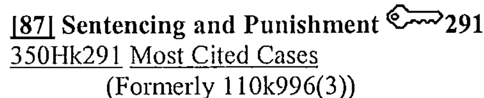
Court deciding motion for modification of death penalty need not orally recite all possible mitigating evidence. West's Ann.Cal.Penal Code § 190.4(e).


[86] **Sentencing and Punishment 291**
350Hk291 Most Cited Cases
(Formerly 110k996(3))

Trial court should not have considered probation report in ruling on motion to modify death penalty.


[87] **Sentencing and Punishment 291**
350Hk291 Most Cited Cases
(Formerly 110k996(3))

Trial court error in relying on probation report when ruling on motion to modify death penalty played no role in denial of motion; Supreme Court was required to assume that court was not improperly influenced, and defendant did not cite any part of report that might support assertion that considering report influenced court. West's Ann.Cal.Penal Code § 190.4(e).

*****227*810**1314** Thomas J. Nolan, Nolan & Armstrong, Palo Alto, Andrew H. Parnes, Ketchum, ID, for Appellant.

Edward T. Fogel, Office of the Attorney General, Los Angeles, for Respondent.

*****228** MOSK, Justice.

In *People v. Memro* (1985) 38 Cal.3d 658, 214 Cal.Rptr. 832, 700 P.2d 446 *(Memro I)*, we reversed a judgment imposing a death sentence ***811** under the 1977 death penalty statute. The district attorney filed a new information in Los Angeles County Superior Court on May 13, 1986, charging defendant with the murders of Scott Fowler and Ralph Chavez, Jr., in July 1976, and of Carl Carter, Jr., in October 1978. The information also contained a multiple-murder special-circumstance allegation.

A jury heard the evidence and found defendant guilty of the first degree murders of Carter and Chavez and of the second degree murder of Fowler. It found the special circumstance true. After a penalty trial, it returned a verdict of death and judgment was entered accordingly. This appeal proceeds automatically.

For reasons that will appear, we affirm the judgment.

FACTS

A jogger found the bodies of Scott Fowler and Ralph Chavez, Jr., sprawled 178 feet apart near a pond in John Anson Ford Park in Bell Gardens early on the morning of July 26, 1976. Fowler was 12 years old, Chavez 10. Each victim's throat had been cut with a sharp instrument. Witnesses testified that the boys had been fishing for hours the day before, staying well into the evening. They were placing their catch in a plastic gallon-size milk jug with the top excised so as to keep the handle intact. The police found the jug nearby, along with bologna wrappers, which were evidence of the boys' picnic. A trail of blood suggested that Chavez had tried to run after the attack. The medical examiner fixed the time of death at about midnight.

Carl Carter, Jr., was reported missing in South Gate on October 22, 1978. He was seven years old. His body was found some five days later amidst dense scrub alongside a road. He had been strangled to death--a cord was still bound around his neck. An enzyme found in his anal area suggested an attempt at sodomy.

I. Guilt Phase

A. The Prosecution's Case

The prosecution's case was based almost entirely on defendant's confession, which he gave during the last of three interrogations at the South Gate city jail.

The police became aware of defendant when they were interviewing individuals who might have information regarding Carter's whereabouts. ***812** They went to his apartment, and he introduced himself by saying, in the words of Officer William Sims, " 'I knew you were coming.... I ['ve] been in Atascadero [State Prison] ....' " At the time, there was wide awareness in South Gate that Carter was missing.

At the apartment, defendant and the police discussed Carter's disappearance. Defendant either said nothing about Carter at all or provided no useful information. The police returned to the Carter residence, and while they were there, defendant came over to drop off a part for his Volkswagen with Carl Carter, Sr., an occasional automobile repairer. Officer Sims testified that he asked him where he had been and what he might have seen on the night he dropped off his car. Officer Sims testified that he told him, " 'I remember now.... I took--I came to the Sizzler for

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dinner.' ... He said it was just before dark, and he had come up to the Carter residence ... to talk to Carl Carter, Sr., about working on his Volkswagen. [¶] Stated that when he got to the rear of the house that Carl Carter, Jr., was at the rear and they had a short conversation, and he ... had taken him for a Coke."

Officer Sims then arrested defendant for kidnapping.

****1315** There followed the three interrogations that evening at the jail. At the third, four officers were present: Sims, Lloyd Carter, Louie Gluhak, and Dennis Greene. Officer Sims treated defendant severely and Officer Carter more kindly. If this was a psychological tactic, it evidently worked, for Officer Carter, an experienced police investigator, won defendant's confidence. Officer Carter took notes of his confession, but it was not transcribed or taped--in fact defendant requested *****229** that all policemen except Officer Carter leave the room so that he could check it for bugs before making a statement.

After they returned, defendant told his story. Officer Carter testified that he "stated that he had known Carl Carter, Jr.'s, father for quite some time, that he was a personal friend of his, [and] that he was a mechanic....

"He decided it would be a good time to stop and talk to him about repairing his Volkswagen. That he pulled in the back of Carl [Carter], Sr.'s, house and was preparing to exit his car when little Carl, Jr., rode up on his bicycle...." Carter said he wanted a soft drink and defendant invited him into his car and drove him to his apartment. "He said the reason he wanted to take him over to his apartment was--that he liked to take pictures of little boys in the nude and he was hoping to take some pictures of Carl, Jr., in the nude. He said he went into his apartment and took him into his bedroom, and he turned on these real fancy strobe lights. And these lights began flashing ***813 *812** on and on and he said that Carl, Jr., seemed to be fascinated with these lights."

Shortly thereafter Carl, Jr., said he wanted to leave. This made defendant angry. He "grabbed the clothesline that he had on the nightstand there and put it around Carl, Jr.'s, neck and choked him. He says he then threw him on the bed and that he took off his clothes and that Carl--then he took off Carl, Jr.'s, clothes, all except his T-shirt, and he said that sometime he taped his hands behind his back with masking tape that he had on the nightstand." He then tried to engage in anal intercourse with Carter's dead body.

After this, he knew that he needed an alibi, and he decided to use the victim's father for the purpose. "[H]e knew that he had to get his Volkswagen fixed so he tried to call Carl, Sr., to see if he could get his Volkswagen fixed and Carl said that he could."

Defendant arranged to have a friend drive with him to the Carter home. Before the friend arrived, a neighbor boy stopped by and with "Carl, Jr., ... still laying in on the bed, [defendant] conversed with [the neighbor boy] for quite sometime, and started showing [him] slide pictures of naked girls." The boy left after helping him jump-start his Volkswagen.

He drove the car over to the Carter residence and dropped it off. He returned to his apartment, "wrapped Carl, Jr.'s, body in a[n] army-type green blanket and rolled him up in it with his clothes. He said at this point he forgot to put the boy's shoes and socks in the blanket, but the rest of the clothing was in the blanket." He "dumped the body and the blanket over the side of" a rural road. The next morning, after a troubled sleep, he went to work. He "had heard about Carl missing because it had been in the newspapers...."

Officer Carter testified that defendant told him he had tied a square knot in the clothesline wrapped around Carl, Jr.'s neck, and that he had enclosed his shoes in a red suitcase in his garage and put it under a workbench.

Officer Carter further testified that he invited defendant to confess to any other crimes he might have committed.

Defendant then told Officer Carter that about two years before he had visited John Anson Ford Park in Bell Gardens on a red Yamaha motorcycle to take pictures of young boys. About dusk he saw two young boys walking toward a pond with fishing poles and what he believed to be a sack lunch. "He started conversing with them and taking pictures.... He says one of ***814** the boys was named Scott, and he was a male, white about 13 and blond-headed and good-looking. The other boy was a Mexican boy named Ralph that was a little younger, about 12[;] he said he was fat and ugly."

Defendant explained that they had a lunch of bologna sandwiches and that Fowler offered ****1316** him one. As he lingered with them "he was thinking about sucking Scott's dick because he liked blonds

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and just had a thing for young blonds. He says that it finally got real late and Ralph fell asleep on the bank while they were fishing." Defendant persuaded Fowler to walk to the other side of the pond. When they got there, he "just got real smart and said something about fucking faggots. He said this pissed him off, and he grabbed his 2 1/2 -inch Barlow knife out of his ***230 pocket and bent Scott backwards and slit his throat and put his knee in his back.

"He says this caused quite a commotion and apparently it woke up Ralph who was asleep over on the other side of the pond. He says Ralph started [waking] up and screaming, that he ran around to where Ralph was and chased him and grabbed him from behind and he says he slit his throat and ran on--and was running across the grassy area to get on his motorcycle.

"And he says as he was getting on his motorcycle he looked back and Ralph ... had gotten up from where he had slit his throat and left him and was trying to walk. He said this scared him quite a bit and really made him sick, and he rode his motorcycle on home...." He discarded his knife at work the next day.

Officer Carter testified that defendant then "started crying and sobbing, and he said, 'Let's go find Carl, Jr.'s, body.' " The police escorted him to the area he had described and found the decomposing body, clad in underwear. A cord was still bound around the neck. Although defendant agreed to take the police to the site, he begged them not to make him look at the scene.

Officer Carter, accompanied by other members of the South Gate Police Department, then went to defendant's apartment. There was testimony that he had given them permission to search it. They recovered a pair of boy's shoes and socks in a red suitcase stored partly underneath a workbench. They also found boy's clothing in the suitcase and a length of clothesline that resembled the cord tied around Carter's neck. In addition, they found sexually explicit magazines featuring young men and boys, and a wealth of photographs of young boys, "literally hundreds" of which showed them unclothed. Some of the photographs were of neighborhood children.

The next day defendant confessed to Officer Donald Barclift of the Bell Gardens police. In essence he repeated his confession to Fowler's and ***815** Chavez's murders. He told Officer Barclift how he had cut the milk jug (see *ante,* p. 228 of 47 Cal.Rptr.2d, p. 1314 of 905 P.2d), and chided the police for failing to recover any evidence from it given that "he had his fingerprints all over it." Officer Barclift testified that only the killer could have known precisely how the milk jug was cut so as to leave the handle intact.

The prosecution's case essentially rested on the foregoing testimony and evidence consistent with it.

The coroner's representative, Dr. Joseph Choi, testified that the cause of death of both Fowler and Chavez was a cutting wound to the neck, and that Carter was strangled by a rope. Dr. Choi testified that an examination on Carter with an anal swab was "negative for ... spermatozoa and two plus for acid phosphatase." The positive result for that enzyme revealed the presence of seminal fluid that came from the prostate gland of someone other than Carter.

The prosecution's theory of the case departed from the confessions as described by Officers Carter and Barclift only in that the prosecutor asserted that defendant either tried to or did have sex with Carter before killing him, rather than making an attempt on his dead body as he described.

B. The Defense's Case

Defendant did not take the stand. He did, however, present a defense.

With regard to the Fowler and Chavez murders, the defense was alibi. Defendant maintained that his confession was a fabrication based on secondhand knowledge of the killings, which were widely publicized. He theorized that one or both of two men seen near or talking to the children killed them. Certain witnesses recalled seeing two men. Alfie Feliciano remembered a man on a motorcycle ****1317** and another with a long knife strapped to his belt or his leg. The latter was wearing a green Army jacket. He had no camera, and he talked to Alfie for about an hour.

José Feliciano, Alfie's brother, told a police officer immediately after the killings that he saw two men near Fowler and Chavez. One of them wore a green Army jacket and had a long hunting knife strapped to his leg. That individual spoke to a man on a yellow offroad *****231** motorcycle with a green gasoline tank. In his confession, it will be recalled, defendant said that his motorcycle was red.

Scott Bushea, a witness for the prosecution,

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accompanied José Feliciano to the park that evening. He testified that two men were with Fowler and ***816** Chavez. Shown in court a picture of defendant taken immediately after his arrest, he testified that the photograph did not depict either of the people he saw at the park. The police prepared a composite sketch of one of the men.

Defendant argued that he could have learned all the details of the killings from media accounts notwithstanding the testimony that only the killer would know how the milk jug was cut. And he asserted that in significant respects his confession failed to match the evidence found at the crime scene or the most plausible inferences to be drawn from that evidence. For example, the person in the composite drawing did not resemble him, and the motorcycle that the witnesses described did not match his.

Defendant conceded that he killed Carter. However, he argued that the killing did not amount to first degree murder: the prosecution's account of his confession showed that he killed Carter in a rage and without reflection.

II. Penalty Phase

A. The Prosecution's Case

The prosecution introduced evidence of prior violent conduct. In May 1972, David Schroeder, the child of neighbors, was nine years old. Defendant beat him and left him bleeding from the face, ears, nose, and the back of the head. The attack was severe enough that the police officer who arrested defendant said he asked whether he had killed him. Schroeder spent the night in the hospital and was left with a nine-inch scar on his scalp. On cross- examination, the jury learned that the police perceived defendant to be distraught and that he told them he did not know why he assaulted Schroeder.

B. The Defense's Case

Over defendant's objection, the defense summoned one witness: Kathy Klabunde, his sister. She testified that their father, an alcoholic, verbally abused the children. Defendant, the eldest, would care for the others. He had migraine headaches "on and off for years." His headaches would cause him to "get very angry easily. I remember a period where he stayed downstairs for a couple of days where it was dark and cool to stay out of the light because his head hurt."

As stated, defendant sought to bar his sister's testimony--he objected to a specific question at one point and called her a liar from his chair at another. After the jury retired, he asked to reopen the case so that he could testify, ***817** and the court acceded to his request. He stated to the jury, "I just have a short statement I'd like to read to the jury. [¶] While I do not concede the truth, accuracy or correctness of the jury's verdicts, I do feel that since the jury has returned the verdicts of guilt in the maximum degree possible on all counts and the special circumstance, that they should also now return with a verdict of death as the appropriate penalty. Thank you."

At closing argument, counsel emphasized defendant's mental problems, his cooperation with the police, lingering doubt regarding the special circumstance in light of his alibi defense to the killings of Fowler and Chavez, the grimness of life imprisonment, his lack of a prior felony conviction, the likelihood that he would not be dangerous in prison, and positive aspects of his background and character, including his remorse when he was discovered.

CONTENTIONS ON APPEAL

I. Jury Selection Claims

A. Court's Failure to Conduct Further Voir Dire

[1] At voir dire the court asked Elva Cazares, a member of the venire, whether ****1318** she would refuse to vote to return a verdict of first degree murder "so that you wouldn't even have to get to the death penalty?" She replied, "Yes, I think I would." It then asked her if she would vote to find the special circumstance allegation false in order to stop a capital penalty phase. She replied, "Well, it's kind of confusing in that term. *****232** But just to sum it all up, I don't believe in the death penalty."

The court asked Julietta Lopez, also a member of the venire, "If the prosecution proves that the defendant's guilty of first degree murder, ... would you refuse to vote for that because you know by voting for something other than first degree murder there wouldn't be a death penalty?" She replied, "I would."

Defendant contends that the court erred in failing to inquire more fully about the basis for the two potential jurors' opposition to the death penalty. The result, in his view, was a violation of a right he asserts to an impartial jury under the Sixth and

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Fourteenth Amendments.

[2] Potential jurors "must be excused if their views on capital punishment would prevent or substantially impair the performance of their duties in accordance with the instructions and their oath." ***818**(*People v. Mayfield* (1993), 5 Cal.4th 142, 169, 19 Cal.Rptr.2d 836, 852 P.2d 331.) The court's determination resolves "what is essentially a question of fact or, perhaps more accurately, a mixed question that is essentially factual." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1262, 270 Cal.Rptr. 451, 792 P.2d 251.) Accordingly, our review is deferential: we determine whether substantial evidence supported the rulings. (*Ibid.*)

The court implicitly ruled that the ability of the two potential jurors in question to follow their oaths was substantially impaired. These determinations were supported by substantial evidence.

[3][4] First, we note that the court excluded the potential jurors on its own motion after eliciting their views on the death penalty, and that counsel failed to object. It continues to be the rule that "the failure to object does not waive the right to raise the issue on appeal [citation]...." (*People v. Cox* (1991) 53 Cal.3d 618, 648, fn. 4, 280 Cal.Rptr. 692, 809 P.2d 351.) But the failure to object to the rulings "does suggest defense counsel's concurrence in the court's assessment of each venireperson's firm and sincere expression of his or her inability to impose the death penalty." (*Ibid.*)

Substantial evidence supported the court's implicit determination that the ability of the potential jurors to follow the law at the guilt phase was, at a minimum, substantially impaired. Defendant does not persuade us that any constitutional right was violated.

B. Counsel's Failure to Conduct Further Voir Dire

[5] Defendant contends that counsel were ineffective for failing to question sufficiently or at all nine potential jurors, including Cazares and Lopez, who were excused for cause--specifically, for what he terms "a general opposition to the death penalty."

It is fundamental that "a defendant claiming ineffective assistance of counsel must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome." (*People v. Davis* (1995) 10 Cal.4th 463, 529, 41 Cal.Rptr.2d 826, 896 P.2d 119, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064, 2068, 80 L.Ed.2d 674; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218, 233 Cal.Rptr. 404, 729 P.2d 839.) Counsel were not ineffective.

To be sure, "part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. [Citations.]"***819** (*Morgan v. Illinois* (1992) 504 U.S. 719, 729, 112 S.Ct. 2222, 2230, 119 L.Ed.2d 492, 503.)

But each venireperson to whom defendant refers us either made clear that he or she would never vote for death, or gave slightly more ambiguous answers from which the court and counsel could reasonably conclude that his or her ability to follow the law was, at a minimum, substantially impaired. We have already described the testimony of Cazares and Lopez. (See *ante,* p. 231 of 47 ****1319** Cal.Rptr.2d, p. 1317 of 905 P.2d.) To provide other examples, Josefina Docuyanan flatly testified, "I will never vote for a verdict of death," and in answer to the question, "Would you automatically vote for a verdict other than first degree [murder] in order to avoid having to worry about the death penalty?" *****233** Pamela Elofson testified, "Yes. Yes, I would."

Hence, "[n]othing in the record indicates that counsel lacked a plausible, tactical reason for asking these individuals few or no follow-up questions. [Citation.] Indeed, counsel might have determined from the demeanor of these prospective jurors that additional questioning would be futile. Counsel might also have reasonably concluded that any ambiguity in the answers they had already given would be beneficial and would promote retention of pro-life jurors. No constitutional deficiency in counsel's performance on voir dire has been shown." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 587, 15 Cal.Rptr.2d 382, 842 P.2d 1142, fns. omitted, affd. *sub nom. Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750.) In the case of many of the venirepersons to whose examination defendant alludes, questioning by counsel for either party would have been superfluous, for the court effectively elicited the venireperson's opinion. At other times, it was defense counsel who confirmed what was already apparent: the potential juror was opposed to the death penalty and could not vote for it. Thus, even if counsel were deficient for not questioning each potential juror--an unlikely prospect--we cannot conclude that defendant was prejudiced. There is no reasonable probability that the court's rulings would have differed, and hence that the result might have

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differed, if counsel had questioned the potential jurors at length.

Defendant also asserts that the potential jurors were excused solely because they opposed the death penalty. He contends that "the exclusion from the guilt phase of jurors categorically opposed to the death penalty deprived him of a jury composed of a representative cross-section of the community, in violation of his Sixth and Fourteenth Amendment rights. We have rejected such claims [citation], as has the United States Supreme Court...." (*People v. Kaurish* (1990) 52 Cal.3d 648, 674, 276 Cal.Rptr. 788, 802 P.2d 278.)

***820 II. Guilt Phase Issues**

Defendant asserts that errors in deciding his guilt or the truthfulness of the special circumstance allegation occurred. As will appear, his claims lack merit.

A. Double Jeopardy and Collateral Estoppel Issues

[6] At the prior trial, the court found defendant guilty of first degree murder for Carter's killing, and found true a special circumstance of multiple murder under the 1977 death penalty statute, but found not true a special circumstance of felony murder under the same law.

To find true the felony-murder special circumstance under the 1977 death penalty law, the court had to determine that Carter's murder was "willful, deliberate, and premeditated and was committed during the commission or attempted commission of" "a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288." (Stats.1977, ch. 316, § 9, subd. (c)(3), p. 1258.) By finding the special circumstance not true, the court may have decided that there was no premeditation, or that there was no attempted or completed lewd act--we do not know. It could not have decided that both theories failed, however, because at the same time, by finding defendant guilty of first degree murder, it determined either that defendant killed Carter with premeditation and deliberation, or while committing or attempting to commit a violation of section 288. (Pen.Code, § 189; unlabeled statutory references are to this code.)

The prosecution did not reallege the felony-murder special circumstance, but did try the case under a theory that defendant was guilty of first degree murder by reason of felony murder or premeditation and deliberation, or both. The jury was instructed on both theories.

The jury found defendant guilty of first degree murder for killing Carter. He asked ****1320** that the jury be polled to discover the legal basis for each vote. The court denied the motion.

Defendant first contends that the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states through the due process clause of *****234** the Fourteenth Amendment, and that of article I, section 15, of the California Constitution, barred his retrial on charges that he murdered Carter under theories of felony murder or premeditated and deliberate murder. He premises this contention on an argument that the court must have rejected one of those theories when it found the ***821** felony-murder special circumstance not true, and therefore he should not have been retried on either theory.

We disagree. Preliminarily, we note that among the pleas that defendant might have entered are "[a] former judgment of conviction or acquittal of the offense charged" (§ 1016, subd. 4) and "[o]nce in jeopardy" (*id.*, subd. 5; see also § 1023). Not only may former jeopardy be affirmatively pleaded, but it must be, or any claim on that ground is not preserved for review. (*People v. Belcher* (1974) 11 Cal.3d 91, 96, 113 Cal.Rptr. 1, 520 P.2d 385.) Defendant did not enter a plea of former jeopardy. Rather, when he was arraigned on the amended information, he refused to enter a plea at all, demanding instead to be returned to San Quentin Prison. The court entered a plea of not guilty on his behalf.

At oral argument defendant contended that if we decide the double jeopardy question adversely to him on the ground that he did not enter the proper plea on retrial, he did not receive the effective assistance of counsel. Without agreeing that any such claim would persuade us, we do agree that we should decide the issue on the merits.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...." Defendant was *convicted* of Carter's murder at his first trial. Retrying him on a charge of murder did not place him twice in jeopardy for that offense. " 'It has long been settled ... that the Double Jeopardy Clause's general prohibition against successive prosecutions does not prevent the government from retrying a defendant who succeeds in getting his first conviction

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set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction.' [Citations.] '[T]o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.' [Citation.]" (*People v. Santamaria* (1994) 8 Cal.4th 903, 910-911, 35 Cal.Rptr.2d 624, 884 P.2d 81.)

[7] Defendant next contends that collateral estoppel bars relitigation of the killing of Carter on a first degree murder theory. In his view, when the court at the prior trial found not true the felony-murder special circumstance, it necessarily determined either that there was no felony murder or that there was no premeditated and deliberate murder, and therefore retrial of the murder on either theory was barred by collateral estoppel.

It is questionable whether the doctrine of collateral estoppel even applies to further proceedings in the same litigation. ***822**(*People v. Santamaria, supra,* 8 Cal.4th at pp. 913-916, 35 Cal.Rptr.2d 624, 884 P.2d 81.) Even if it does, at most it would bar retrial of the felony-murder special circumstance, which was not realleged. (See *id.* at p. 914, 35 Cal.Rptr.2d 624, 884 P.2d 81 [collateral estoppel would, at most, bar retrial of an enhancement allegation, not an offense of which the defendant was found guilty].) We are not persuaded by defendant's contention, advanced at oral argument, that *Santamaria* is distinguishable because the prior trial therein was by jury, whereas the prior trial herein was by the court.

[8] Therefore defendant's collateral estoppel contention must be rejected. So must his ancillary contention that this court's remand of his case without "delimiting the proper scope of charges for which appellant could be retried" violated rights he discerns in the Fifth, Sixth, Eighth, and Fourteenth ****1321** Amendments to the United States Constitution.

This assertion rests on a view that a combination of errors requires the reversal of his conviction for the murder of Carter. The asserted errors are that we declined, in *****235***Memro I, supra,* 38 Cal.3d 658, 214 Cal.Rptr. 832, 700 P.2d 446, to decide the adequacy of the evidence to prove a premeditated and deliberate murder, leaving open the theories on which he could be retried, and that the court failed to preclude the prosecution from proceeding on at least one theory of first degree murder or to require that the jury identify the theory on which it found him guilty of that crime.

Defendant did not seek rehearing or modification of our decision in *Memro I, supra,* 38 Cal.3d 658, 214 Cal.Rptr. 832, 700 P.2d 446, on the ground complained of. We find his assertion unavailing. The court's ruling on the felony-murder special-circumstance allegation required at most that the special circumstance not be realleged at the second trial. It was not. Nothing more could have been required. There was no violation of any constitutional right in retrying defendant on a charge that he murdered Carter on a theory of first degree murder.

B. Claims of Error Regarding the Voluntariness of Defendant's Confession and Discovery of Interrogators' Personnel Records

1. Denying Motion to Suppress Confession

a. Statement of Facts

[9] Defendant's pretrial litigation strategy focused mainly on an *in limine* motion, brought under Evidence Code section 402, to suppress his confession because coerced by threats and inducements following invocation of his rights to counsel and to silence.

***823** Defendant testified on his own behalf for purposes of the motion to suppress. He testified that during the interrogations at the South Gate jail, Officer Carter made clear that he would get answers to his questions, pointed to the muscular Officer Greene, asked him whether he thought he could beat Officer Greene in a fight, and told him if a fight began Officer Greene "literally would kill me if somebody didn't stop him." He also testified that the police showed him a depression in a wall of the interrogation room that could have been made by the impact of a human head and suggested that his head might be used to enlarge it if he failed to reveal what he knew about Carter's disappearance. In sum, he was "terrified of Greene and the situation...." Moreover, he testified, the police told him that if he should be imprisoned for the murders he would be unlikely to survive.

Defendant introduced (in the context of his *Pitchess* motion, discussed *infra* at pages 829-832, 47 Cal.Rptr.2d 219, 905 P.2d 1305). The testimony of his own counsel, Michael C. Carney, that when he was a prosecutor he learned the police had received a letter complaint that Officer Greene had used excessive force during a drunk-driving arrest. At the time, Officer Greene also told Carney that he had

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broken a citizen's jaw and received a restrictive- duty assignment as a result. There was also evidence that a letter complaint might be treated by the police as minor and never be placed in a personnel record for the officer later to discover. Indeed, after Carney's testimony, Officer Greene testified that his file contained no complaint.

Defendant also called his counsel from the prior trial, Peter L. Williams, who testified that another client, Angelina Nasca, told him that Officer Greene forced her to confess to a trumped-up charge of burglary because he "took her in the interview room in the South Gate jail and hit her, driving her tooth through her cheek, and threatened to put her head through a hole in the wall of the interview room of the South Gate jail." Williams also testified that defendant told the public defender's office about the wall on "the morning after his arrest."

The court considered Nasca's testimony from the prior trial, as well as that of Michael Bridges. Both claimed to have been bullied and beaten by Officer Greene while under arrest. Nasca said that Officer Greene threatened to "push my head through that hole" in the interrogation room wall "the same way he did someone else's." Bridges also testified that Officer Greene threatened him with a shotgun. When Bridges was in the South Gate jail's interrogation room, he ****1322** filled out a card indicating that he wanted a lawyer and did not want to talk. Another member of the police department tore it up and Officer Greene beat him again. Bridges denied knowing defendant.

Louis Moreno testified that he was roughed up by the South Gate police in October *****236** or November of 1978 when they arrested him on a fugitive warrant ***824** for armed robbery. The court found that his description of the assertedly offending police officers did not match those who had testified in the hearing.

There was testimony that for three or four years the local public defender had not received a single request to appear at the South Gate jail in response to an invocation of the right to counsel.

As stated, defendant also testified that the police offered him an inducement to confess. It "was my understanding that [Officer Carter] was promising that if I cooperated with him and told him whatever it was he wanted to hear that he would send me back to Atascadero ..., that there wouldn't be any charges filed.... That was in the form of a promise."

Defendant further testified that he was never read his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694) and that when he demanded to see a lawyer Officer Carter refused, responding "did I want to talk to him or did I want to fight, something to that effect." "[N]obody told me why I wasn't read my rights. I was told ... something to the effect that they had already done a number of things improperly and that he [Officer Carter] probably couldn't make a case hold up in court anyway."

The prosecution produced numerous witnesses to support its assertion that his confessions were made voluntarily.

Officer Sims testified that defendant was neither threatened nor offered an inducement for his statements: he responded freely and voluntarily and his demeanor was "somewhat nervous, but was also relaxed...." Officer Carter, who conducted the key interrogation, also testified that defendant's demeanor was "normal, maybe a little emotionally upset"; neither Officer Carter nor any other member of the South Gate Police Department threatened him or offered any inducement or benefit other than coffee and cigarettes. Officer Greene was not flexing his muscles or making threatening gestures; rather, he "was very quiet that evening and seemed to be real remorseful if anything." Indeed, when "Mr. Memro started telling us about picking up the boy and what he had done to the boy, ... Greene became quite emotional and appeared as though he couldn't take it and he went over and sat in the corner."

After an hour of general conversation to make defendant feel comfortable, Officer Carter testified, he confessed to the Carter murder. "At that time he became extremely emotionally upset and ... seemed to be very remorseful. ***825** He started crying very heavily...." Officer Carter gave him a few minutes to calm down and then invited him to unburden himself of any other criminal activity. Defendant told him that the murders of Fowler and Chavez had weighed on his mind for a long time, and he confessed to them.

Officer Carter agreed that there was a slight, six- to eight-inch-wide impression in one plaster wall of the interrogation room.

Anthony Cornejo, a fellow jail inmate, testified that defendant told him that he had lied about his confession being coerced. "He admitted making the

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statements freely to the police. And he said--the quote was, 'That was the only thing I had going for me on my appeal was to say that I was beat up and coerced and had the statements beat out of me.' "

On cross-examination, Cornejo was impeached as a notorious jailhouse informant who had repeatedly testified about fellow inmates' statements in jail for the prosecution in state and federal court. Cornejo was a convicted murderer, robber and burglar who, the cross-examination suggested, would hope for lenity from the parole board. And another informer had written Cornejo about defendant's case. Defendant also called Theodore Frank--presumably the defendant in *People v. Frank* (1985) 38 Cal.3d 711, 214 Cal.Rptr. 801, 700 P.2d 415, following retrial **1323 *People v. Frank* (1990) 51 Cal.3d 718, 274 Cal.Rptr. 372, 798 P.2d 1215--who testified that defendant was very reticent about his case: he would never answer questions or volunteer any information about it.

South Gate Police Officer Walter R. Carter drove defendant back to the police station ***237 from the site where Carter's body was recovered. He testified that Lloyd Carter told him not to bother to handcuff him, but that he (Walter Carter) insisted that he should be restrained. On the way to the station, defendant told him that "he didn't understand how anyone could treat him so fairly and so nice when he had done such a terrible thing."

Defendant conceded that he was never physically harmed, that he had studied karate in 1972, that he was attending judo classes before his arrest, that he was in good physical condition, and that he had wrestled in school--evidently high school--and also played football there.

The court also heard evidence that while in jail defendant was fed and was allowed to make two phone calls. He called Linda Brundige, a reserve deputy sheriff who knew him because, as she testified at trial after the court had ruled the confession voluntary, he "was one of my assistant instructors in a judo class I taught for the city of Huntington Park." Brundige also *826 explained that defendant "had been trained by somebody that was good with martial arts" and that "he was good within his skill level" in a form of karate.

The court denied the motion to suppress the confession. "Based upon the totality of the evidence," it declared, "the court finds beyond a reasonable doubt the confession was free and voluntary." It further declared that "the totality of the circumstances clearly point to the credibility of the prosecution witnesses and against the credibility of the defense witnesses, and I find the statement to be free and voluntary."

b. Discussion

Defendant contends that the court erred in finding beyond a reasonable doubt that his confession was given voluntarily and that his witnesses were not credible. He asserts that this ruling was inherently implausible and is unsupported by substantial evidence given his testimony regarding his interrogation and that of witnesses who testified that the South Gate police department behaved brutally toward arrestees, particularly while interrogating them. He is wrong: substantial evidence supported the ruling.

The parties agree on the applicable burden of proof regarding the claim of involuntary confession. Because the crimes charged occurred before the adoption of article I, section 28, subdivision (d) of the California Constitution in 1982, state law required the prosecution to show beyond a reasonable doubt that defendant's statements were made voluntarily. (*People v. Anderson* (1990) 52 Cal.3d 453, 470, 276 Cal.Rptr. 356, 801 P.2d 1107.) Federal law requires the prosecution to make the same showing by a preponderance of the evidence. (*People v. Morris* (1991) 53 Cal.3d 152, 200, 279 Cal.Rptr. 720, 807 P.2d 949.) "On appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including 'all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation' [citations].... [¶] The trial court's determinations concerning whether coercive police activity was present, whether certain conduct constituted a promise and, if so, whether it operated as an inducement, are apparently subject to independent review as well." (*People v. Benson* (1990) 52 Cal.3d 754, 779, 276 Cal.Rptr. 827, 802 P.2d 330.) However, "the trial court's findings as to the circumstances surrounding the confession--including 'the characteristics of the accused and the details of the interrogation' [citation]--are clearly subject to review for substantial evidence. The underlying questions are factual; such questions are examined under the deferential substantial-evidence standard [citation]...." (*Ibid.*)

Applying the foregoing law to the record before us, we conclude that the confession was voluntary.

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***827** What the Constitution permits to be admitted in evidence is "the product of an essentially free and unconstrained choice ..." to ****1324** confess. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (lead opn.); accord, *id.* at p. 249, 93 S.Ct. at p. 2059 (conc. opn. of Blackmun, J.) and 93 S.Ct. at p. 2059 (conc. opn. of Powell, J.).) The question is whether defendant's choice to confess was not "essentially *****238** free" because his will was overborne. (*Id.* at pp. 225-226, 93 S.Ct. at pp. 2046-2047.) The inquiry is essentially factual. "In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances--both the characteristics of the accused and the details of the interrogation." (*Id.* at p. 226, 93 S.Ct. at p. 2047.)

The police testified that defendant was not threatened, was offered no inducement, and waived his rights to counsel and to remain silent. There was thus substantial evidence before the court that the interrogation was free of any taint that might make it involuntary. The court believed the testimony of the police and rejected that of defendant's witnesses. We must accept its evaluation of the facts when substantial evidence supports it, as the testimony does. (*People v. Benson, supra,* 52 Cal.3d at p. 779, 276 Cal.Rptr. 827, 802 P.2d 330.) Doing so, independently resolving the legal question whether the confession was voluntary is a simple task: it was.

2. Refusing to Exclude Cornejo's Testimony

[10] Before trial defendant moved to exclude the testimony of Anthony Cornejo. He argued that it would be substantially more prejudicial than probative (Evid.Code, § 352) and that introducing it would violate constitutional rights he asserted to a reliable guilt and penalty determination, to due process, and to the right to counsel. Just before Cornejo testified *in limine,* defendant also added the ground of objection that if the court had granted him as speedy a trial as he desired he would never have encountered Cornejo and his testimony would not now be heard.

To recapitulate, Cornejo testified that defendant told him his statements to the police were voluntary. On cross-examination, he was thoroughly impeached as a notorious jailhouse informant.

[11] Defendant argues that the government used Cornejo as an agent to elicit his purported statement about the circumstances surrounding his confession. This, he asserts, violated his Sixth Amendment rights, because, as we stated in *People v. Pensinger* (1991) 52 Cal.3d 1210, 1249, 278 Cal.Rptr. 640, 805 P.2d 899, "[i]t is a denial of the Sixth Amendment ***828** right to counsel to admit evidence of an indicted defendant's incriminating statements deliberately elicited from the defendant by a government agent. (*Massiah v. United States* (1964) 377 U.S. 201, [84 S.Ct. 1199, 12 L.Ed.2d 246]; see also *United States v. Henry* (1980) 447 U.S. 264 [100 S.Ct. 2183, 65 L.Ed.2d 115].)" A government agent includes a jailhouse informant whom the state has hired to obtain incriminating statements, even if they are made voluntarily and without solicitation. (*Maine v. Moulton* (1985) 474 U.S. 159, 173, 106 S.Ct. 477, 485, 88 L.Ed.2d 481.)

[12][13] The court's ruling allowing a jailhouse informant's testimony to be introduced presents an essentially factual question, and we review it on a deferential standard. There was no abuse of discretion (Evid.Code, § 352; *People v. Clair* (1992) 2 Cal.4th 629, 660, 7 Cal.Rptr.2d 564, 828 P.2d 705) in admitting Cornejo's testimony. We disagree with defendant's perception of Cornejo's role. The record does not at all compel the conclusion that Cornejo was acting at the government's behest. Pointing to Cornejo's history of testifying for the government, defendant naturally disagrees, but such a history does not automatically make an informant a state agent. (See *In re Williams* (1994) 7 Cal.4th 572, 597-598, 29 Cal.Rptr.2d 64, 870 P.2d 1072.) In our view, no constitutional question arises unless the informant is an agent of the state at the time he or she elicited the statements that would be the subject of later testimony. (See *U.S. v. Sanchez* (11th Cir.1993) 992 F.2d 1143, 1159-1160, modified 3 F.3d 366.) It is clear that Cornejo testified to further selfish goals, and it appears that he instigated his conversation with defendant, if that is what happened, for the same ends, even though he declared that he was ****1325** testifying "out of a moral consciousness of the things that I believe that are involved in this." His goal may have been lenience from the parole board--he was awaiting or was on trial for murder when he first testified in this case in December 1986--but he testified that he was promised nothing except safe housing *****239** when incarcerated and there is nothing in the record to the contrary. The record supports our conclusion that this promise was made after he obtained defendant's statements against interest.

In sum, the record supports the conclusion of the

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trial court that Cornejo was gathering information on his own initiative, not that of the state. As such, he was not a government agent. (*In re Williams, supra,* 7 Cal.4th at p. 598, 29 Cal.Rptr.2d 64, 870 P.2d 1072; *People v. Williams* (1988) 44 Cal.3d 1127, 1141, 245 Cal.Rptr. 635, 751 P.2d 901.) We find no abuse of discretion in admitting the testimony and no constitutional violation.

***829** *3. Denying Motion to Dismiss for Loss of Police Personnel Records*

a. Statement of Facts

[14][15] To aid his assertion of coercion, defendant also moved, as he did before his prior trial, to discover the personnel records of various South Gate police officers under authority of *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 537-538, 113 Cal.Rptr. 897, 522 P.2d 305. We discern from the record that he renewed the motion made at his prior trial. That motion sought "information regarding complaints against South Gate Police Department officers--including the four officers who had participated in [defendant's] postarrest interrogation. His motion requested the identity of individuals who had filed complaints 'relating to unnecessary acts of aggressive behavior, ... violence, and/or attempted violence, and ... excessive force and/or attempted excessive force' against 16 officers in the department. [Defendant] also sought discovery of investigative reports based on these complaints, including statements of witnesses interviewed, information concerning the officers' use of excessive force or violence contained in personnel files, statements of psychiatrists, psychologists, or other officers contained in such files, and findings of disciplinary actions taken against any officers as a result of their use of force and violence. The purpose of such information, it was alleged, was to enable appellant to bolster his claim that his confession had been coerced." (*Memro I, supra,* 38 Cal.3d 658, 674, 214 Cal.Rptr. 832, 700 P.2d 446.) In *Memro I,* we reversed the judgment because the court denied this motion.

The court granted the motion to discover the personnel records of Officers Carter, Gluhak, Greene, and Sims--defendant's four interrogators. (Defendant later moved to discover the personnel records of four other members of the South Gate Police Department--the partners of defendant's interrogators. That motion was denied because the court found there was "no showing of need" and no "nexus or connection between conduct complained of ... and those officers.") The prosecution informed the court and defendant that the officers' personnel files had been purged according to the terms of the department's document-destruction policy, governed by Government Code section 34090, which permits, and has permitted since 1975, that records two years old or older may be purged if "no longer required." The policy was to purge material from personnel files that was more than five years old.

Defendant then asserted that the records were destroyed to conceal information relevant to his claim of coercion. He moved to dismiss the information, in essence as a proper sanction for their loss. He argued that the police knew a major issue on the appeal from the original judgment was denial of ***830** the motion to discover police personnel records and that the department destroyed the records notwithstanding the possibility of a reversal on that ground.

In response, the prosecution introduced evidence of the procedure whereby the records were purged, and, to aid the court in ruling on the motion to suppress, secondary evidence of their contents.

The South Gate Police Department's records custodian testified that police officers would be alerted to any citizen complaints placed in their personnel record. Each officer testified that his personnel file contained ****1326** no such complaints at the times for which the information was sought, except for Officer Sims, who described one "unfounded" complaint in 1978 involving asserted use of excessive force during an arrest.

The custodian also testified that the records were destroyed in accordance with the *****240** requirements of Government Code section 34090: he believed the police chief asked of and received from the city attorney permission to purge "the ones that were at least five years old." However, records relevant to unresolved civil lawsuits were kept longer, and the department did not ask the district attorney or Attorney General to ascertain whether records might be needed for pending criminal cases.

The court denied the motion for a sanction for destroying the records. It rejected the argument that the records were destroyed to conceal information relevant to defendant's assertion of coercion. It first ruled that defendant bore the burden of showing that the records were destroyed for an improper purpose. It then found that the only evidence of such a purpose was that oral argument in *Memro I, supra,* 38 Cal.3d 658, 214 Cal.Rptr. 832, 700 P.2d 446, took place on

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May 7, 1984, and that permission to destroy the records was granted on July 3, 1984. It found this evidence insufficient to show that the records were destroyed in bad faith. Rather, it found that they were destroyed in good faith according to established procedure.

b. Discussion

[16] Preliminarily, we note that we review the court's decision to consider secondary evidence of the records' contents on a deferential standard. (*Mayo v. Mayo* (1935) 3 Cal.2d 51, 57, 43 P.2d 535, overruled on other grounds in *Stitt v. Stitt* (1937) 8 Cal.2d 450, 453, 65 P.2d 1297.) There was no abuse of discretion: the court did not exceed the bounds of reason when it decided to hear testimonial evidence of the contents of the police officers' files.

***831** Defendant contends that due process was violated because evidence material to his defense was withheld. We agree with the People, however, that the question instead regards the failure to preserve evidence. Defendant also contends that the court erred in failing to impose a sanction for the records' destruction.

i. Failure to Preserve Evidence

[17] In *Arizona v. Youngblood* (1988) 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281, the federal high court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Moreover, a trial court's inquiry whether evidence was destroyed in good faith or bad faith is essentially factual: therefore, the proper standard of review is substantial evidence. (See *U.S. v. Stevens* (3d Cir.1991) 935 F.2d 1380, 1387-1388 [applying clearly erroneous standard].)

[18] Under the holdings of *Youngblood* and *Stevens,* we conclude that substantial evidence supported the court's ruling. The burden was on defendant to show bad faith, and he did not meet his burden. Even if the records were potentially useful, the failure to preserve them did not violate due process.

ii. Denying Motion to Impose Sanction for Failure to Preserve Evidence

"It is settled that trial courts 'enjoy a large measure of discretion in determining the appropriate sanction that should be imposed' because of the failure to preserve or destruction of material evidence. [Citations.]" (*People v. Sixto* (1993) 17 Cal.App.4th 374, 399, 21 Cal.Rptr.2d 264; see also *People v. Zapien* (1993) 4 Cal.4th 929, 964, 17 Cal.Rptr.2d 122, 846 P.2d 704.) We find no abuse of discretion. Although defendant calls the circumstances surrounding the records' destruction suspicious because the court's denial of the motion to discover them was a major focus of his appeal from the original judgment and the records were destroyed two months after oral argument in that appeal, the court could reasonably conclude tha[illegible] the evidence showed the records were destroyed according to the provisions of the Government Code--indeed, they were kept for three years beyond the two- ***1327** year period after which Government Code section 34090, subdivision (d), permitted their destruction--and (2) the department, unschooled in the nuances of appellate procedure, did not realize that the records might be needed after the court in defendant's prior *****241** trial denied the motion to discover them. Nor, the court could reasonably conclude, was there an improper purpose behind the policy to keep personnel records relevant to civil cases ***832** while not attempting to determine whether criminal cases might still be unresolved: criminal cases rarely remain active after five years. We find no abuse of discretion and no violation of due process in the refusal to impose a sanction.

4. Denying Motion to Discover Other Officers' Personnel Records

[19] As described, the court denied defendant's motion to discover the records of four other police officers not present at his interrogation. It found no "nexus or connection" between those officers and his claim of involuntary confession that would justify discovering their personnel records.

Defendant contends that the court erred in so finding. He asserts that he showed the officers trained with his interrogators, and that in *Memro I, supra,* 38 Cal.3d 658, 686, 214 Cal.Rptr. 832, 700 P.2d 446, we held that the records of those who "trained or otherwise had substantial contacts with any of the four interrogating officers" would be discoverable.

[20] Trial courts are granted wide discretion when ruling on a motion to discover such records. (*People v. Breaux* (1991) 1 Cal.4th 281, 311, 3 Cal.Rptr.2d 81, 821 P.2d 585, quoting *Pitchess v. Superior Court, supra,* 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d 305.) Here the court found that there was no sufficient connection between training sessions or

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other activities in which the officers had mutually participated and the circumstances surrounding the interrogation. There is nothing in the record to contradict that finding. Plainly the court did not abuse its discretion.

C. Asserted Failure to Obtain Knowing and Intelligent Waiver of ***Miranda*** *Rights*

[21] It will be recalled that the court found beyond a reasonable doubt that defendant confessed freely and voluntarily. (*Ante,* p. 237 of 47 Cal.Rptr.2d, p. 1323 of 905 P.2d.) Officer Carter testified, however, that just before defendant confessed, he asked to sweep the room for concealed electronic recording devices with his help and with the other police out of the room, and that Officer Carter obliged him. He also testified that defendant said he wanted to talk to him alone because he trusted him and did not trust the other interrogators. He explained to defendant that the other officers were just doing their job, and they came back into the room, evidently without his objecting to their renewed presence. Then, some time later and with all interrogators present, he confessed.

Defendant contends the fact he wanted to speak "off the record," so to speak, as shown by his asking to sweep the room for recording devices, ***833** showed that he did not realize his confession could be used against him. Thus, he reasons, he did not knowingly and intelligently waive his right to remain silent and to counsel. He cites *People v. Braeseke* (1979) 25 Cal.3d 691, 159 Cal.Rptr. 684, 602 P.2d 384, vacated and remanded *sub nomine California v. Braeseke* (1980) 446 U.S. 932, 100 S.Ct. 2147, 64 L.Ed.2d 784, reiterated *People v. Braeseke* (1980) 28 Cal.3d 86, 168 Cal.Rptr. 603, 618 P.2d 149.

"Under the familiar requirements of *Miranda* [*v. Arizona, supra,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694], designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. (384 U.S. at pp. 444-445, 473-474 [86 S.Ct. at pp. 1612, 1627-1628, 16 L.Ed.2d at pp. 706-707, 722- 724]; *People v. Boyer* (1989) 48 Cal.3d 247, 271 [256 Cal.Rptr. 96, 768 P.2d 610].) Once having invoked these rights, the accused 'is ****1328** not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 1885, 68 L.Ed.2d 378, 385-386].) *****242** The initiation of further dialogue by the accused, however, does not in itself justify reinterrogation. (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1044 [103 S.Ct. 2830, 2834, 77 L.Ed.2d 405, 411-412].) '[E]ven if a conversation taking place after the accused has "expressed his desire to deal with the police only through counsel," is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation.' (*Ibid.*)" (*People v. Sims* (1993) 5 Cal.4th 405, 440, 20 Cal.Rptr.2d 537, 853 P.2d 992.)

We have already explained that the court accepted the police version of the circumstances surrounding the confession. (*Ante,* p. 238 of 47 Cal.Rptr.2d, p. 1324 of 905 P.2d.) Implicitly it accepted Officer Carter's description of the search of the room for recording devices, and we are bound by that acceptance.

[22] Defendant did not raise before the court the issue he presents to us. Hence he has failed to preserve it for review. (*People v. Wader* (1993) 5 Cal.4th 610, 635-636, 20 Cal.Rptr.2d 788, 854 P.2d 80.) Defendant contends that if we draw that conclusion, counsel were ineffective because there could be no tactical reason not to raise the issue with the court, and therefore we must address the point on the merits. (*Id.* at p. 636, 20 Cal.Rptr.2d 788, 854 P.2d 80.)

As stated, it is fundamental that "a defendant claiming ineffective assistance of counsel must show both deficient performance under an objective ***834** standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome." (*People v. Davis, supra,* 10 Cal.4th 463, 529, 41 Cal.Rptr.2d 826, 896 P.2d 119.)

Even if defendant's request to sweep the room for bugs can be construed as evidence of his preparing to act on a mistaken belief that he could talk privately to Officer Carter without his statements being used against him--a state of affairs the record does not support (see *People v. Johnson* (1993) 6 Cal.4th 1, 26, 23 Cal.Rptr.2d 593, 859 P.2d 673)--he abandoned any such hypothetical course of action when he acceded to Officer Carter's indication that the other

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police officers would have to return so that the interrogation could resume. He could have halted his statements then by asking for counsel, and did not. Previously the police had read him his rights under *Miranda v. Arizona, supra,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, from a card they used for that purpose. The police warned him twice that he had the rights to remain silent and to counsel, and that "anything you say can and will be used against you in a court of law." Defendant said on both occasions that he understood the consequences of speaking, and elected to proceed. We cannot conclude that his waiver was made unknowingly or unintelligently.

Thus, counsel could not have been ineffective for failing to raise this issue before the trial court. The Sixth Amendment does not require counsel " 'to waste the court's time with futile or frivolous motions' " (*U.S. v. Hart* (1st Cir.1991) 933 F.2d 80, 83). Although we hesitate to characterize the motion that might have been made as frivolous, it would probably have been futile, given the testimony adduced on the circumstances surrounding defendant's waiver of his rights to silence and to counsel.

We turn to defendant's second confession. Officer Barclift testified that the day after defendant confessed to South Gate police, he repeated his confession to the 1976 murders to the Bell Gardens police. Without explaining the legal basis for his contention, defendant contends rather summarily that his confession must be suppressed because it was tainted by the first confession, which was improperly obtained.

This claim also was not preserved for appeal--defendant did not raise it below. Nor, for the reasons given above, were counsel ineffective for not asserting it.

****1329** In any event, were the premise of an ignorant waiver of rights true, the result defendant urges might be valid. (*People v. Williams* (1988) 45 Cal.3d 1268, 1299, 248 Cal.Rptr. 834, 756 P.2d 221 [discussing Fourth Amendment requirements].) However, we have found no violation of state or ***835** federal law in the eliciting of his initial *****243** confession to the South Gate police. "Because the tree was not poisonous, its fruit was not tainted." (*People v. Mickey* (1991) 54 Cal.3d 612, 652, 286 Cal.Rptr. 801, 818 P.2d 84.)

D. Denying Motion to Dismiss for Seizure of Papers

[23] Defendant contends that the court erred in failing to grant his motion to dismiss the information for the seizure and scrutiny of certain papers and the seizure and loss of others. (Apparently he made his motion under authority of section 1385, but the record is unclear on the point.) The ruling, in defendant's view, caused a violation of a Sixth Amendment right to counsel. He seeks reversal of his conviction or a remand for a hearing to determine whether any Sixth Amendment rights were violated.

On the day that it imposed the sentence of death on defendant, the court at the prior trial directed the sheriff to "confiscate from the defendant all copies of the Reporter's Transcripts of the proceedings [forthwith] ... and return them to Department SE L...." Rather than let the parties call witnesses, the court herein accepted various offers of proof and found that 14 pages of defendant's trial notes, as well as the annotated transcripts of the prior trial, were taken from him by the court order and then lost, and also that his legal papers were briefly seized in prison in 1982, scrutinized, and returned to him. Defendant objected to the hearing procedure--he preferred to present witnesses.

At argument on the motion, counsel asserted that defendant could not recall from the prior trial conversations with counsel about his arrest and questioning, matters of strategy, the demeanor of witnesses, or the names or location of witnesses and locations where evidence favorable to him might be found.

In reply, the prosecutor said that he could not "imagine what witnesses Mr. Memro might be talking about."

The court found that under the standard set forth in *United States v. Morrison* (1981) 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564, there was no "demonstrable prejudice, or substantial threat thereof" (*id.* at p. 365, 101 S.Ct. at p. 668) that would justify "imposing a remedy in this particular instance" even if the state intentionally interfered with defendant's right to counsel. It denied the motion to dismiss the information.

[24][25] Assuming, as appears likely, that the court denied a motion to dismiss the information brought under section 1385, we review it for an abuse of ***836** discretion. (*People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 502, 72 Cal.Rptr. 330, 446 P.2d 138.) And we review the underlying basis for the ruling--a decision that the facts do or do not

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support a claim of state interference with the right to counsel--for substantial evidence. (Cf. *U.S. v. Leisure* (8th Cir.1988) 844 F.2d 1347, 1359-1360 [applying clearly erroneous standard].) Here, the court decided that even if there was intentional interference with that right, defendant had been able to show no prejudice.

The ruling was sound. The case against defendant centered on his detailed confessions to the crimes. The court could reasonably refuse to believe that he would forget about a witness who could cast doubt on their authenticity. And it could also reasonably conclude that the other reasons he advanced in pressing his motion to dismiss the information were unpersuasive. Moreover, nothing in the record suggests that attorney-client communications were revealed, and the prosecutor stated in his offer of proof that no information from the materials was known to, received by, or used to benefit the prosecution or the police.

[26] Defendant also contends that certain Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the court accepted offers of proof in ruling on his motion rather than hearing witnesses' testimony. But, asked by the court what specific constitutional ground or grounds would justify **1330 not considering offers of proof favorable to the defense rather than live testimony, he was unable to offer any. It appears that there were no disputed material issues of fact. Unless the court is alerted to the presence of such issues, it is difficult to perceive what would be gained by a hearing with live witnesses. (See ***244*People v. Hedgecock* (1990) 51 Cal.3d 395, 415, 272 Cal.Rptr. 803, 795 P.2d 1260.) Moreover, it is difficult to imagine what they could have added that would have favored defendant more than the state of the record the court adopted: it ruled that the record would reflect an offer of proof that when defendant's papers were seized in prison in 1982, as related by his counsel, "two deputies went through Mr. Memro's legal folder and read portions of every document that they picked up ..." and when it was returned "the documents had been gone through, that they were not in the same order they had been in before they were confiscated." It also ruled that the papers seized in jail immediately following the prior trial were mislaid and were never recovered.

E. Denying Motion to Dismiss for Failure to Produce Police Records

[27] On December 27, 1978, at his prior trial, defendant broadly sought discovery of any information that might bear on the case. In January 1979 the motion was granted with regard to the crime report, reports written by ***837** police investigating the crime, and the names and addresses of all other persons arrested as suspects. But some hundreds of pages of investigative material in the hands of the Bell Gardens police, who had investigated the killings of Fowler and Chavez, were not turned over until October 1986. The prosecutor represented that he learned of the material only then and gave it to defendant forthwith. He also averred that counsel for both parties at the prior trial told him that they did not know about the documents. Officer Barclift of the Bell Gardens police testified that for the prior trial he gave the prosecution reports he thought relevant to the case, but did not turn over all those that the police possessed. This procedure had the prosecutor's approval. Peter L. Williams, defendant's counsel at the prior trial, reviewed the complete file and testified that he did not recall having been given arrest reports on other suspects in the 1976 Bell Gardens murders. He also testified, however, that he could not be sure that knowing about the withheld information would have affected his trial strategy.

Defendant moved to dismiss the information, strike the special circumstance allegation, or preclude the possibility of a death sentence as sanctions for the failure to disclose the complete file before 1986. On appeal he asserts that the denial of this motion deprived him of due process of law.

The People assert that the record bespeaks only an inadvertent failure to timely comply with the court's 1979 discovery order. We need not decide that question, however. Assuming, as defendant asserts, citing *U.S. v. Bryan* (9th Cir.1989) 868 F.2d 1032, 1036, that the prosecution's duty to disclose evidence requested in discovery motions encompasses evidence held by the police who investigated the crimes charged, and also accepting solely for purposes of argument defendant's assertion that the police intentionally withheld the material, "such hypotheses do not rise to the level of constitutional cognizability [under the due process clause]. *United States v. Bagley* [(1985)] 473 U.S. 667 [105 S.Ct. 3375, 87 L.Ed.2d 481], sets forth the standard of review applicable to defendant's claims of constitutional violations for failure to disclose favorable ... information. 'The holding in *Brady v. Maryland* [(1963) 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215] requires disclosure only of evidence that is both favorable to the accused and "material either to guilt or to punishment." ' (*Id.* at p.

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674 [105 S.Ct. at p. 3379].) 'The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' (*Id.* at p. 682 [105 S.Ct. at p. 3383] (lead opn. of Blackmun, J.); accord, *id.* at p. 685 [105 S.Ct. at p. 3385] (conc. opn. of White, J.).)" (*People v. Roberts* (1992) 2 Cal.4th 271, 330-331, 6 Cal.Rptr.2d 276, 826 P.2d 274.)

***838 **1331** Under this standard, no violation of the due process clause appears. As stated, the case was centered on defendant's detailed, elaborate confessions. Even if the undisclosed materials had pointed to others who might once have been suspected of the Fowler and Chavez murders, we do not discernany *****245** reasonable probability that the outcome would have differed.

Defendant also asserts perfunctorily that the failure to provide discovery violated rights he discerns in the Eighth Amendment to a reliable fact determination in a capital case and to avoid an arbitrary death sentence. We are unpersuaded.

F. Denying Motion to Exclude Evidence Stemming from Arrest

[28] Pursuant to section 1538.5, defendant moved at his prior trial to exclude all evidence of his guilt stemming from his arrest as the product of an arrest made without probable cause and hence unlawful. The court denied the motion, stating in a minute order, "The court finds there was probable cause for the arrest of the Defendant."

Defendant sought to renew his motion at the trial before us, also under section 1538.5. In response, the prosecution filed papers citing authority for the proposition that such a motion ordinarily may not be relitigated. The court denied the motion and it was not reheard.

Defendant contends that (1) there was no probable cause to arrest him, (2) certain witnesses should have been excluded during the motion hearing, and (3) the court erred by denying his application to renew his motion. Because the court herein left intact the ruling from the prior trial, we address all of these contentions on the merits, including the first and second. To do otherwise would be to unfairly deny defendant a determination of the matter on the merits.

1. Probable Cause to Make Arrest

Defendant urges that because his crimes predate Proposition 8 (Cal. Const., art. I, § 28), we must inquire whether the police actually suspected that he committed a crime, and if we conclude that they did, we must then ask whether the facts known to them gave them adequate cause to arrest on an objective standard. (*People v. Miller* (1972) 7 Cal.3d 219, 226, 101 Cal.Rptr. 860, 496 P.2d 1228.) For purposes of this opinion only we will accept this contention, without deciding whether it is correct. In the first step of our inquiry we apply the deferential standard of substantial evidence; in the second, we exercise our own judgment. (See *People v. Leyba* (1981) 29 Cal.3d 591, 596-597, 174 Cal.Rptr. 867, 629 P.2d 961.)

***839** *a. Facts.*

In this case, the police and defendant told the court almost entirely conflicting stories of the events leading to defendant's arrest. Preliminarily, we note two facts that were essentially undisputed. There was undisputed if implicit evidence that Carter's mysterious disappearance had generated substantial news coverage in local media, and explicit evidence that defendant was aware of the news stories although he had not read them. And there was no necessary indication of foul play: Carter had simply vanished.

The police version of the events preceding defendant's arrest provided overwhelming evidence of probable cause for his arrest. They related the facts as follows:

According to Officer Sims, by Friday, October 27, 1978, five days after Carter's disappearance, he and Officer Gluhak had exhausted all leads. There was implicit evidence that the police were desperate, because they had resorted to the paranormal in their investigation: they obtained an artist's sketch based on a psychic's vision of a person Carter might have been with.

Armed with that sketch, they went back to the Carter residence. Carter's parents each said the sketch looked like defendant. Officers Sims and Gluhak decided to interview him. They knocked on defendant's door and, Officer Sims testified, he virtually blurted out, " 'I knew you were coming sooner or later. I['ve] been in Atascadero for molestation of a nine-year-old boy in the city of Huntington Park.' " Soon thereafter--this first pre-arrest interview lasted 15 minutes--as the police were

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copying down information from defendant's driver's license, he also volunteered, **1332 in Officer Sims's words, " 'You are going to find out,' or he stated to me, 'You are going to find out anyway.' He said, 'When I was arrested in Huntington Park in '72 it was because I went into a fit of rage and beat the shit out of a nine-year-old boy.' ***246 He said he was sent to Atascadero for that reason."

In the interim, defendant had invited Officers Sims and Gluhak into the living room of his apartment. The police did not go into any other part of the house. The living room, said Officer Sims, was littered with "literally hundreds of pictures of young boys, both clothed and partially clothed. I also observed lying on the floor and living room furniture of the apartment numerous books, pornographic material." [FN1]

FN1. Although the transcript shows that Officer Sims testified that the boys were "clothed and partially clothed," a reported statement we repeated in *Memro I, supra,* 38 Cal.3d 658 at page 667, 214 Cal.Rptr. 832, 700 P.2d 446, the record suggests that he meant to say *unclothed.* At the second trial, Officer Carter testified that the police found photographs, including some of nude boys, on the living room coffee table in a manila file folder. Other witnesses at the first trial were asked whether they had ever seen nude photos of boys in plain sight. And at argument on the motion, defendant's counsel referred to testimony that the police had found photographs of "young males, nude males" in plain sight on their first visit to the apartment. (See also *post,* p. 248 of 47 Cal.Rptr.2d, p. 1334 of 905 P.2d.)

The police explained to defendant that they were investigating Carter's disappearance, an event that, as stated, had generated major news coverage. ***840** He replied that he had seen nothing unusual at the Carters' house the night of Carter's disappearance.

The police left defendant's residence to return to the Carters' house.

Defendant left his residence separately to bring a car part to the Carters' house--it will be recalled that Carter's father was repairing defendant's Volkswagen and that defendant had dropped it off the day of Carter's disappearance. When he saw defendant at the Carters' house, Officer Sims asked him again whether he might have seen anything when he dropped off his car on the Sunday that Carter disappeared. In Officer Sims's words, defendant "stated to me, 'Oh, yeah. I remember now. I was going to the Sizzler to get some dinner, but the line was too long.' [¶] He said it was about 6:00 ... in the evening. He said he decided to go over to Carl Carter, Sr.'s, house to talk to him about working on his car. He stated that when he got to the rear door, Carl Carter [Jr.] was there and he asked him if he wanted to go and have a Coke." This occurred around the time that Carter was last seen.

Officer Sims then arrested defendant on suspicion of kidnapping. He arrested him because of "the seriousness of the crime, the fact that a seven-year-old boy had been missing for a week, that Defendant Memro did not give me any of those statements at his apartment, the fact that he had told me he had taken the boy but he didn't do anything to him[,] led me to believe that he was possibly involved in the missing boy's disappearance." He added that he believed defendant was also the last person to see Carter before he was reported missing.

On cross-examination, the testimony was impeached in several important respects. Although Officer Sims testified that the police had not ventured beyond defendant's living room, he also testified that he arrested him because of the urgency of the case, including "an urgency about the boy's safety at that point." When defendant asked him to reconcile this perceived urgency with his own testimony that the police did not search his entire apartment until after he had confessed later that night, he could not do so--he offered no explanation except that he did not know why he had not searched the dwelling.

***841** Officer Sims also had testified that the police turned to defendant because they had no other leads, but conceded that they had not interviewed registered sex offenders in South Gate, nor had they learned the name of the individual who helped Carter's father repair cars.

As stated, defendant's version almost entirely contradicted that of the police.

Defendant testified in great detail about the events surrounding his arrest. The police asked to talk to him as he was preparing **1333 to drive away. He agreed. They asked whether he had ever been arrested, and he stated that he had served time at Atascadero for a violation of section 273d (child

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abuse; see Stats.1965, ch. 1271, § 4, p. 3146). They asked when he had last seen Carter, and he *****247** replied that it was the Saturday before he vanished. They asked to search his apartment, and when he asked if it would do any good to refuse, they said no, so on that basis he consented. The police looked at the bedroom, kitchen, bathroom, and closets as well as the living room. Defendant, an amateur photographer, had a stack of photographic proof sheets on the living room coffee table, which the police examined. A good many of them were of males under 20 years old, as were those on the living room walls. None of them, it can be inferred, were sexually explicit. The police then asked to view the trunk of his car and asked him about a sleeping bag in it. Again being told he could not refuse, he consented.

Defendant also described the second encounter, at the Carter residence, in different terms. The police, seeing him there, said they had more questions. "He wanted to know again when the last time I seen Carl was. And I told him--Carl, Jr., that is--I told him that was on the previous Saturday; that he had been playing up and down the block with the neighbor kids when I stopped over to see Mrs. Carter." He said nothing about seeing Carl the day he vanished.

The police then asked defendant to take a polygraph test. He refused initially, but eventually agreed to it. The police told him he could choose to take the test or be arrested for kidnapping. He went to the station with them.

On cross-examination, defendant adhered to his story.

Carter's father, Carl Carter, Sr., testified that he could not recall the police mentioning that they had seen any unusual photographs in defendant's apartment when they interviewed Carter just after their initial contact with defendant, and just before defendant's return to the Carter residence.

During argument on the hearing on the section 1538.5 motion, defendant pointed out what he viewed as serious inconsistencies in the testimony of the ***842** police regarding his arrest. He pointed out the oddity of claiming to fear for Carter's safety and yet failing to search his apartment for hours. Given testimony that the police found photographs of male youths in plain sight on their initial visit to the apartment, defendant emphasized the curiousness of the police officers' failure to ask Carter's father whether he might know anything about defendant's choice of photography subjects. He maintained that there was no probable cause for his arrest, the police knew it, and therefore they had at times manufactured their testimony to justify it.

Citing *People v. Rios* (1956) 46 Cal.2d 297, 294 P.2d 39, the court found that "there was probable cause for the arrest of the defendant; that the arrest occurred in the alley behind the Carter residence in the afternoon of the 27th of October.

"..

"The Court finds that the use of the psychic in this case was merely an investigative tool and cannot be relied upon by the officers in connection with justifying their arrest. However, it may be used to follow up additional leads.

"The comments, the testimony that was presented and the identification by Mr. Carter, then the admission by the defendant at the home that he had been at Atascadero for assaulting another young boy, then his position that he hadn't seen the boy on the day the boy was missing, the information to the officers that he was there the day the boy was missing and then after the officers talked to the defendant and see him again at the Carter residence, the inconsistent statements of the defendant to the officers that he actually was the last person with the individual, in this Court's evaluation is sufficient evidence to justify an arrest for a homicide....

"The Court finds there was a legal arrest of the defendant."

b. Discussion

As stated, we defer to the trial court's findings regarding the officers' suspicion that ****1334** defendant had committed a crime and then decide, based on the facts known to them, whether probable cause objectively existed to make an arrest. The trial court in essence entirely accepted the police officers'testimony *****248** regarding defendant's arrest. We are bound by that acceptance.

Under the version of defendant's interviews the police described, substantial evidence supports the court's implicit conclusion that the police suspected defendant of committing the crime of kidnapping. It would have been extraordinary for the police not to have such a suspicion.

***843** The case had dominated public discourse in

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South Gate for a week, and defendant knew the Carter family, yet when the police asked him whether he had seen anything unusual the day Carter vanished, he first said no. He later suddenly recalled that he had invited Carter out for a soft drink at around the time that he disappeared. He had various materials in his living room in plain sight showing a morbid sexual interest in young boys. And he had a record for physical abuse of a nine-year-old.

The foregoing facts, accepted by the court, supplied ample "reasonable cause" under state law (former § 836, subd. 3), and ample probable cause under the federal Constitution--the standards are identical (*People v. Talley* (1967) 65 Cal.2d 830, 835, 56 Cal.Rptr. 492, 423 P.2d 564)--to believe that defendant had committed a crime and thereby justify a warrantless arrest (*Dunaway v. New York* (1979) 442 U.S. 200, 208, 213-214, 99 S.Ct. 2248, 2254, 2257, 60 L.Ed.2d 824 (plur.opn.); see also *id.* at pp. 215-216, 99 S.Ct. at p. 2258 [requiring probable cause to effect arrest made for investigative purposes]).

The police officers' awareness that defendant had made conflicting statements for which there could be no innocent explanation and that he admitted being in Carter's company about the time he vanished are particularly significant. (See *People v. Kaurish, supra,* 52 Cal.3d at p. 676, 276 Cal.Rptr. 788, 802 P.2d 278 [police knew suspect had left apartment in same building shortly before murder committed]; *People v. Wright* (1990) 52 Cal.3d 367, 392, 276 Cal.Rptr. 731, 802 P.2d 221 [police knew suspect was seen near victim's residence shortly before her death]; *People v. Davis* (1981) 29 Cal.3d 814, 823, 176 Cal.Rptr. 521, 633 P.2d 186 [suspect admitted he was with victim at approximate time of death]; *People v. Galceran* (1960) 178 Cal.App.2d 312, 313, 316-317, 2 Cal.Rptr. 901 [irreconcilably conflicting statements regarding ownership of vehicle, inter alia, furnished sufficient cause to search], cited with approval in *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 197, 101 Cal.Rptr. 837, 496 P.2d 1205 [conflicting answers "constitute ... a further suspicious circumstance sufficient to support a belief that the vehicle is stolen"]; *People v. Garcia* (1981) 121 Cal.App.3d 239, 246, 175 Cal.Rptr. 296 [conflicting statements that television set belonged to "the 'black man' and also to Madrid," inter alia, provided probable cause to arrest]; *In re Collins* (1969) 271 Cal.App.2d 195, 197, 203-204, 76 Cal.Rptr. 622 [suspect first said articles belonged to sister, then that he found them under a bridge; probable cause to believe crime had occurred].) By themselves, defendant's patently inconsistent statements on such a vital matter as the whereabouts of Carter near the time he vanished had "no discernible innocent meaning" and strongly indicated consciousness of guilt. (*People v. Superior Court (Simon), supra,* 7 Cal.3d at p. 197, 101 Cal.Rptr. 837, 496 P.2d 1205.) There is no question that the police had probable cause to arrest defendant.

***844** *2. Excluding Witnesses During Hearing*

[29] Defendant maintains that the court erred when it denied his motion to exclude witnesses during the hearing to suppress evidence because there was no probable cause for his arrest. He asserts in a conclusory manner that "[b]y permitting all of the officers to remain, the court irreparably prejudiced appellant's opportunity to cross-examine the officers effectively and to prove the invalidity of the arrest." He does not state that the court violated any statute. His claim is purely speculative and lacks merit. (See *State v. Seel* (Utah Ct.App.1992) 827 P.2d 954, 959.)

3. Denying Application to Renew Motion

[30] As stated, at defendant's second trial, the court denied an application to hear his ****1335** motion to suppress evidence under section 1538.5 de novo. The motion was made in a manner the court called "conclusionary"; defendant did not explain what new evidence *****249** might justify a rehearing. Nevertheless, he argued at the motion hearing that the matter should be relitigated because there was "more [evidence] on the credibility of the officers that were involved in the [prior section 1538.5] motions." The purported new evidence consisted of the possibility that two other witnesses would testify they "never saw nude pictures" in plain sight in defendant's apartment. The court rejected that offer of proof immediately, saying that defendant could have told counsel about any such witnesses before the prior litigation.

Defendant also suggested vaguely that prior counsel may have exercised poor judgment in not pursuing the possibility that Carter had been seen in another individual's company after defendant admitted having been with him.

The court found that "defendant has not established through any evidence whatsoever that [he] lacked an opportunity for a full determination of the merits of his motion as originally made and noticed at the previous hearing and the request for a 1538.5 de novo is denied."

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Defendant now contends that the court erred in denying a new hearing on his section 1538.5 motion because counsel at the first trial was ineffective for not impeaching the arresting officers with purported evidence, contained in a police report that they possessed, that Carter was seen by his brother near their house an hour after defendant saw him. He contends that the denial of his application violated rights he finds in the Sixth, Eighth and Fourteenth Amendments to due process, to counsel, and to a reliable factfinding process in a capital case.

***845** [31] In *People v. Superior Court (Corona)* (1981) 30 Cal.3d 193, 199-200, 178 Cal.Rptr. 334, 636 P.2d 23, we suggested that if counsel's ineffectiveness at a section 1538.5 suppression hearing denied a defendant an opportunity for a "full determination" of the motion's merits, in some circumstances the defendant should receive a new hearing. But we believe that the question whether there was an opportunity for a full determination of the motion's merits at the prior trial is essentially factual and we review for substantial evidence the court's implicit ruling that there was such an opportunity. Substantial evidence supports the ruling: on this record, we conclude that the court could reasonably find that defendant failed to show he was denied the opportunity to present all the available evidence at the time of the original hearing. This record is similar to that before the Court of Appeal in *People v. Dorsey* (1973) 34 Cal.App.3d 70, 109 Cal.Rptr. 712, overruled on another ground in *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 602, 119 Cal.Rptr. 302, 531 P.2d 1086: "The reversal of defendant's conviction returned him to the position he occupied prior to his conviction, i.e., facing trial after the denial of his motions to set aside the information and suppress the evidence. Defendant made no showing of any change of circumstance necessitating renewal of these motions at the second trial. The opportunity of renewing such motions for a second time is within the discretion of the trial court judge upon retrial. [Citation.] We find no abuse of discretion here." (34 Cal.App.3d at p. 73, 109 Cal.Rptr. 712.) Neither do we.

[32] Anticipating we might reach this conclusion, defendant contends briefly that any failure to raise the point adequately constituted ineffective assistance of counsel. Presumably he refers to the fact that defendant's motion papers did not mention the purported exculpatory police report and that he only alluded to it vaguely at the hearing.

We doubt that the contents of any such report, if admissible in evidence and accepted by the court, would have altered its ruling denying a new hearing, for it is also doubtful that the court at the prior trial would have ruled differently if it had learned of the report and received it in evidence. It is unlikely that the purported one-hour discrepancy to which defendant alludes would have changed the officers' assessment of his possible guilt of crime, assuming for purposes of argument that they were aware of it. Although Officer Sims listed his perception that defendant was the last person known to have ****1336** seen Carter as a factor in arresting him, it is clear that his inconsistent statements alone provoked strong suspicion that he had committed an offense. On this record, we reject *****250** the ineffective-assistance contention: there is no reasonable probability that, if defendant had better briefed the motion with supporting argument or furnished a police report of the type he describes, the outcome would have differed.

***846** *G. Denying Motion at Prior Trial to Exclude Evidence for Lack of Consent to Police Search of Apartment*

[33] At the prior trial, defendant moved to exclude physical evidence obtained following his statements to the police. He testified at that trial that he did not consent to a search of his apartment after his arrest and confession. The court at that trial denied the motion to exclude the evidence resulting from the search. On this appeal, he contends that the search was unlawful because it was made without his effective consent.

Defendant did not litigate the matter in the proceeding before us. In answer to an anticipated conclusion that there was no action of the court for us to review, he argues that the court made plain, by denying his application to relitigate his motion to suppress or exclude evidence under section 1538.5, that it would not entertain any request to reconsider the prior ruling, and therefore it would have been pointless to try. He contends that under these circumstances to deny review on the merits of his claim would violate the Eighth Amendment. Without necessarily agreeing with him, we will, in an abundance of caution, evaluate his contention on the merits.

Prosecution witnesses from the South Gate and Bell Gardens Police Departments testified that defendant consented, from his jail cell, to let them search his apartment for physical evidence relating to the

murders. Defendant testified that he could tell that the police had already searched his apartment before his second in-jail interrogation, at which time he had not consented to any further search of his premises, because they showed him items they had recovered from it.

The parties dispute not only whether defendant consented to the search, but also whether any consent was effective given that it was sought, according to Officer Carter, about 4:00 a.m.

[34] When reviewing a ruling on an unsuccessful motion to exclude evidence, we defer to the trial court's factual findings, upholding them if they are supported by substantial evidence, but we then independently review the court's determination that the search did not violate the Fourth Amendment. (*People v. Loewen* (1983) 35 Cal.3d 117, 123, 196 Cal.Rptr. 846, 672 P.2d 436.)

"The fourth amendment generally prohibits the warrantless entry of a person's home, either to make an arrest or to conduct a search. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); *Johnson v. United States*, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 ***847** (1948). An exception to this general proscription arises, however, when voluntary consent to search has been given ... by the individual whose property is searched, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043, 36 L.Ed.2d 854 (1973)...." (*U.S. v. Towns* (7th Cir.1990) 913 F.2d 434, 442.)

When the court denied defendant's motion, we must assume that it found he consented to the search. We are bound by that implicit determination. But defendant contends that even under the testimony favoring the prosecution, his consent to the search would have been ineffective because the hour was late and he was exhausted, hungry, and distraught.

However, we need "not now decide whether [any] consent was valid or whether the ... searches were lawful. Even if the searches were unlawful and the evidence should not have been admitted against [defendant], the other evidence of his guilt was so overwhelming that the alleged error was harmless beyond a reasonable doubt." (*United States v. Murray* (9th Cir.1976) 530 F.2d 856, 857.) His confessions amounted to almost the whole of the prosecution's guilt and penalty case. The record strongly suggests that his remorse prompted him to confess, not the fear or the realization that incriminating evidence ****1337** might be found, or had been found, in his apartment. Although the physical evidence recovered from the apartment served to confirm certain details of his confession to *****251** Carter's murder, he confessed in detail and led the police to the body. The state proved by overwhelming evidence that he killed Carter. It has met its burden of showing that "any possible error admitting the contested evidence was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710, 24 A.L.R.3d 1065].)" (*People v. Perry* (1972) 7 Cal.3d 756, 776, 103 Cal.Rptr. 161, 499 P.2d 129; cf. *U.S. v. Towns, supra*, 913 F.2d at pp. 446-447.)

H. Denying Motions to Sever Counts Charging Fowler and Chavez Murders from Count Charging Carter Murder

[35] On March 19, 1986, defendant filed a motion to sever trial on counts I and II of the information--the counts alleging the 1976 murders of Fowler and Chavez--from count III, which alleged the 1978 Carter murder.

Relying on *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454, 204 Cal.Rptr. 700, 683 P.2d 699, defendant argued that all the factors that case listed as favoring severance applied to him. Specifically, he maintained that the evidence would generally not be cross-admissible if presented in separate trials because the facts relating to the Carter killing were quite ***848** different--e.g., the method was different and it occurred years later--and hence the facts of the killings did not show a particular modus operandi. He also argued that presenting evidence of the killing of three children to one jury would be inflammatory--at the hearing he contended that "extreme prejudice" would result from the fact that the victims in the 1976 killings were ten and twelve years old but the victim in the 1978 killing was only seven. He maintained that the case against him for the 1976 murders was weaker because there was "no evidence to connect [him] to these crimes," and he also observed that count III made him potentially death-eligible whereas counts I and II did not.

In reply, the prosecution argued that defendant killed Fowler and Carter for sexual reasons and Chavez because he witnessed Fowler's killing. It also argued that the cases were of equal strength because in each he "confesse[d] to information that only the killer would know." It asserted that no killing was more inflammatory than the others. And it maintained that

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defendant would present a psychiatric defense as he had at his prior trial, raising the issue of intent and requiring litigation of his mental state when he killed all his victims.

The prosecution conceded that one of the charges carried the potential for the death penalty, but argued that the fact would not prejudice defendant. It also argued that judicial economy favored conducting one trial.

After hearing argument at length, the court denied the motion without comment.

On October 31, 1986, defendant filed papers asking the court to reconsider its ruling in light of *People v. Smallwood* (1986) 42 Cal.3d 415, 228 Cal.Rptr. 913, 722 P.2d 197.

There were two different hearings on the motion to reconsider. At the first, held February 27, 1987, defendant asked the court to hold an in camera hearing so that he could present an offer of proof of possible inconsistent defenses. He asserted, and the court agreed, that presenting inconsistent defenses was a factor to consider in favor of severance. But it refused to hold an in camera hearing, saying it would deny the People due process of law by forcing their absence at a critical stage in the proceedings. It postponed a ruling on the motion because it was unsure whether it had jurisdiction to decide it.

The second hearing occurred March 18, 1987. On that date, the court initially said it would deny the motion on procedural grounds. It ruled that "*Smallwood* does not state any new law...."

***849** Defendant nonetheless urged the court to reconsider its ruling in light of the new evidence he had wanted to present in the in camera hearing almost three weeks before. When the court reminded him that it would not hold an in camera hearing, he declared that request no longer mattered because in the interim the prosecutor had seen the new evidence. He explained that the new evidence ****1338** consisted of other "suspects that were identified by people in the first two murders" and therefore identity was at issue.

*****252** After defendant raised this argument the court elected to hear the motion to reconsider on the merits. It ruled that under Evidence Code section 1101, subdivision (b), evidence of each crime was cross-admissible because "it seems [the prosecution is saying it can show evidence of] motive, intent, plan," otherwise adopted the arguments the prosecution set forth, and denied the motion for severance. It emphasized that the People did not have to present their entire case to defeat a motion for severance; their offer of proof was enough. It ruled that there was no issue of identity, notwithstanding defendant's offer of proof. It did agree that inconsistent defenses to the 1976 and 1978 murder charges--a possibility defendant broached during the hearing on the motion--might conceivably justify severance, but it pointed out that his moving papers never raised the possibility that he might present inconsistent defenses, and for that reason it refused to consider such a scenario in making its ruling. "That [point] is not in any of your moving papers filed at any time that I am aware of. All that you have really talked about is the prejudice...."

At trial, defendant presented no psychiatric defense to any charge.

The governing statute is section 954, which provides in relevant part: "An accusatory pleading may charge ... two or more different offenses of the same class of crimes or offenses, under separate counts,.... provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately...."

"The statutory requirements for joinder were met here because both incidents involved the same class of crimes--murder. Since the requirements for joinder were satisfied, defendant can predicate error only on a clear showing of potential prejudice. [Citation.] 'The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]

[36] " 'The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged ***850 *849** to provide guidance in ruling upon and reviewing a motion to sever trial.' [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the

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outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]" (*People v. Sandoval* (1992) 4 Cal.4th 155, 172-173, 14 Cal.Rptr.2d 342, 841 P.2d 862, affirmed in *Victor v. Nebraska* (1994) 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583.)

The criteria listed in *Sandoval* should not be misunderstood as being equally significant, however. "[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172, 222 Cal.Rptr. 184, 711 P.2d 480; see *People v. Mason* (1991) 52 Cal.3d 909, 934, 277 Cal.Rptr. 166, 802 P.2d 950.)

[37] Cross-admissibility suffices to negate prejudice, but it is not needed for that purpose. Although " 'we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice.' " (*People v. Sandoval, supra,* 4 Cal.4th at p. 173, 14 Cal.Rptr.2d 342, 841 P.2d 862; see also § 954.1, enacted June 5, 1990 [codifying rule].)

****1339** [38][39] We review the court's ruling for an abuse of discretion. (See *****253***People v. Cummings* (1993) 4 Cal.4th 1233, 1284, 18 Cal.Rptr.2d 796, 850 P.2d 1.) A court abuses its discretion when its ruling "falls outside the bounds of reason." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1226, 9 Cal.Rptr.2d 628, 831 P.2d 1210.) The ruling was reasonable.

The court had before it the prosecution's statement that in the prior trial defendant had relied on a psychiatric defense. It could reasonably conclude that evidence of the killing of Chavez, who the prosecution believed was murdered because he was a witness, would be introduced to challenge an available psychiatric defense (*People v. Mickey, supra,* 54 Cal.3d at p. 639, fn. 1, 286 Cal.Rptr. 801, 818 P.2d 84) that defendant lacked the mental capacity to premeditate, deliberate, or conform his behavior to the law's requirements because a personality disorder existing since childhood caused him to fly into rages in certain sexual ***851** situations. (*People v. Gay* (1972) 28 Cal.App.3d 661, 667-668, 670, 104 Cal.Rptr. 812.) That was the defense at the prior trial. (*Memro I, supra,* 38 Cal.3d at pp. 693-694, 214 Cal.Rptr. 832, 700 P.2d 446.) Defendant did not say that he would not rely on that defense.

And the court had before it the prosecution's theory that defendant's modus operandi was to seek out boys to fulfill his sexual desires. Given its discretion to decide severance questions, the court's conclusion that intent, motive, or plan was at issue was reasonable. (Evid.Code, § 1101, subd. (b).) It properly rejected defendant's surmise that he might offer inconsistent defenses as not having been raised in a timely fashion--he mentioned the matter too late for the court to consider it as possibly weighing in favor of severance.

In sum, then, the court did not abuse its discretion in finding no cross- admissibility consideration that might favor severance. For that reason, its ruling ordinarily must be sustained. (See *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639, 257 Cal.Rptr. 550, 770 P.2d 1119.) An exception might apply if the joinder was so grossly unfair as to deny defendant due process. (*People v. Sandoval, supra,* 4 Cal.4th at p. 174, 14 Cal.Rptr.2d 342, 841 P.2d 862.) No such gross unfairness appears. The crimes were of a similar class: murder. If one was inflammatory, all were.

[40] Defendant also contends that the court erred by not holding an in camera hearing on an offer of proof regarding inconsistent defenses. (He does not point us to anything in the record, however, that shows that the court would have understood his request as pertaining to an offer of proof regarding inconsistent defenses, if indeed it would have so pertained.) Citing *Simmons v. United States* (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247, he maintains that he was unconstitutionally forced to waive one constitutional right to invoke another. He asserts that he had to "diminish his right to due process of law in presenting his basis for severance of the charges" in order to "protect the invasion of his right to counsel under the Sixth Amendment and his right against self-incrimination under the Fifth Amendment...."

Defendant waived any claim of error, however, when, at the resumed session almost three weeks after the court's initial hearing on the motion to reconsider, he stated that because the prosecution already had the relevant materials he no longer required a closed hearing.

I. Denying Motion Challenging Jury-selection

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Process

Defendant was tried in the Southeast Judicial District (Norwalk) of the Los Angeles County Superior Court. He implicitly moved to challenge the ***852** jury-selection process on the basis that jurors would not be drawn from a representative cross-section of the community. The court implicitly denied the motion. The parties stipulated that the challenge to the jury-selection process that we rejected in *People v. Mattson* (1990) 50 Cal.3d 826, 842-844, 268 Cal.Rptr. 802, 789 P.2d 983, was raised on the same record as exists in this case. Mattson was also tried in the Norwalk district. Defendant argues that we should reconsider our holding in *Mattson,* in which we held that because "the record does not demonstrate a disparity when the population ****1340** of this community is used for comparison purposes, defendant has not established a prima facie violation of the cross- *****254** section guaranty" of the state and federal Constitutions. (*Id.* at p. 844, 268 Cal.Rptr. 802, 789 P.2d 983.) We decline to reconsider our conclusion.

J. Denying Motion to Dismiss for Failure to Bring the Case Speedily to Trial

[41] Defendant contends that the court erroneously denied a motion to dismiss the charges for failure to bring the case to trial speedily. He maintains that the judgment must therefore be reversed on state law grounds.

We issued the remittitur in *Memro I, supra,* 38 Cal.3d 658, 214 Cal.Rptr. 832, 700 P.2d 446, on August 1, 1985, and defendant was returned to superior court for retrial on August 21. He waived his right to a speedy trial. Counsel moved for continuances for various purposes and the case was set for trial on November 3, 1986.

On June 18, 1986, defendant, acting in propria persona, moved that his case be dismissed for failure to bring it to trial within 60 days "in contravention of my guaranteed right to a speedy trial." The court implicitly denied the motion when it referred his letter to counsel for "appropriate action" and continued to grant counsel continuances. The cause was called to trial on April 1, 1987.

At the time of the motion, section 1382 provided that the court, "unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: [¶] ... [¶] 2. When a defendant is not brought to trial in a superior court within 60 days after the ... filing of the remittitur in the trial court...." (See also § 1050, subd. (a) [cases should be tried as soon as possible].)

[42] We review a decision to grant continuances under section 1382 for an abuse of discretion. (*People v. Johnson* (1980) 26 Cal.3d 557, 569-570, 162 Cal.Rptr. 431, 606 P.2d 738 (plur.opn.).) "A continuance granted at the request of counsel normally constitutes ... good ***853** cause [citation], at least in the absence of evidence showing incompetency of counsel [citation] or circumstances where counsel's request for a continuance is prompted only by the need to [serve] other clients and the defendant himself objects to the delay. [Citation.]" (*People v. Wright, supra,* 52 Cal.3d 367, 389, 276 Cal.Rptr. 731, 802 P.2d 221.)

The court plainly did not abuse its discretion in granting continuances rather than dismissing the charges. Defendant's life was at stake. Given the gravity of the charged crimes, the court and counsel could have believed that a rush to try the case would be a rush to death, and there is evidence that the court did so believe--it told defendant that it "cannot permit you, in effect, to commit suicide by insisting upon going to trial within the 60-day period...."

There is nothing whatever in the record to show that counsel's requests for continuances were prompted solely by the need to serve other clients. To try to show that this was the case, defendant relies on the declarations of Peter Larkin, his lawyer, that he spent 42 hours preparing for the case from August-November 1985, and 89 1/2 hours from June-December 1986. This, however, is not enough purely by itself to show a lack of diligence as a matter of law, much less to establish a claim that he was motivated solely "by the need to [serve] other clients." (*People v. Wright, supra,* 52 Cal.3d at p. 389, 276 Cal.Rptr. 731, 802 P.2d 221.) Nor is there anything in the record to hint at counsel's incompetence. Rather, our review of the record shows that they were diligent and presented an able defense. They brought important pretrial motions, some of which potentially had significant merit and, if granted, might have benefitted defendant more than anything they could have achieved at trial. In particular, the motion to suppress the confession was crucial, and it was well litigated.

Accordingly, the court did not abuse its discretion in implicitly denying the motion to dismiss the charges by continuing to grant continuances.

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[43] Defendant also contends that the Sixth Amendment required that independent counsel be appointed for the hearings on his **1341 motions to dismiss the charges and to remove counsel, and that the guaranty was violated when the court refused to grant ***255 either motion. He cites no authority for this proposition save the constitutional provision itself. We are not persuaded.

K. Denying Motions to Substitute Counsel

[44] Larkin was appointed to represent defendant August 21, 1985, and on November 14, 1985, Carney was also appointed to represent him. Four times defendant moved to replace them. The court denied each motion.

***854** On May 9, 1986, defendant complained in court about "the lax and unconscientious performance of my attorneys...." A few minutes later he asked that "a competent attorney be assigned. I feel both these attorneys are incompetent. They haven't been doing their job." The court called his request "ludicrous.... They are both competent attorneys." Before the hearing concluded, he also complained that his counsel "hasn't had the time to come down and see me, even.... I haven't gotten copies of motions, I haven't gotten copies of the discovery material. He hasn't interviewed witnesses I've requested for seven and eight months, now."

On May 20, 1986, defendant evidently wrote to the court about counsel, and on June 6 it decided to consider his motion to appoint new counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44 (*Marsden*). Defendant asked that counsel be appointed for the *Marsden* hearing. The court refused.

Defendant declared that his lawyers had failed to give him copies of all discovery materials, discuss and allow him to veto trial strategies, give and explain to him pretrial motions before filing them, keep him informed about the case, investigate avenues that might lead to new evidence, adequately communicate with him, and promptly file a motion in which he was particularly interested. He appeared to be especially concerned about counsel's failure to interview new potential witnesses, some "90 to 100" of whom were "relevant to the pretrial motions and defense in this case...."

In response, Carney, Larkin's assistant, acknowledged that he had lost a page of notes defendant had given him. Aside from that minor error, Carney said he had been almost excessively meticulous in preparing pretrial motions, a task on which he had spent many hours. He had tried four capital cases and in effect said that he was aware of the gravity of a capital trial and of the need for a diligent defense "more than Mr. Memro appears to realize." He said that he would never allow defendant, or any defendant, to have the final say on strategy. He would ordinarily tell a client so. Carney explained aspects of the defense's plans and indicated that the defense would not pursue some avenues defendant had demanded, as they were "just straw issues ... not of significant consequence [as] to whether or not he is going to get a fair trial, or with respect to pretrial motions." Defendant was uncooperative when Carney asked for family-background information that might help at a possible penalty phase. (See *ante,* p. 231 of 47 Cal.Rptr.2d, p. 1317 of 905 P.2d.)

Larkin also responded in detail to each allegation. Defendant had free access to call his office and did so several times a week, at Larkin's expense. He had visited him in jail at least 15 times. He tried to be responsive to his ***855** requests and complaints and to keep him informed. He discussed the case strategy with him. He filed some motions to which defendant was opposed because in his judgment they were necessary. He had an investigator working on the case. There were difficulties because the crimes had occurred so long ago, but the defense was trying to surmount them. Larkin stated that defendant did not want any defense at the penalty trial if one were to occur, but that he would be afforded one anyway.

Both counsel denied that the relationship with their client was steadily deteriorating--his *Marsden* motion was a surprise to Larkin. While Carney would not characterize defendant as "a malingerer or a[n] obstreperous individual," he warned that he might refuse to cooperate with future counsel if "his whims are not answered" and "they don't go down and hold his hand...."

****1342** In response, defendant said that counsel were not being diligent or keeping him informed and that Larkin had promised him "the final say in strategy."

*****256** The court ruled against defendant. It pronounced itself "satisfied that the attorneys are doing everything they can for you; that they are both qualified and competent...." The court urged him to cooperate with them for his own sake.

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Defendant responded by asking to be removed from the courtroom.

On November 3 and November 5, 1986, another *Marsden* hearing was held before temporary Judge John A. Torribio, who had replaced Judge Eugene J. Long in presiding over the trial. Defendant indicated initially that his complaints were no different from those he had brought before Judge Long--"[t]he problem is that it is continuing." He inaccurately told Judge Torribio, who did not have a transcript of the prior hearing, that Judge Long had told his lawyers they did not have to speak with him or show him discovery materials--in sum, "[t]hey can do whatever they want to, and they are going to defend this case however they want to." He again complained that his lawyers were refusing to interview witnesses who he thought might be helpful.

The court decided not to obtain a copy of the transcript of the hearing before Judge Long. It reasoned that it would take too long and would impair defendant's right to a speedy trial, which he had been insisting on for some time. It stated that there would not "be any continuances[,] because I respect your right to have a speedy trial...." Instead it went through defendant's ***856** list of complaints with him and his counsel to determine which were new and which not. Those raising issues that Judge Long had decided the court declined to hear.

The court reviewed counsel's performance on the remaining issues. In essence, it asked them whether they were keeping defendant informed and were investigating information that might lead to new evidence. Thereafter it denied the motion without explanation. Defendant immediately asked, "Why does the court seem to be so concerned about my rights to a speedy trial but so unconcerned about my rights to a fair trial?"

The next day, the court granted counsel a continuance to February 18, 1987. The defense used this time to file, on February 6, 1987, motions to strike a prior felony conviction as an aggravating factor; to discover certain information from the South Gate Police Department interrogating officers' personnel files; to dismiss the charges for nonpreservation of evidence, for failure to comply with a 1979 discovery order, and for failure to preserve the officers' records; to exclude the testimony of jailhouse informants; to exclude psychiatric testimony; to suppress certain evidence under section 1538.5; and to waive a jury at the penalty phase, if any. On February 6, 1987, a continuance until March 25, 1987, was granted, and on March 18, 1987, the court ordered jury selection to begin April 1.

On March 25, 1987, there was another *Marsden* hearing, at which defendant again complained that counsel had failed to locate witnesses and were unwilling to demand the personnel records of other South Gate police officers, and that he did not want counsel to admit that he was guilty of second degree murder for Carter's killing. Calling Larkin "a respected and capable attorney," the court denied the *Marsden* motion.

On June 3, 1987, just before the penalty trial began, defendant made his final *Marsden* motion. He wanted counsel either to be relieved or to be ordered not to mount a penalty defense. To him, the "death penalty would be preferable [to] life without parole." He declared that counsel would not tell him their plans for the defense. Counsel acknowledged that defendant would not be told the names of specific witnesses for him, but explained that he was trying to get witnesses not to cooperate when he learned of their identity. The court implicitly denied the motion.

Defendant contends that the court erred each time it denied his motion to appoint new counsel. He maintains that there was a "complete and utter breakdown of the attorney client relationship" occasioned by counsel's failure to "contact material witnesses ****1343** regarding the pre-trial motions" and to prepare his case in a timely manner.

***857** [45] We review the court's rulings for an abuse of discretion. *****257**(*People v. Berryman* (1993) 6 Cal.4th 1048, 1070, 25 Cal.Rptr.2d 867, 864 P.2d 40.) We shall explain that none occurred.

A defendant "may be entitled to an order substituting appointed counsel if he shows that, in its absence, his Sixth Amendment right to the assistance of counsel would be denied or substantially impaired." (*People v. Berryman, supra,* 6 Cal.4th at p. 1070, 25 Cal.Rptr.2d 867, 864 P.2d 40, citing *Marsden, supra,* 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44.) The law governing a *Marsden* motion "is well settled. 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance. [Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate

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representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result [citations].' [Citations.]" (*People v. Fierro* (1991) 1 Cal.4th 173, 204, 3 Cal.Rptr.2d 426, 821 P.2d 1302.)

The court's rulings were reasonable. The record makes plain that counsel were representing defendant diligently and well. The great substance and weight of his appeal to this court, which contains 46 claims of error, was made possible by tenacious litigation of his cause before, during and after trial. The record also reveals that the court "carefully inquired into defendant's reasons for requesting substitution of counsel, which proved to be either groundless or patently insufficient to demonstrate 'such an irreconcilable conflict that ineffective representation [was] likely to result.' " (*People v. Fierro, supra,* 1 Cal.4th at p. 206, 3 Cal.Rptr.2d 426, 821 P.2d 1302.)

To be sure, defendant made plain that he did not like his lawyers and did not think highly of them. That, however, "was not enough [to show a conflict of interest]. '[I]f a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.' " (*People v. Berryman, supra,* 6 Cal.4th at p. 1070, 25 Cal.Rptr.2d 867, 864 P.2d 40.)

Defendant also asserts that, over his objection, counsel implicitly entered a plea of guilty to Carter's murder when they conceded at closing argument that he killed him. He implicitly argues that doing so over his objection reveals an irreconcilable conflict.

Counsel did not, however, plead defendant guilty to any offense. At closing argument, he conceded the obvious: that defendant had killed Carter. ***858** At one point his tongue slipped and he called Carter's killing a "murder," but he then argued, "In looking at the charges you have to again, as I stated, look at the malice instructions to determine whether malice has even been shown, number one. Because if there's no malice, no malice aforethought, it's not a murder. It could be a manslaughter." The jury had just been instructed on voluntary manslaughter. We think that counsel's concession, read as a whole, was only that defendant had killed Carter, not that he had murdered him. To acknowledge that fact was not to enter a plea of guilty on his behalf. As Judge Posner explained in a case with a similar posture, "[t]he lawyer was trying to enhance his credibility with the jury by conceding his client's guilt of the offense of which the evidence was overwhelming, and to focus his efforts on the weakest link in the state's case, the charge that [defendant] had attempted to have sex with his victim, an essential element.... [¶] ... The lawyer did not plead Underwood guilty; he merely acknowledged the weight of the evidence of criminal confinement in order to contrast it with the lack of direct evidence of an intent ... to have intercourse with the victim." (*Underwood v. Clark* (7th Cir.1991) 939 F.2d 473, 474; see also *People v. Jones* (1991) 53 Cal.3d 1115, 1139-1140, 282 Cal.Rptr. 465, 811 P.2d 757.)

****1344** Defendant next contends that the court erred in failing to admonish him and obtain his waiver of his rights to confrontation, to a jury trial, and against self-incrimination (see *****258** *Boykin v. Alabama* (1969) 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed.2d 274; *In re Tahl* (1969) 1 Cal.3d 122, 132-133, 81 Cal.Rptr. 577, 460 P.2d 449) before counsel entered a plea of guilty to Carter's murder. As stated, however, counsel entered no such plea.

If defendant is arguing that counsel's concession caused an irreconcilable conflict, we disagree. He may not have welcomed their approach, but he was not entitled to claim that an irreconcilable conflict had arisen merely because he could not veto their reasonable tactical decisions. (*People v. Douglas* (1990) 50 Cal.3d 468, 520, 268 Cal.Rptr. 126, 788 P.2d 640.) This was a reasonable tactical decision (see *Underwood v. Clark, supra,* 939 F.2d at p. 474): defendant's confession would have made any argument that he did not kill Carter wholly unpersuasive, and counsel were wise to maintain credibility with the jury by acknowledging the obvious. (See *People v. Jackson* (1980) 28 Cal.3d 264, 292-293, 168 Cal.Rptr. 603, 618 P.2d 149 (plur. opn.).)

[46] Defendant also contends that by denying his motion to appoint counsel for him to help him prosecute his *Marsden* claims the court deprived him of rights he asserts to due process of law and to the effective assistance of counsel. We acknowledge that some courts have appointed independent ***859** counsel to press a *Marsden* claim. (*People v. Hardy* (1992) 2 Cal.4th 86, 132, 5 Cal.Rptr.2d 796, 825 P.2d 781.) However, defendant cites no authority requiring such an appointment, and indeed the rule is to the contrary. (*People v. Douglas, supra,* 50 Cal.3d at p. 521, 268 Cal.Rptr. 126, 788 P.2d 640.) What

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our decisions have consistently required is that the court listen to and evaluate a defendant's claim that counsel are failing to perform adequately. The court did so, and defendant was entitled to no more.

Defendant further maintains that the court deprived him of due process of law when it "used his assertion of [his] speedy trial rights as a pretext to deny him the opportunity to prepare fully for the *Marsden* hearings." It will be recalled that the court ruled that because it would interfere with the case proceeding to trial, no transcript of the first hearing could be prepared, yet the next day it granted counsel a continuance. Even assuming that there was some inconsistency in those rulings, we are unpersuaded that there was a violation of any possible right to due process of law. Defendant, counsel, and the court went through defendant's list of complaints and determined jointly which ones had already been adjudicated before Judge Long. We discern no denial of due process in this procedure.

Finally, defendant contends that when the court denied his *Marsden* motion between the guilt and penalty trials it failed to apply the proper standard to such a motion, at least to the extent of appointing new counsel to investigate its basis. In his view, the standard following the verdict of guilt was less burdensome to him than that articulated in *Marsden* 's progeny, which requires that " 'the record clearly show[ ] that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result....' " *(People v. Fierro, supra,* 1 Cal.4th 173, 204, 3 Cal.Rptr.2d 426, 821 P.2d 1302.) Rather, he asserts that after the guilt trial he need have presented only a "colorable claim that he was ineffectively represented at trial" *(People v. Stewart* (1985) 171 Cal.App.3d 388, 397, 217 Cal.Rptr. 306) to have the court appoint independent counsel to investigate and bring the motion. However, after he filed his opening brief we held that the standard actually articulated in *Stewart* is the *Marsden* standard. *(People v. Smith* (1993) 6 Cal.4th 684, 693-694, 25 Cal.Rptr.2d 122, 863 P.2d 192.) Under that standard, as we have already concluded, no abuse of discretion appears in denying the motion. Defendant wanted to be put to death; his lawyers desired a different outcome for him; their choice cannot be faulted, nor that of the court in refusing to relieve them.

***1345 L. Failing to Preserve Photographic Evidence*

[47] At trial, defendant learned that the Bell Gardens police had recently lost photographs of individuals whom José Feliciano *****259** identified in 1976 as being ***860** the two men taking turns riding the motorcycle. Defendant asserted that one of the missing photographs was taken of someone else who matched the composite sketch exactly.

The court ordered the parties to search for the missing photographs and agreed that if they could not be found the jury would have to be told they showed persons other than defendant. Defendant moved to also instruct the jury that one of the photographs precisely matched the composite sketch, but the court tentatively denied the motion on grounds of cumulativeness. It put aside a definitive ruling on the question of the photograph's resemblance to the composite sketch pending the prosecution's effort to try to locate the photographs.

The prosecution was unable to do so, and the parties stipulated before the jury that on July 28, 1976, José Feliciano was shown six color photographs similar to the composite sketch of the individual seen at Ford Park, and that he identified a photograph of a person other than defendant--apparently the man with the knife he had seen near Fowler and Chavez. The parties also stipulated that Feliciano later viewed photographic lineups and identified individuals other than defendant as possibly being the man on the motorcycle and the man wearing the green Army jacket.

Defendant does not attack the tentative ruling or the stipulation, but maintains that failing to preserve the photographs undermined rights he asserts to a fundamentally fair trial and to a reliable guilt and penalty determination. The claim lacks merit. The parties resolved the problem by providing the jury with evidence by stipulation of the photographs' content and significance. Defendant apparently was satisfied with the stipulation, and he may not now complain about it--he has not preserved the point for appeal. *(People v. Fierro, supra,* 1 Cal.4th 173, 215, 3 Cal.Rptr.2d 426, 821 P.2d 1302; cf. *People v. Bacigalupo* (1991) 1 Cal.4th 103, 138-139, 2 Cal.Rptr.2d 335, 820 P.2d 559, vacated and remanded on other grounds *sub nom. Bacigalupo v. California* (1992) 506 U.S. 802, 113 S.Ct. 32, 121 L.Ed.2d 5 [when stipulation made only to control form in which evidence would be introduced following adverse ruling, point preserved for appeal].)

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[48] Defendant also may be understood to contend that to enter into the stipulation constituted ineffective assistance of counsel. We do not agree. It was professionally reasonable to stipulate in effect that José Feliciano identified individuals other than defendant as having been at Ford Park with Fowler and Chavez on the night they were killed.

***861** *M. Claims of Insufficient Evidence for First Degree Murder Convictions*

[49] Defendant challenges the sufficiency of the evidence of the first degree murder convictions for the Carter and Chavez killings.

1. Sufficiency of Evidence of Felony Murder of Carter

Defendant contends that the jury had insufficient evidence of a violation or attempted violation of section 288 to convict him of first degree murder under a felony-murder theory for the Carter killing. He asserts that the resulting conviction violated his rights under state law and the due process clause of the federal Constitution.

"To determine [the validity of a claim of insufficient] evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole. [Citations.]" (*People v. Johnson, supra,* 6 Cal.4th 1, 38, 23 Cal.Rptr.2d 593, 859 P.2d 673.) If we determine that a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt, the ****1346** due process clause of the United States Constitution is satisfied (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560), as is the due process clause of *****260**article I, section 15 of the California Constitution (*People v. Berryman, supra,* 6 Cal.4th at p. 1083, 25 Cal.Rptr.2d 867, 864 P.2d 40).

We have held that a violation of section 288 occurs whenever, to gratify the child's or the actor's sexual desires, an actor touches a child under 14. (*People v. Raley* (1992) 2 Cal.4th 870, 907, 8 Cal.Rptr.2d 678, 830 P.2d 712; but cf. *People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 7, 36 Cal.Rptr.2d 627, 885 P.2d 1040 [declining to decide whether the act must be "patently 'sexual' in nature as well as [in] intent...."].)

In his confession, defendant said he lured Carter to his apartment to photograph him in the nude. Once there he turned on some strobe lights, which seemed to mesmerize the young boy. After a few minutes Carter said he wanted to leave, which angered defendant who then choked him and tried to have sex with his body.

The jury also received evidence of defendant's sexual interest in youths. These included pornographic magazines and photographs featuring young boys in the nude.

***862** In *Memro I, supra,* 38 Cal.3d 658, 214 Cal.Rptr. 832, 700 P.2d 446, we rejected a claim that there was insufficient evidence to satisfy defendant's felony-murder conviction for Carter's killing. He urges a different conclusion now, but on the record here as on that of the prior trial, "there is little doubt that [he] possessed the requisite lewd intent" (*id.* at p. 697, 214 Cal.Rptr. 832, 700 P.2d 446) to commit a lewd or lascivious act with Carter, and that "the 'arrangement' of lights, pornographic materials and other paraphernalia in [his] apartment would suggest sufficient planning to enable [him] to commit lewd conduct once a willing participant came along." (*Id.* at p. 699, 214 Cal.Rptr. 832, 700 P.2d 446.)

In addition to the assortment of magazines and photographs suggesting defendant's sexual interest in youths, the jury also had before it the confession in which he described wanting to photograph Carter and wanting to have sex with 12-year-old Scott Fowler before killing him in 1976. From this evidence, a rational jury could infer that he planned to act on his sexual interest in young boys by performing a lewd or lascivious act with Carter. That the jury did not hear the psychiatric testimony presented at the prior trial regarding defendant's sexual motivation to bring Carter to his apartment (*Memro I, supra,* 38 Cal.3d at pp. 693-694, 214 Cal.Rptr. 832, 700 P.2d 446) altered the quantum of evidence, to be sure, but did not, in our view make the evidence insufficient as a matter of law. Even if, as he asserts, taking a photograph of a nude child was not a crime at the time (see § 311.3, enacted by Stats.1981, ch. 1056, § 1, p. 4080), a rational trier of fact could infer that he intended to touch Carter with lewd or lascivious intent while alive, and took a direct if possibly ineffectual step toward that goal--in other words, he attempted to violate section 288. (*Memro I, supra,*

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38 Cal.3d at pp. 697- 698, 214 Cal.Rptr. 832, 700 P.2d 446; see also § 21a, enacted by Stats.1986, ch. 519, § 1, p. 1859 [later codifying rule].) Indeed, the trier of fact could infer from the evidence that defendant disrobed Carter while alive with lewd or lascivious intent. Such conduct and mental state would complete a violation of section 288. (See *post,* p. 266 of 47 Cal.Rptr.2d, p. 1352 of 905 P.2d.) In sum, the evidence sufficed for a rational trier of fact to conclude that he attempted to violate, or did violate, section 288. The law required no more for a conviction of first degree murder on a felony-murder theory. (§ 189.)

2. Sufficiency of Evidence of Premeditation and Deliberation in the Chavez and Carter Killings

[50] First degree murder may be found when the prosecution proves beyond a reasonable doubt that the actor killed with malice aforethought, intent to kill, premeditation, and deliberation. (§ § 187, 189.) Defendant contends that there was insufficient evidence that Carter and Chavez were killed with premeditation and deliberation. He is unpersuasive.

****1347** We have defined "deliberate" as " 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for ***863** and against the proposed course of action.' " (*People v. Perez* (1992) 2 Cal.4th 1117, 1123, 9 Cal.Rptr.2d 577, 831 P.2d 1159.) *****261** We have defined "premeditated" as " 'considered beforehand.' " (*Ibid.*) Premeditation and deliberation can occur in a brief interval. "The test is not time, but reflection. 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " (*People v. Bloyd* (1987) 43 Cal.3d 333, 348, 233 Cal.Rptr. 368, 729 P.2d 802.)

The jury heard evidence that the bodies of Fowler and Chavez were found 178 feet apart. They also heard defendant's confession that he had no sexual interest in Chavez, whom he found "fat and ugly"; he killed him because he started screaming after Fowler was knifed.

There was sufficient evidence of premeditation and deliberation for a rational trier of fact to conclude that defendant's actions satisfied those elements of first degree murder. The jury could reasonably have concluded that defendant decided he had to kill Chavez to prevent him from identifying him as Fowler's killer, a motive it could reasonably conclude was imbued with deliberation and premeditation. (*People v. Perez, supra,* 2 Cal.4th at p. 1126, 9 Cal.Rptr.2d 577, 831 P.2d 1159.) Moreover, he had to run from Fowler's position to Chavez's. He then cut Chavez's throat from behind. A rational jury could conclude that he intended death and no other result, and that he considered his options as he ran toward Chavez.

[51] A rational jury could also have found Carter's killing premeditated and deliberate. It could have concluded that defendant used masking tape to tie Carter's hands behind his back and then strangled him. It could have concluded that these deeds required reflection and consumed some time. It could also have determined that Carter was killed to prevent him from later identifying defendant as his captor and sexual exploiter, a motive requiring calculation and reflection.

[52] Defendant relies on *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, 73 Cal.Rptr. 550, 447 P.2d 942, which, to sustain a verdict of premeditated and deliberate murder, required (1) extremely strong evidence of planning, (2) evidence of motive in conjunction with evidence of planning or of a calculated manner of killing, or (3) evidence of all three indicia of premeditation and deliberation. But *Anderson* 's "guidelines are descriptive, not normative" (*People v. Perez, supra,* 2 Cal.4th at p. 1125, 9 Cal.Rptr.2d 577, 831 P.2d 1159); its "factors, while helpful ..., are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*Ibid.*) For example, notwithstanding *Anderson, supra,* 70 Cal.2d at pages 26-27, 73 Cal.Rptr. 550, 447 P.2d 942, the method of killing alone can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, ***864** deliberate murder. (*People v. Hawkins* (1995) 10 Cal.4th 920, 956-957, 42 Cal.Rptr.2d 636, 897 P.2d 574.)

N. Denying Motion to Exclude Photographs and Magazines Portraying Youths

[53] Over an objection made on grounds of irrelevance and undue prejudice, and also implicitly made under Evidence Code section 1101, the court ordered certain magazines and photographs depicting clothed and unclothed youths admitted under Evidence Code section 1101, subdivision (b), as evidence of motive and intent to perform a lewd or lascivious act on Carter in violation of section 288. The court admonished the jury not to consider the items as evidence that defendant was evil or was disposed to commit certain types of crimes.

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We review the admission of evidence under Evidence Code section 1101 for an abuse of discretion. (*People v. Daniels* (1991) 52 Cal.3d 815, 856, 277 Cal.Rptr. 122, 802 P.2d 906 [evidence of other offenses].)

Character evidence is admissible in this state unless barred by a particular statute. (Evid.Code, § 1100.) Evidence Code section 1101, subdivision (a), creates an exception to that rule. It generally forbids introducing character evidence to "prove ... conduct on **1348 a specified occasion." Subdivision (b) of Evidence Code section 1101 in turn creates an exception to subdivision (a): evidence of conduct may be admitted to prove motive or intent, although it may not be admitted to show a disposition to do the type of conduct shown by the evidence.

***262 We have examined the magazines and photographs in question. They contain sexually explicit stories, photographs and drawings of males ranging in age from prepubescent to young adult. Some of the photographs are of similar character. Others depict youths in a manner that is not sexually suggestive.

The court did not abuse its discretion by ruling the magazines admissible under Evidence Code section 1101, subdivision (b), to show intent. We believe the photographs were admissible to show defendant's intent to molest a young boy in violation of section 288.

Defendant's intent to violate section 288 was put at issue when he pleaded not guilty to the crimes charged. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423, 27 Cal.Rptr.2d 666, 867 P.2d 777; see also *People v. Robbins* (1988) 45 Cal.3d 867, 879, 248 Cal.Rptr. 172, 755 P.2d 355.) Although not *865 all were sexually explicit in the abstract, the photographs, presented in the context of defendant's possession of them, yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction. (See *People v. Bales* (1961) 189 Cal.App.2d 694, 701, 11 Cal.Rptr. 639 [photograph of molestation victim in the nude admissible to show "lewd intent."].) The photographs of young boys were admissible as probative of defendant's intent to do a lewd or lascivious act with Carter.

[54] Defendant also contends that the items were substantially more prejudicial than they were probative. Hence, in his view, their introduction was barred by Evidence Code section 352. We find no abuse of discretion in admitting the magazines or the photographs. To be sure, some of this material showed young boys in sexually graphic poses. It would undoubtedly be disturbing to most people. But we cannot say that it was substantially more prejudicial than probative, for its value in establishing defendant's intent to violate section 288 was substantial. The court balanced the items' evidentiary worth against their potential to cause prejudice and determined that the former substantially outweighed the latter. Its decision was reasonable.

Citing *Dawson v. Delaware* (1992) 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309, a capital sentencing case, defendant also contends that his First Amendment rights were violated when materials he was constitutionally entitled to possess were used against him. He did not raise a claim of error on this ground below, and he has not preserved it for review.

O. Denying Motion to Exclude Photographs of Murder Victims

[55] Over defendant's objection on grounds of prejudicial impact substantially exceeding probative value and cumulativeness (Evid.Code, § 352), the court admitted post mortem photographs of each victim. Some of them showed the victims at the murder scenes, while others were taken in the coroner's office. The court ordered certain photographs cropped before admission to minimize any unduly prejudicial effect, and excluded others entirely as cumulative.

Defendant contends that the admitted photographs lacked any probative value because the cause of death was never disputed, he offered to stipulate to certain details regarding the cause of death, and the coroner's testimony was sufficient to explain the cause of death in any event. In sum, he argues that the photographs were gruesome and that after seeing them, "the jury no doubt felt compelled to convict *someone.*"

The People respond in effect that all the photographs were probative of malice--i.e., they show an intent to kill and therefore express malice--and, *866 because a clothesline was used to strangle Carter, photographs of his body, which show a cord wrapped around his neck, are probative of deliberation and premeditation. (See, e.g., *People v. Garceau* (1993) 6 Cal.4th 140, 180-181, 24 Cal.Rptr.2d 664, 862 P.2d 664 [photographs showing bodies' condition when found

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relevant to issue of **1349 malice]; People v. Raley, supra, 2 Cal.4th at pp. 896-897, 8 Cal.Rptr.2d 678, 830 P.2d 712 [same].)

The court had broad discretion in deciding whether to admit such evidence. (People v. Raley, supra, 2 Cal.4th at p. 896, 8 Cal.Rptr.2d 678, 830 P.2d 712.)

***263 *1. Undue Prejudice*

We agree with defendant that some of the photographs the jurors saw must have been extremely disturbing to them. They were of children who were killed in a ghastly manner. The jury knew these grim facts in the abstract, to be sure, but the photographs made them horribly concrete. It would surprise us if the jurors were able to view them without being sickened, disgusted, or shocked.

But the question before us is whether the court's ruling that the photographs could be admitted was within reason. It was. The photographs were clearly probative of the prosecution's theory that defendant killed with malice, and they corroborated other evidence of the circumstances surrounding the murders. Before returning its verdict, the jury was instructed "not [to] be influenced by pity for a defendant or by prejudice against him," and "not [to] be swayed by mere sentiment, conjecture, sympathy, passion, [or] prejudice...." We assume that the jurors followed that instruction (People v. Mickey, supra, 54 Cal.3d 612, 689, fn. 17, 286 Cal.Rptr. 801, 818 P.2d 84) and considered the photographs for their evidentiary value alone.

[56] Some of the photographs of defendant's victims clearly depict them as they were found, whereas others may conceivably reflect the authorities' examining procedures. To be sure, a risk of prejudice may arise should " '[p]hotographs taken during an autopsy.... depict the corpse as it is left, not by its assailant, but by the probing instruments and procedures of the medical examiner.' " (State v. Iverson (N.D.1971) 187 N.W.2d 1, 38, quoting People v. Turner (1969) 17 Mich.App. 123, 132, 169 N.W.2d 330, 335; see also People v. Burns (1952) 109 Cal.App.2d 524, 541, 241 P.2d 308; People v. Allen (1986) 42 Cal.3d 1222, 1258, 232 Cal.Rptr. 849, 729 P.2d 115 (lead opn.).) In the case of autopsy photographs as with any other, however, the court enjoys broad discretion in deciding whether prejudice substantially outweighs probative value. (People v. Steger (1976) 16 Cal.3d 539, 552-553, 128 Cal.Rptr. 161, 546 P.2d 665.) Often *867 their probative value can be considerable. (People v. Carter (1957) 48 Cal.2d 737, 751, 312 P.2d 665 (lead opn.).) We find no abuse of discretion.

2. Cumulativeness

As stated, defendant also argued that many of the photographs were prejudicial because they were cumulative. The court agreed: it excluded some on that ground. We find no abuse of discretion in the court's culling procedure, for each photograph showed different aspects of the killings; none gratuitously duplicated any other.

3. Constitutional Contentions

Defendant also contends that admitting the photographs violated a right he asserts to a fundamentally fair trial under the Fourteenth Amendment and to a reliable determination of guilt under the Eighth Amendment. He did not raise these bases for exclusion with the court, and did not preserve the claim on appeal. In any event, we do we see how either constitutional provision was implicated by the photographs' admission. The contention lacks merit. (See People v. Price (1991) 1 Cal.4th 324, 440-441, 3 Cal.Rptr.2d 106, 821 P.2d 610.)

P. Sustaining Objection on Relevance Grounds to Cross-examination

[57] The prosecution called Fowler's mother, Mary Ella Fowler, to identify her son and Chavez from photographs, and also to explain that the two concocted a story for their respective parents that they were going to spend the night at the other's house to avoid detection as going to the park. The direct examination contained 10 questions.

Cross-examination was equally brief. Defendant elicited from Mrs. Fowler that Fowler was precocious: "He had a lot of older friends." Defendant wanted to know how much older those friends were. The prosecutor**1350 objected that the answer would be irrelevant. The court sustained the objection.

Defendant contends that ending this line of questioning infringed on rights he asserts to cross-examine witnesses under the confrontation clause of the federal Constitution's Sixth Amendment. He argues that "[i]f counsel ***264 had been permitted to question Mrs. Fowler, and she had revealed that most of Scott's older friends were sixteen, then doubt would be cast on the proposition that Fowler spoke

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with [him]. Furthermore, probing into this area [might] have revealed other persons who[ ] Fowler may have met on the night of the murders."

***868** "The claim lacks merit. On this record, the trial court's ruling, even if erroneous, could not have prejudiced defendant because any favorable inference he sought to draw from the proposed impeachment was purely speculative." (*People v. Davis, supra,* 11 Cal.4th 137a, 41 Cal.Rptr.2d 826, 896 P.2d 119.)

In any event, we discern no constitutional violation. "The confrontation clause allows 'trial judges ... wide latitude ... to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' (*Delaware v. Van Arsdall* [(1986) 475 U.S. 673,] 679 [106 S.Ct. 1431, 1435, 89 L.Ed.2d 674, 683] [speaking specifically of cross-examination on bias, but without limitation thereto].) The court here did no more than it was permitted." (*People v. Clair, supra,* 2 Cal.4th 629, 656, fn. 3, 7 Cal.Rptr.2d 564, 828 P.2d 705.) It stayed well within the bounds of the "wide latitude" the Constitution affords it.

Q. Denying Request to Instruct With a Version of CALJIC No. 2.91

[58] Defendant asked the court to instruct the jury with a version of CALJIC No. 2.91 (4th ed. 1987 supp.). We quote in relevant part the language he requested: "You must be satisfied beyond a reasonable doubt of the accuracy of the identification of defendant as the person who committed the offense before you may convict him."

The court refused to give the instruction as inapplicable, saying, "There has been nobody identifying the defendant as the person who committed the crime...."

Defendant contends that the failure to give the instruction violated state law and also "created an impermissible risk that the conviction and sentence of death were arbitrary and unreliable in violation of appellant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution."

We disagree. The court was correct: no witness identified defendant as the killer. He concedes this, but argues that there was testimony and other evidence suggesting he might have been the killer, and that the prosecution emphasized that testimony at closing argument.

[59] Whether or not we agree with defendant's description of the prosecution's case, it did not require the court to give his version of CALJIC No. 2.91. A party is not entitled to an instruction on a theory for which there is no supporting evidence. (*People v. Roberts, supra,* 2 Cal.4th 271, 313, 6 Cal.Rptr.2d 276, 826 P.2d 274.) No witness identified defendant as the killer.

***869** Defendant's constitutional claims must also fail. We cannot discern any reason that the Constitution would require giving an instruction when no evidence to support it was adduced.

R. Adequacy of Notice of Intent to Seek Felony-murder Conviction

[60] The prosecutor requested a felony-murder instruction on the basis that defendant killed Carter while violating or attempting to violate section 288. Defendant objected on the ground that the felony-murder theory was unavailable to the People because the felony-murder special circumstance was found not true in his prior trial. As noted, however, his position is unpersuasive. (See *ante,* at pp. 233-235 of 47 Cal.Rptr.2d, at pp. 1319-1321 of 905 P.2d.)

****1351** Defendant contends that the prosecution surprised him when it sought the instruction on a felony-murder theory for Carter's killing, thereby violating rights he finds in the Sixth and Eighth Amendments to the United States Constitution to adequate notice of the charges against him.

If the prosecution's felony-murder theory surprised defendant, he could have moved to reopen the taking of evidence so as to present *****265** a defense against it. (See *People v. Murtishaw* (1981) 29 Cal.3d 733, 751, fn. 11, 175 Cal.Rptr. 738, 631 P.2d 446.) He did not do so. He has waived any claim of error.

[61] Defendant urges that if we reach that conclusion, counsel were ineffective for failing to raise the matter at trial. We disagree. Counsel were not deficient in failing to move to reopen the case, for it was plain to the parties that the prosecution was proceeding on a theory of felony murder. In *Memro I, supra,* 38 Cal.3d 658, 695, 214 Cal.Rptr. 832, 700 P.2d 446, we declared that "substantial evidence supports the verdict on a felony-murder (attempted lewd or lascivious conduct (§ 288)) theory" and, therefore, the case could be retried on that theory (see

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id. at pp. 690, 699-700, 214 Cal.Rptr. 832, 700 P.2d 446). The retrial proceeded accordingly.

S. Failure to Instruct Sua Sponte That Jurors Must Agree Which Act Constituted Underlying Felony for Purpose of Felony Murder

[62] Defendant contends that the court should have instructed the jurors on its own motion that they must unanimously agree on the nature of the lewd or lascivious act he committed or attempted to find him guilty of felony murder. He contends that its failure to do so created a risk that the guilt judgment was arrived at arbitrarily and capriciously, in violation of a right he discerns in the Eighth Amendment.

We disagree for reasons we gave in *People v. Pride* (1992) 3 Cal.4th 195, 10 Cal.Rptr.2d 636, 833 P.2d 643. We held that the defendant in that case***870** "was not entitled to a unanimous verdict as to the particular manner in which any such felony murder occurred." (*Id.* at p. 250, 10 Cal.Rptr.2d 636, 833 P.2d 643.) Although it appears that the defendant in *Pride* did not specify the constitutional basis for his claim as clearly as defendant does in this case, we believe that *Pride* 's reasoning applies with equal force to the claim presented here.

We reach that conclusion notwithstanding defendant's argument, in his reply brief, that *Pride* is distinguishable because this case was retried following a court finding that a felony-murder special-circumstance allegation was not true. (*Ante,* p. 233 of 47 Cal.Rptr.2d, p. 1319 of 905 P.2d.) He asserts that "the jury instructions and verdict had to be precisely drawn to avoid violation of the double jeopardy clause."

In *Memro I, supra,* 38 Cal.3d at pages 690, 695, 699-700, 214 Cal.Rptr. 832, 700 P.2d 446, we held that there was sufficient evidence that Carter was killed in an attempt to violate section 288 that retrial for his killing could constitutionally proceed on a felony-murder theory. We have already observed there was no double jeopardy violation in retrying defendant on a felony-murder theory. We conclude that the holding of *People v. Pride, supra,* 3 Cal.4th at pages 249-250, 10 Cal.Rptr.2d 636, 833 P.2d 643, applies fully to this case.

T. Failure to Instruct on Other Offenses Involving Children

[63] Defendant contends with regard to his conviction of Carter's murder--which, if decided on a theory of felony murder, required a conclusion that he violated or attempted to violate section 288--that the court erred in failing to instruct sua sponte on what he calls "lesser included offenses" of section 288, namely "misdemeanor child molest" under former section 647a and "contributing to the delinquency of a minor under Penal Code section 272." He maintains that the error deprived him of a right he asserts to a reliable guilt determination under the Eighth Amendment to the United States Constitution.

When defendant killed Carter, former section 647a provided in relevant part: "Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable ****1352** upon first conviction by a fine not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both...." (See Stats.1976, ch. 1139, § 262, p. 5136; see now § 647.6.) Defendant argues in essence that the jury might have found he intended only to annoy Carter by photographing him.

It has been held that misdemeanor child molestation under former section 647a was a *****266** lesser included offense of section 288. ***871**(*People v. Poon* (1981) 125 Cal.App.3d 55, 80, 178 Cal.Rptr. 375.) Even if that is so, and even if defendant was entitled to an instruction on a lesser included offense in the felony-murder context, in which the rationale for instructing on lesser included offenses may not be implicated (cf. *People v. Geiger* (1984) 35 Cal.3d 510, 518-520, 199 Cal.Rptr. 45, 674 P.2d 1303)--issues we do not decide--we disagree that he was entitled to an instruction on that offense.

[64] A criminal defendant is entitled to an instruction on a lesser included offense only if (see *People v. Morrison* (1964) 228 Cal.App.2d 707, 712-713, 39 Cal.Rptr. 874) "there is evidence which, if accepted by the trier of fact, would absolve [the] defendant from guilt of the greater offense" (*id.* at p. 712, 39 Cal.Rptr. 874) *but not the lesser.* (Accord, *People v. Green* (1971) 15 Cal.App.3d 524, 529, 93 Cal.Rptr. 84; see also *People v. Berry* (1976) 18 Cal.3d 509, 518-519, 134 Cal.Rptr. 415, 556 P.2d 777; *People v. McCoy* (1944) 25 Cal.2d 177, 187-188, 153 P.2d 315; *People v. Lesnick* (1987) 189 Cal.App.3d 637, 642-643, 234 Cal.Rptr. 491; *People v. Chambers* (1982) 136 Cal.App.3d 444, 455-456, 186 Cal.Rptr. 306; *People v. Ellers* (1980) 108 Cal.App.3d 943, 954, 166 Cal.Rptr. 888; *People v. Salas* (1978) 77 Cal.App.3d 600, 607-608, 143 Cal.Rptr. 755.)

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In this case, there was no evidence that, if accepted by the trier of fact, *would* have absolved defendant of having violated section 288 but *would not* have absolved him of having violated former section 647a.

Specifically, defendant was not entitled to an instruction based on section 647a if there was no evidence that one or more of the elements peculiar to a violation of section 288 was absent but that all of the elements required to establish a violation of former section 647a were present. Assuming that former section 647a is a lesser included offense of section 288, it must be so because it lacks the element of a lewd touching. "[T]he primary distinction between section 288, subdivision (a), and section 647.6 is that the former requires that a touching or constructive touching occur, and that the touching is lewd. It is this type of overt contact, or intrusion upon the body of the child done with lewd intent, that distinguishes a section 288, subdivision (a), offense from the less serious offense defined by section 647.6." (*People v. Levesque* (1995) 35 Cal.App.4th 530, 539, 41 Cal.Rptr.2d 439.) That primary distinction was also true of section 647a, the predecessor of section 647.6. (*People v. La Fontaine* (1978) 79 Cal.App.3d 176, 185, 144 Cal.Rptr. 729 [discussing version identical, as relevant here, to that in effect when defendant killed Carter; see Stats.1967, ch. 154, § 1, p. 1241; Stats.1976, ch. 1139, § 262, p. 5136].)

There was evidence from which a rational trier of fact could conclude that a violation of section 288 occurred. It will be recalled that defendant ***872** confessed that brought Carter to his apartment intending to take nude pictures of him. He admitted disrobing him, although he stated that he did so after death. But the jury could conclude, notwithstanding that part of defendant's confession, that he disrobed Carter while alive, either at his command or by an actual touching, with lewd or lascivious intent, and then, as the prosecutor argued, sodomized or attempted to sodomize him while alive. "[T]he jury may believe a part and reject the remainder of a confession [citations]." (*People v. Garcia* (1935) 2 Cal.2d 673, 679, 42 P.2d 1013; cf. *People v. Ramirez* (1990) 50 Cal.3d 1158, 1176, 270 Cal.Rptr. 286, 791 P.2d 965 [jury could find sexual acts took place while victim was alive "in the absence of any evidence" of intent "to have sexual conduct with a corpse"]; accord, *People v. Cain* (1995) 10 Cal.4th 1, 46, 40 Cal.Rptr.2d 481, 892 P.2d 1224.) The disrobing while alive, actual or constructive, if accepted by the trier of fact, establishes a violation of section 288. (*People v. Mickle* (1991) 54 Cal.3d 140, 176, 284 Cal.Rptr. 511, 814 P.2d 290.) What was ****1353** missing, however, was any evidence that a lewd touching was absent but that all of the elements of a violation of section 647a--i.e., lewd conduct without a lewd touching--were present. Defendant interpreted the evidence as not establishing any criminally lewd act or act of criminal annoyance at all: indeed, on appeal he maintains that the evidence showed only that he brought Carter to his home to photograph him, Carter wanted to *****267** leave, and he impulsively strangled him. His closing argument proceeded along similar lines. For its part, the prosecution relied on evidence that he violated or attempted to violate section 288. Under these circumstances, he was not entitled to an instruction based on former section 647a.

[65] We turn to the other offense to which defendant refers. When he killed Carter, section 272 provided in relevant part, "Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Sections 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 18 years or any ward or dependent child of the juvenile court to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or remain a person within the provisions of Sections 300, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor...." (See Stats.1976, ch. 1125, § 16, p. 5037.)

It has been held that contributing to a minor's delinquency under section 272 is not a lesser included offense to performing a lewd or lascivious act ***873** with a child under 14 as proscribed by section 288, subdivision (a). (See *People v. Vincze* (1992) 8 Cal.App.4th 1159, 1162- 1164, 11 Cal.Rptr.2d 430.) Accordingly, we find defendant's contention unpersuasive.

In sum, there was no error. Nor was there any violation of the Eighth Amendment. (*People v. Berryman, supra,* 6 Cal.4th at p. 1081, fn. 9, 25 Cal.Rptr.2d 867, 864 P.2d 40.)

U. Prosecutor's Remark Purportedly on Defendant's Failure to Testify

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[66] Defendant maintains that the prosecutor engaged in misconduct at closing argument when he purportedly commented on defendant's failure to testify. He contends that the misconduct violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Discussing Fowler's and Chavez's killings, the prosecutor dwelt on the alibi defense: defendant was elsewhere, read about the killings in the newspapers, and falsely confessed. He pointed out discrepancies in the newspaper accounts and the confession. For the most part, he emphasized that defendant could not have given his detailed description of the facts solely from having read newspaper accounts of the crimes.

The prosecutor proceeded; "Now, the theory--I assume the defense theory is that for some reason he wanted to falsely confess to this crime and he wanted to do it properly. He didn't want to be caught in any lies or anything for some reason, otherwise who would be prosecuting him for these murders which he apparently wanted? And if there's a reason for that, perhaps we'll hear it from the defense. I don't know what it is.

"Why doesn't he tell us about his friend that the police are looking for? Now, according to most of these articles, very prominent in the whole thing is that there were these two people at this park. Now why doesn't he tell us about his pal who presumably got away?

"How is it that 27 months later he could remember the sort of detail that he has if he didn't do it?"

[67] Defendant complains that the remark, "Why doesn't he tell us," was a comment on his failure to take the witness stand. To be sure, the federal Constitution has been deemed to prohibit a prosecutor's comment on a defendant's failure to testify. **1354(*People v. Mayfield, supra,* 5 Cal.4th 142, 178, 19 Cal.Rptr. 2d 836, 852 P.2d 331, citing *Griffin v. California* (1965) 380 U.S. 609, 615, 85 S.Ct. 1229, 1233, 14 L.Ed.2d 106.) But defendant did not assign misconduct to the remark *874 when the prosecutor made it, and there is no reason to believe any harm could not have been cured. Defendant's point must therefore be rejected on procedural grounds. (See *People v. Benson, supra,* 52 Cal.3d 754, 794, 276 Cal.Rptr. 827, 802 P.2d 330.)

***268 Moreover, counsel cannot be faulted for not interposing an assignment of misconduct. Such an action would have been without merit, for it is manifest that the prosecutor did not comment on the failure to testify.

We examine whether there is a reasonable likelihood that the jury would have understood the remark to be a comment on defendant's failure to testify. (*People v. Clair, supra,* 2 Cal.4th 629, 663, 7 Cal.Rptr.2d 564, 828 P.2d 705.)

There is no such likelihood. The remark's context shows that the prosecutor was ridiculing the possibility that defendant wanted to confess falsely to two homicides on the basis of newspaper stories. He first stated that such an idea was inherently implausible. He then added that it was unlikely in fact: if defendant were confessing solely on the basis of newspaper accounts, he would, in his confession, have mentioned an accomplice because the stories mentioned the presence of two men at John Anson Ford Park.

So this was not a comment on defendant's failure to testify, but rather on discrepancies between newspaper accounts of the Bell Gardens killings and the confession. It was "a fair comment on the state of the evidence that falls outside the purview of *Griffin*...." (*People v. Mayfield, supra,* 5 Cal.4th at p. 178, 19 Cal.Rptr.2d 836, 852 P.2d 331.) There was no misconduct, and no constitutional violation.

III. Penalty Phase Issues

Defendant contends that various errors bearing on penalty occurred in this case. As will appear, none of his claims has merit.

A. Constitutionality of the 1977 Death Penalty Statute

Defendant contends that California's 1977 death penalty statute (Stats.1977, ch. 316, pp. 1256-1266) is facially unconstitutional, in essence because it is unconstitutionally vague and gives the trier of fact too much discretion to decide his fate. For those asserted reasons he urges that it violates the federal Constitution's Eighth Amendment. It does not. (*Tuilaepa v. California, supra,* 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 [considering the 1978 death penalty statute]; *Pulley v. Harris* (1984) 465 U.S. 37, 51- 54, 104 S.Ct. 871, 879-881, 79 L.Ed.2d 29 [considering the 1977 statute]; *People v. Jackson, supra,* 28 Cal.3d 264, 315-316, 168 Cal.Rptr. 603, 618 P.2d 149 (plur. opn.); accord, *id.* at p. 318, 168 Cal.Rptr. 603, 618 P.2d 149 (conc. opn. of Newman,

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J.).)

***875** *B. Denying Motion to Waive Jury for Penalty Trial*

[68] After his motion to sever counts was denied, defendant asked the court to hear the penalty trial itself in lieu of the jury. The court refused, stating that the prosecution was entitled to a jury trial and wanted one. Citing *Singer v. United States* (1965) 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630, defendant maintains that the ruling violated the due process clause and a right he claims to a reliable sentence under the Eighth Amendment because there were compelling reasons to have the court, rather than the jury, decide his fate.

We have held that there is no state law right to waive a penalty trial by jury over the prosecution's objection. (*People v. King* (1970) 1 Cal.3d 791, 795, 83 Cal.Rptr. 401, 463 P.2d 753.) The court could not constitutionally have granted defendant's request over the prosecutor's opposition. (Cal. Const., art. I, § 16.) Thus his claim that former section 190.4, subdivision (c), did not require prosecutorial approval for a jury waiver must fail. The state Constitution would have trumped any such implicit statutory rule. (*People v. Roberts, supra,* 2 Cal.4th 271, 336, fn. 18, 6 Cal.Rptr.2d 276, 826 P.2d 274.)

****1355** [69] The United States Constitution is not offended: it is proper to require the prosecution and the court to agree to a defendant's request for a court trial. (*Singer v. United States, supra,* 380 U.S. at pp. 26, 36, 85 S.Ct. at pp. 785, 790.) Defendant does not dispute this, but urges us to conclude that his case falls under *Singer* 's dictum that "there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial." *****269**(*Id.* at p. 37, 85 S.Ct. at p. 791.) He asserts that there were such circumstances here because two noncapital murder charges were joined with a capital murder charge, and the evidence relating to the three killings would be "highly inflammatory," and would reveal inconsistent defenses to the killings.

We agree with the People that this argument does little more than restate defendant's unsuccessful contention that the court wrongly denied his motion to sever the counts for the 1976 murders from that for the 1978 murder. (*Ante,* at pp. 251-253 of 47 Cal.Rptr.2d, at pp. 1337-1339 of 905 P.2d.) We disagree that there were any circumstances that might possibly have entitled him to a court trial under *Singer.*

C. Failing to Order Counsel to Tell Defendant the Defense Strategy

[70] As described *ante,* page 256 of 47 Cal.Rptr.2d, page 1342 of 905 P.2d, before the penalty phase began, defendant moved that counsel either be relieved or not present a penalty defense. He ***876** complained that they would not tell him the defense strategy. Counsel acknowledged that defendant would not be told the names of specific witnesses, but explained that defendant was trying to get witnesses not to cooperate when he learned of their identity.

From the beginning of pretrial proceedings, the record reveals that defendant wanted no meaningful penalty defense. His refusal to mount a penalty defense continued throughout the trial. It culminated in his statement to the jury urging his execution. (*Ante,* p. 231 of 47 Cal.Rptr.2d, p. 1317 of 905 P.2d.) Just before the penalty phase began, his counsel told the court, "Mr. Memro would rather we not proceed with presenting evidence at a penalty phase. He has informed us that if we were to call some of these people or tell him that we are going to call them that he would make sure that they wouldn't appear." Defendant replied, "I believe I have a right to know what is going to be done at the penalty phase or what isn't going to be done." The court ruled, "I am not going to tell [counsel] to do anything."

The court also refused to appoint new counsel who might tell defendant what witnesses would be called at the penalty phase.

Defendant contends in effect that the court's refusal either to compel counsel to adequately confer with him regarding penalty phase strategy or to relieve them for refusing to do so denied him the assistance of counsel in violation of the state and federal constitutions.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15, of the California Constitution conferred a right to the assistance of counsel on defendant. (*Maine v. Moulton, supra,* 474 U.S. 159, 168, 106 S.Ct. 477, 483, 88 L.Ed.2d 481; *People v. Bonin* (1988) 46 Cal.3d 659, 694, 250 Cal.Rptr. 687, 758 P.2d 1217.) But we have concluded that the right "is not infringed when 'the opportunity [of the defense] to participate fully and fairly in the adversary factfinding process'

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[citation] is not significantly limited." (46 Cal.3d at p. 695, 250 Cal.Rptr. 687, 758 P.2d 1217, first bracketed material added in *Bonin.*)

No such limitation occurred here. Rather, it was defendant who was trying to thwart the ability of the defense to participate fully in the factfinding process, and counsel who were trying to present a defense as fully as possible. At the time of the retrial, counsel was obligated to present evidence in mitigation even over defendant's objection. (*People v. Deere* (1991) 53 Cal.3d 705, 712, 716-717, 280 Cal.Rptr. 424, 808 P.2d 1181.) Neither the right to counsel nor any right to a reliable penalty determination was violated by the court's refusal to accede, in effect, to defendant's desire to prevent his ***877** counsel ****1356** from presenting evidence in mitigation. Nor do we discern any other federal constitutional violation.

[71] Defendant also asserts that the state Constitution's guaranty of the right to be "personally present with counsel" (Cal.Const., art. I, § 15) would be "illusory if counsel were allowed to keep secret from [their] client [their] plans for trial." We disagree with the premise, however. Counsel obviously told him that they would introduce evidence in mitigation. They did refuse to reveal who the witnesses might be after he *****270** told them he would try to stop them from testifying. We do not see how the right to be personally present with counsel was violated by counsel's refusal to aid him in that quest.

D. Sufficiency of Notice of Aggravating Evidence

[72] Defendant contends that the prosecution erred in failing to give him proper notice of evidence introduced in aggravation. He asserts that this failure violated state law and a right he discerns to a fundamentally fair penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. As will appear, his claim is not preserved for review, for he failed to move to have the evidence excluded.

The cause was called to trial April 1, 1987. Months before, on December 30, 1986, the prosecution filed a notice of intention to introduce evidence in aggravation. In court the prosecutor handed defense counsel a photocopy of "essentially the entire district attorney's file" of the Schroeder incident.

On February 6, 1987, defendant moved to have evidence of his prior conviction barred from any penalty trial. The court agreed, ruling that no evidence of the prior conviction could be introduced. At trial the prosecution elicited other evidence that defendant assaulted Schroeder in 1972 when the victim was nine years old. His conviction of that crime was not introduced in evidence.

Section 190.3 provides in relevant part, "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation."

"The purpose of this provision 'is to advise an accused of the evidence against him so that he may have a reasonable opportunity to prepare a ***878** defense at the penalty trial. [Citation.]' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1152, 36 Cal.Rptr.2d 235, 885 P.2d 1.) "We have construed the phrase 'prior to trial' to mean before the cause is called to trial." (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1070, 5 Cal.Rptr.2d 230, 824 P.2d 1277.)

But defendant did not move, before or during trial, to exclude evidence of the attack itself. He has failed to preserve his claim on appeal. In any event, a motion to exclude the evidence would have been unavailing. The prosecution had given ample notice of its intention to rely on the incident involving Schroeder, and defendant could not reasonably have believed that by having caused proof of the prior conviction to be barred, he had thwarted the prosecution's ability to show the circumstances of the crime against the victim by other evidence.

E. Allowing Defendant to Testify In Favor of Death

[73] Defendant testified before the jury that he wanted a verdict of death. (*Ante,* p. 231 of 47 Cal.Rptr.2d, p. 1317 of 905 P.2d.) He contends that "the effect of [his] testimony was to compel the death penalty," and that it "likely relieved the jury of its full responsibility to fix the penalty based upon the proper statutory factors." He asserts that the evidence was irrelevant (Evid.Code, § 350), and that its introduction made the verdict unreliable and thereby violated rights he finds in the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Defendant invited any error when he testified. Moreover, he offered no objection at ****1357** trial on the grounds he now raises. He has failed to preserve

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his claims for review.

F. Propriety of Questions Put to Defendant

[74] After defendant testified that he desired death, he was cross- examined. He was asked whether he planned to appeal his conviction--he denied that he did--and whether he felt he would "get quicker and more direct access to the Supreme Court if you're given the death penalty...." Defendant did not object to these questions.

***271 Defendant asserts that the cross-examination improperly focused the jury on the role of the appellate process, thereby relieving the jury of the need to be aware that it was responsible for determining his fate. He contends that this procedure violated the federal Constitution.

To be sure, "[a]rguably the mere mention of appeal is improper, since it rarely serves any constructive purpose and may lead the jury on its own to *879 infer that [its] responsibility for penalty determination is diluted. But when the context does not suggest appellate correction of an erroneous death verdict, the danger that a jury will feel a lesser sense of responsibility for its verdict is minimal." (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1106, 259 Cal.Rptr. 630, 774 P.2d 659.) As was true in *Bittaker,* there was no suggestion of appellate correction of an erroneous verdict. (Cf. *Caldwell v. Mississippi* (1985) 472 U.S. 320, 325-326, 328- 329, 105 S.Ct. 2633, 2637-2638, 2639, 86 L.Ed.2d 231 (plur. opn.); *id.* at p. 341, 105 S.Ct. at p. 2646 (opn. of O'Connor, J., conc. in part & in judg.).) Therefore "defense counsel's failure to object is fatal to his contention." (*People v. Bittaker, supra,* 48 Cal.3d at p. 1106, 259 Cal.Rptr. 630, 774 P.2d 659.)

G. Propriety of Prosecutor's Closing Argument

[75] Defendant contends that the prosecutor committed misconduct when he argued to the jury that life imprisonment without possibility of parole was "legally not worse" than death, and again when he argued that "if you think that by sentencing him to life without possibility of parole that you're going to cause him to sit around and contemplate this for the rest of your life, the rest of his life, I think you're going to make a big mistake."

Defendant did not assign misconduct to either statement. He maintains here that the prosecutor's first comment misstated the law, and that the second hinted to the jury that defendant might not spend the rest of his life in prison if not sentenced to death. The result, in his view, was to deprive him of a right he asserts to a fair, reliable, and individualized sentence under the Sixth, Eighth, and Fourteenth Amendments.

Because defendant did not assign misconduct to either statement, and there is no reason to believe that an admonition would not have cured any harm, his claims are not preserved on appeal. (*People v. Davis, supra,* 10 Cal.4th 463, 537, 41 Cal.Rptr.2d 826, 896 P.2d 119.)

Defendant urges that if we so conclude, the failure to assign misconduct to the prosecutor's statements amounts to ineffective assistance of counsel. We disagree.

[76][77] First, the prosecutor's comment that life imprisonment without possibility of parole was "legally not worse" than death was accurate as a *legal* matter, whatever philosophical feelings individuals might have on the subject (*People v. Bloom* (1989) 48 Cal.3d 1194, 1223, fn. 7, 259 Cal.Rptr. 669, 774 P.2d 698), for indeed death is the worse punishment. At the time the jury decides the penalty for a death-eligible individual that person will already *880 have been convicted of first degree murder and one or more special circumstances will have been found true, meaning that a minimum penalty of life imprisonment without possibility of parole must be imposed, or the accused will have been convicted of another offense imposing a sentence either of death or of life imprisonment without possibility of parole (e.g., Mil. & Vet.Code, § 1672, subd. (a); Pen.Code, § 128). Thus, the law's command to the trier of fact to weigh aggravating and mitigating circumstances at that time can only mean to consider the possibility of a worse punishment than what the individual was already automatically subject to. (§ § 190.2, **1358 subd. (a), 190.3.) The 1977 statute was no different. Moreover, section 190.4, subdivision (b), provides that if a jury twice cannot decide the penalty, the court may order a third jury impaneled or may sentence the defendant to prison. It is unlikely, in our view, that the Legislature would have allowed a court to prescribe the legally worse penalty if the community could not agree that the defendant should receive it. (The 1977 statute's different penalty retrial scheme (see *post,* p. 273 of 47 Cal.Rptr.2d, p. ***272 1359 of 905 P.2d), does not compel a different conclusion.)

And the prosecutor's reference to defendant's lack of future reflection was a comment that because he

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would not spend the rest of his life racked by regret over his murders of Fowler, Chavez, and Carter, imprisonment was an insufficient punishment. He was not arguing that defendant would spend less than the rest of his life in prison if sentenced to that fate.

H. Instructing Jurors on Penalty Factors to Which Defendant Objected

Defendant requested that the court not instruct the jury with language derived from factors (e) and (j) of section 190.3 in the penalty instructions. It refused.

The instructions directed the jury to consider whether or not the victims consented to "the homicidal acts" or were "participant[s] in the defendant's homicidal conduct," and whether "the defendant was an accomplice to the offense [s] and his participation ... relatively minor."

Defendant contends that giving instructions he views as listing inapplicable mitigating factors violated the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. We have rejected similar claims (*People v. Danielson* (1992) 3 Cal.4th 691, 718, 13 Cal.Rptr.2d 1, 838 P.2d 729 [construing 1978 death penalty statute]) and do so here as well.

I. Failing to Instruct on Elements of Crime Constituting Prior Violent Conduct or to Instruct on Assault

[78] At the penalty phase, the prosecution introduced evidence of prior violent criminal conduct. The court instructed the jury that the evidence was introduced to show that defendant violated section 273d, which the court defined ***881** as "cruel or inhuman bodily injury on a child which involved the express use of force." As the parties were discussing the language of this instruction, defendant said he'd "just as soon have the 245"-- i.e., have the jury instructed on assault with force likely to produce great bodily injury (§ 245, subd. (a)(1)). But the court found section 273d to be a better fit and did not instruct on assault. Defendant did not ask the court to instruct the jury on the elements of section 273d.

He contends that the court erred--he does not specify under what statutory or constitutional regime--in failing to define the elements of section 273d sua sponte. As he concedes, we have rejected that claim (*People v. Johnson, supra,* 6 Cal.4th 1, 48-49, 23 Cal.Rptr.2d 593, 859 P.2d 673), and we continue to do so.

He also contends that the court should have instructed the jury in the language of assault rather than "cruel or inhuman bodily injury on a child...." He argues that the latter definition was inflammatory and violated the Eighth Amendment because it created a risk that the penalty would be arbitrarily decided.

[79] The parties point us to no case in which this question has previously been raised, and we have been unable to locate any. Assuming that defendant's comment registered an objection, there was no error, because there was substantial evidence that defendant violated section 273d and, as a matter of law, simply providing the definition of an offense supported by substantial evidence cannot unduly inflame a trier of fact.

J. Failing to Instruct Jury to Consider Defendant's Background

[80] The jury was instructed to take into account "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse of the crime[,] and any sympathetic or other aspect of the defendant's character or record as a basis for ****1359** a sentence less than death...." Some of the testimony of defendant's sister, offered in mitigation, described aspects of his background. He contends that the court violated the Eighth Amendment by tilting the jury's determination in favor of death when it failed to instruct sua sponte that the jury must also consider background as well as "character or record...."

In *People v. Webb* (1993) 6 Cal.4th 494, 534, 24 Cal.Rptr.2d 779, 862 P.2d 779, we stated that giving an instruction containing *****273** language very similar to that quoted hereabove left "no possibility the jury misunderstood its obligation to consider defendant's character and background evidence...." *Webb* is dispositive. There was no error, and no violation of any constitutional right.

***882** *K. Failing to Instruct Jury on Consequences of a Deadlock*

[81] The jury was instructed that "[i]n order to make a determination as to the penalty, all twelve jurors must agree." Defendant contends that the court's failure to inform the jury sua sponte of the consequence of a deadlock violated the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Under the 1977 death penalty statute, if the jury could not agree on the penalty, the court was required

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to impose a punishment of life imprisonment without possibility of parole. (Former § 190.4, subd. (b).) *People v. Bell* (1989) 49 Cal.3d 502, 262 Cal.Rptr. 1, 778 P.2d 129, held that it was not error to refuse to tell the jury, in response to an inquiry about the legal effect of a penalty deadlock, that if a single juror would not vote for death the penalty would be set at life imprisonment under the 1977 version of section 190.4, subdivision (b). The opinion stated, "[t]he instruction given--that a penalty verdict must be unanimous--correctly stated the law, and defendant did not complain when the court refused to educate the jury on the legal consequences of a possible deadlock. That refusal was not error. [Citations.]" (*Id.* at pp. 552-553, 262 Cal.Rptr. 1, 778 P.2d 129 (plur. opn.); see also *People v. Wader, supra,* 5 Cal.4th 610, 664, 20 Cal.Rptr.2d 788, 854 P.2d 80 [construing 1978 law; no duty to instruct jury a deadlock on penalty may occur].)

In *People v. Haskett* (1990) 52 Cal.3d 210, 276 Cal.Rptr. 80, 801 P.2d 323, also litigated under the 1977 death penalty statute, the jury asked the court about the effect of a deadlock, and it replied that it would declare a mistrial and dismiss the jury. It did not explain that the defendant would then have been sentenced to imprisonment by operation of law. (*Id.* at p. 240, 276 Cal.Rptr. 80, 801 P.2d 323.) We rejected a contention that the court had misinformed the jury. As in *People v. Bell, supra,* 49 Cal.3d 502, we explained that it is not required to "educate the jury on the legal consequences of a possible deadlock"--to do so might tempt a " 'juror inclined against a finding that death was the appropriate penalty' " to exercise " 'a veto power over the verdict' " " 'simply by refusing to participate in good faith in the deliberations.' " *People v. Haskett, supra,* 52 Cal.3d at p. 240.

[82] Because a court is not required to educate the jury about the legal consequences of a deadlock in response to a request to do so, a fortiori it is not required to do so sua sponte. Citing *Mak v. Blodgett* (9th Cir.1992) 970 F.2d 614, and *Kubat v. Thieret* (7th Cir.1989) 867 F.2d 351, defendant urges a contrary conclusion. We decline to rely on those cases. Federal circuit court opinions do not bind us. (*People v. Santamaria, supra,* 8 Cal.4th 903, 923, 35 Cal.Rptr.2d 624, 884 P.2d 81.) They may serve as persuasive authority, of course, but only when they are just that-- persuasive. Having carefully considered the reasoning of both opinions, we find that neither one is so.

***883** *L. Denying Motion to Give Lingering Doubt Instruction*

[83] While discussing possible instructions with the prosecution and the court, defendant moved for an instruction on lingering doubt regarding his guilt as a factor in mitigation. The prosecutor objected on the ground that it was unfair to request the instruction so late in the proceeding. The court, without explanation, denied the request.

Defendant contends that the court violated rights he finds in state law (see ****1360***People v. Terry* (1964) 61 Cal.2d 137, 145-147, 37 Cal.Rptr. 605, 390 P.2d 381) and in the Fifth, Sixth, Eighth, and Fourteenth Amendments when it denied his motion.

We have held that neither the federal nor the state Constitution entitles a defendant to an instruction on lingering doubt. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1251-1252, 14 Cal.Rptr.2d 702, 842 P.2d 1.) But "[t]his is not to say that the jury's consideration of any such doubt is improper; defendant may urge his possible innocence to the jury as a factor in mitigation." *****274**(*Id.* at p. 1252, 14 Cal.Rptr. 2d 702, 842 P.2d 1.) An instruction of the type given here (*ante,* p. 272 of 47 Cal.Rptr.2d, p. 1358 of 905 P.2d), derived from factor (k) of section 190.3, adequately supports a defendant's presentation of evidence or argument that lingering doubt militates against a verdict of death. (*People v. Johnson, supra,* 3 Cal.4th at pp. 1251, 1252, 14 Cal.Rptr.2d 702, 842 P.2d 1.) There was no error.

M. Denying Motion to Modify the Verdict

[84] Defendant contends that the court erred when it denied his motion to reduce the sentence under former section 190.4, subdivision (e). He argues that the court considered matters it should have not and failed to adequately consider matters it should have. The result, he urges, violated state law and requires a remand. He also contends implicitly, by citing United States Supreme Court cases, that the result violated the federal Constitution.

Former section 190.4, subdivision (e), provided as relevant here: "In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an

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independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reasons for his ***884** findings." The quoted statute is identical in meaning to the current version of section 190.4, subdivision (e). (*People v. Frierson* (1991) 53 Cal.3d 730, 751, 280 Cal.Rptr. 440, 808 P.2d 1197.)

"In ruling on the application, the trial judge must independently reweigh the evidence of aggravating and mitigating circumstances and determine whether, in the judge's independent judgment, the weight of the evidence supports the jury verdict. [Citation.] The judge must also state on the record the reasons for the ruling. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 477, 6 Cal.Rptr.2d 822, 827 P.2d 388.) " 'On appeal, we subject [the] ruling ... to independent review.' [Citation.] 'Of course, when we conduct such scrutiny, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty.' " (*People v. Berryman, supra,* 6 Cal.4th 1048, 1106, 25 Cal.Rptr.2d 867, 864 P.2d 40.)

The court began its discussion of the motion by acknowledging that it "must make an independent review of the evidence to determine whether or not the weight of the evidence supports the jury's findings and verdicts."

It then stated, "the evidence clearly supports the verdict of the People for the following reasons.

"The three victims were particularly vulnerable. I believe the oldest child was ten if I am not mistaken. Two of the children were at a public park [;] admittedly they did not have permission to be out that night, but they were at a public park fishing.

"One of the children, and I think [this is] probably the most aggravating circumstance of all in this case, was the son of a family friend so that you had not only the violation of the particular vulnerability of children, but you had the compounding aggravation--it was proper [*sic*] to me the ultimate horror--a family friend tricks and cajoles a vulnerable child of tender years to come into the home, total trust implicit there, and then for little or no provocation, the child is strangled.

"That fact alone to me I find particularly abhor[rent].

****1361** "In addition, the court has not seen any evidence of remorse on the part of Mr. Memro. In fact, I have seen the contrary, as indicated by his statement at the penalty phase. He remains as obdurate as he has ever been, and any remorse that he may have felt when he was in custody that evening has long since disappeared into the wind. He remains a truculent, defiant and particularly insensitive individual.

***885** "There are admittedly factors in mitigation. He has apparently been a[ ] model *****275** prisoner. There is nothing to indicate in the record that he has been other than that.

"He clearly did cooperate with the police.

"Those are the only two factors in mitigation the court can find. The others listed by the defense are various ways of saying the same thing over and over again[:] ... remorse of the crimes, confession, admission, cooperation with the police, aiding the police....

"..

"In this case, the court feels that the factors in aggravation are overwhelmingly against Mr. Memro[ ], and the court therefore adopts and approves the verdict of the jury for the reasons I have stated herein, and the court ... affirms and ratifies the verdict of the jury that the commitment should be death."

Defendant contends that the court erred in considering in aggravation his "obdurate," "truculent, defiant and particularly insensitive" personality and his lack of remorse. These comments, he urges, violated state law, for they are not factors the trier of fact could have considered in aggravation (former § 190.3); hence neither could the court have done so (former § 190.4, subd. (e)).

We disagree. Defendant presented evidence that he was remorseful when apprehended for his crimes against the four boys whom he assaulted, and he argued that his regret should be considered in mitigation. The trier of fact, and hence the court, was entitled to infer from his demeanor as he testified at the penalty phase that any remorse was short lived--his usual mien, as inferable from the circumstances of the crimes and from his testimony, was wanting in remorse. That is the sole conclusion the court drew.

[85] Defendant also maintains that the court failed to consider all possible evidence pointing to factors in mitigation, including evidence of background, character, and lack of a prior felony conviction, and lack of future dangerousness. That is not so. It

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stated that it could only find in mitigation that he had cooperated with the police and had been a model prisoner. It also stated that "the evidence clearly supports the verdict of the People...." The court need not orally recite all possible mitigating evidence (see People v. Berryman, supra, 6 Cal.4th at p. 1107, 25 Cal.Rptr.2d 867, 864 P.2d 40); " 'there is no indication in the record that the court ignored or overlooked such evidence.' " (*Ibid.*) Finally, there was no evidence presented on lack of future dangerousness--the only reference to it came in closing argument.

***886** Defendant implicitly predicates his claims of federal constitutional error on the putative violation of former section 190.4. Because there was no violation of that statute, there can be no basis for his constitutional claims.

N. Claim of Error for Considering Probation Report

[86] Defendant also asserts that the court improperly relied on the probation report in ruling on his motion to modify the verdict. The result, in his view, violated state law and the Fifth Amendment's privilege against self-incrimination, presumably as applied to the states under the Fourteenth Amendment.

[87] The court erred when, as it apparently did, it considered the report. (*People v. Wader, supra,* 5 Cal.4th 610, 665-666, 20 Cal.Rptr.2d 788, 854 P.2d 80.) But even if it did so, "it is apparent from the record that [the report] played no role whatsoever in the court's decision" (*People v. Fierro, supra,* 1 Cal.4th at p. 253, 3 Cal.Rptr.2d 426, 821 P.2d 1302)--" 'we must assume that the court was not improperly influenced' thereby" (*People v. Berryman, supra,* 6 Cal.4th at p. 1106, 25 Cal.Rptr.2d 867, 864 P.2d 40). Defendant ****1362** argues otherwise, mentioning the court's comment about his habitual obduracy, but he does not cite any part of the report that might support his assertion. There was no prejudicial violation of state law or of the Fifth or Fourteenth Amendments. (*Ibid.*)

O. Miscellaneous Claims of Error

Defendant contends in summary fashion that certain rights he finds in the federal Constitution or under state law were violated during the penalty trial under the 1977 statute. *****276** He acknowledges that we have rejected each such claim, but urges us to reconsider our views. We decline to undertake the reevaluations he urges, and we cite authority for our current view after each contention we list.

Defendant's contentions are: (1) the court and the statute failed to designate which statutory factors are aggravating and which are mitigating (*People v. Espinoza* (1992) 3 Cal.4th 806, 827, 12 Cal.Rptr.2d 682, 838 P.2d 204 [construing 1978 statute]); (2) the court failed to instruct the jury that it must find death the proper sentence beyond a reasonable doubt (*People v. Marshall* (1990) 50 Cal.3d 907, 934-935, 269 Cal.Rptr. 269, 790 P.2d 676 [construing 1978 statute]); (3) the court failed to instruct the jury that it must find the aggravating circumstances outweighed those in mitigation beyond a reasonable doubt (*ibid.*), and that the aggravating circumstances were true beyond a reasonable doubt (*People v. Gordon, supra,* 50 Cal.3d 1223, 1273-1274, 270 Cal.Rptr. 451, 792 P.2d 251 [construing 1978 statute]); (4) the statute is unconstitutional ***887** because it does not require (a) written findings as to the aggravating factors the jury found (*People v. Montiel* (1994) 5 Cal.4th 877, 943, 21 Cal.Rptr.2d 705, 855 P.2d 1277 [construing 1978 statute]), (b) jury unanimity on aggravating factors (*ibid.*), or (c) a procedure to enable this court to evaluate the sentencer's decision--by which we understand defendant to mean to undertake proportionality review (*People v. Frierson* (1979) 25 Cal.3d 142, 180-184, 158 Cal.Rptr. 281, 599 P.2d 587 (plur. opn.)); (5) the court failed to instruct that a sentence of life imprisonment without possibility of parole means just that (*People v. Gordon, supra,* 50 Cal.3d at pp. 1277-1278, 270 Cal.Rptr. 451, 792 P.2d 251); (6) the court failed to instruct the jury to consider affirmatively all evidence in mitigation and that it could show mercy (see *People v. Caro* (1988) 46 Cal.3d 1035, 1067, 251 Cal.Rptr. 757, 761 P.2d 680 [construing 1978 statute]); (7) the use of a felony to qualify defendant both for a first degree murder conviction under a felony-murder theory and for a death sentence was impermissible (*People v. Marshall, supra,* 50 Cal.3d at pp. 945-946, 269 Cal.Rptr. 269, 790 P.2d 676); (8) the court failed to instruct the jury sua sponte that an instruction given at the guilt phase to disregard sympathy (*ante,* p. 262 of 47 Cal.Rptr.2d, p. 1348 of 905 P.2d) did not apply at the penalty phase (*People v. Adcox* (1988) 47 Cal.3d 207, 265, 253 Cal.Rptr. 55, 763 P.2d 906 [construing 1978 statute]); (9) an instruction's reference to extreme mental disturbance violated a right to have the jury consider less severe mental disturbances in mitigation (*People v. Turner* (1994) 8 Cal.4th 137, 208, 32 Cal.Rptr.2d 762, 878 P.2d 521 [construing 1978 statute]); (10) the statute deprived him of the benefits of determinate sentencing (*People*

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v. Montiel, supra, 5 Cal.4th at p. 943, 21 Cal.Rptr.2d 705, 855 P.2d 1277); (11) the instruction to the jury to consider "[w]hether or not" defendant committed the crime while "under the influence of extreme mental or emotional disturbance" and "[w]hether or not" mental illness or defect may have impaired his reasoning or his ability to behave lawfully could have led the jury to consider the absence of these mitigating factors in aggravation (People v. McPeters (1992) 2 Cal.4th 1148, 1191, 9 Cal.Rptr.2d 834, 832 P.2d 146 [construing 1978 statute; discussing § 190.3, factor (d)]); (12) it was unconstitutional to introduce prior crimes evidence (People v. Montiel, supra, 5 Cal.4th at p. 943, 21 Cal.Rptr.2d 705, 855 P.2d 1277); (13) it was impermissible to fail to charge the offense underlying the felony-murder theory--i.e., the violation of section 288(People v. Morris (1988) 46 Cal.3d 1, 14-18, 249 Cal.Rptr. 119, 756 P.2d 843, disapproved on other points in In re Sassounian (1995) 9 Cal.4th 535, 543-544, fn. 5, 545, fn. 6, 37 Cal.Rptr.2d 446, 887 P.2d 527); (14) the court failed to let him address the jury without being subject to cross-examination **1363 (People v. Gallego (1990) 52 Cal.3d 115, 203, 276 Cal.Rptr. 679, 802 P.2d 169); (15) his constitutional rights were violated when the court failed to have him present during an instruction conference (People v. Morris, supra, 53 Cal.3d 152, 210, 279 Cal.Rptr. 720, 807 P.2d 949; see also People v. Freeman (1994) 8 Cal.4th 450, 511, 34 Cal.Rptr.2d 558, 882 P.2d 249); (16) instructing the jury with CALJIC No. ***888** 2.90 (4th ed. 1979 bound vol.), defining reasonable doubt, deprived him of rights he finds in the federal and state Constitutions to due process and a *****277** fair trial (Victor v. Nebraska, supra, 511 U.S. 1, ---- - ----, 114 S.Ct. 1239, 1243- 1249, 127 L.Ed.2d 583, 591-597 [federal Constitution]). With regard to the California constitutional prong of this last claim, we cannot agree that any error arose in instructing the jury in this case with CALJIC No. 2.90, and therefore we do not reach defendant's claim that the California Constitution was violated. "When we consider a claim of this sort, the question we ask is whether there is a reasonable likelihood that the jury construed or applied the challenged instruction in an objectionable fashion. (People v. Clair, supra, 2 Cal.4th at p. 663, 7 Cal.Rptr.2d 564, 828 P.2d 705.) [¶] On this record--and notwithstanding any asserted infirmity in the underlying standard instruction itself [citation] the answer is negative. There is no reasonable likelihood that the jury misconstrued or misapplied the instruction in question as defendant argues." (People v. Berryman, supra, 6 Cal.4th at pp. 1073- 1074, fn. 3, 25 Cal.Rptr.2d 867, 864 P.2d 40.)

CONCLUSION

The judgment is affirmed.

LUCAS, C.J., and ARABIAN, J., BAXTER and GEORGE, JJ., concur.

KENNARD, Justice, concurring and dissenting.

I concur in the judgment and, except as to one issue, I concur also in the majority opinion.

The issue on which I part company with the majority concerns defendant's contention that, in connection with the killing of 7-year-old Carl Carter, Jr., the trial court erred in not instructing the jury on former section 647a (now section 647.6) of the Penal Code (annoying or molesting a child under the age of 18; hereafter former section 647a) as a lesser included offense of Penal Code section 288 (lewd and lascivious act on a child under the age of 14; hereafter section 288). The majority rejects this contention. (Maj. opn., *ante,* at p. 266 of 47 Cal.Rptr.2d, at p. 1352 of 905 P.2d.) I agree that it should be rejected, but not for the reason that the majority gives.

The majority concludes that an instruction on former section 647a was not required because the evidence received at trial would not support a conclusion that defendant did not violate section 288 but did violate former section 647a. (Maj. opn., *ante,* at pp. 265-267 of 47 Cal.Rptr.2d, at pp. 1351-1353 of 905 P.2d.) Although this characterization of the evidence may well be correct, the majority's reasoning implies that if the state of the evidence had been otherwise, the trial court would have been obligated to instruct on former section 647a. I disagree.

The majority's reasoning ignores the fact that defendant was not charged with a violation of section 288. Rather, the crime defined in that section was ***889** relevant only as the predicate felony to support the charge of first degree murder on a theory of felony murder. The majority cites no authority for the proposition that a trial court is required to instruct the jury on lesser included offenses of uncharged offenses relevant only as predicate felonies under the doctrine of felony murder.

The rationale underlying a trial court's obligation to instruct on lesser included offenses has been

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explained this way: "The state has no interest in a defendant obtaining an acquittal where he is innocent of the primary offense charged but guilty of a necessarily included offense. Nor has the state any legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that **1364 the defendant has been guilty of wrongful conduct constituting a necessarily included offense. Likewise, a defendant has no legitimate interest in compelling the jury to adopt an all or nothing approach to the issue of guilt. Our courts are not gambling halls but forums for the discovery of truth." (*People v. St. Martin* (1970) 1 Cal.3d 524, 533, 83 Cal.Rptr. 166, 463 P.2d 390.)

This rationale applies only to offenses with which the defendant has been charged; it does not apply to uncharged offenses that ***278 are relevant only to support a theory of felony murder. In this context, the defendant's guilt of an uncharged predicate felony becomes an element of the charged offense of murder; thus, the jury's doubts that the defendant committed the predicate felony may cause it to reject the felony-murder theory. But whether the acceptance or rejection of the felony-murder theory presents the jury with an all-or-nothing choice will depend on whether the jury has been given alternative theories or other verdict options relating to the charged offense of murder. It will not depend on whether the jury has been instructed on offenses that are necessarily included within the uncharged predicate felony.

To be sure, an offense that is a lesser included offense of an uncharged predicate felony might also qualify as a lesser related offense of the charged offense of murder. In such a case, the defendant may be entitled, *on request,* to instructions on that offense. (See *People v. Geiger* (1984) 35 Cal.3d 510, 199 Cal.Rptr. 45, 674 P.2d 1303.) But this is not such a case. Defendant did not request that the trial court instruct the jury on former section 647a as a lesser related offense of murder, nor has he argued in this court that former section 647a is a lesser related offense of murder. Indeed, I do not understand defendant to be arguing that the jury should have been given the option of convicting defendant of former section 647a, but only that the trial court should have explained former section 647a to the *890 jury so that it could somehow better understand the uncharged predicate felony, section 288.

Because defendant was not charged with a violation of section 288, and because former section 647a is not an offense necessarily included within the charged offense of murder, the trial court did not err in failing, on its own initiative, to instruct on former section 647a. In this case, an instruction on former section 647a as a lesser included offense of section 288 would have served no useful purpose and could well have confused the jury.

WERDEGAR, J., concurs.

47 Cal.Rptr.2d 219, 11 Cal.4th 786, 12 Cal.4th 783D, 905 P.2d 1305, 95 Cal. Daily Op. Serv. 9091, 95 Daily Journal D.A.R. 15,919

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MAUD H. HUNSTOCK, Individually and as Trustee, etc., Respondent,
v.
ESTATE DEVELOPMENT CORPORATION (a Corporation), Appellant.

L. A. No. 18244.

Supreme Court of California

May 17, 1943.

HEADNOTES

(1) Process § 24--Service--Mode--Delivery.
The words "by delivering," as used in Code Civ. Proc., § 411, relating to service of process on corporations, require personal service upon the designated persons.

See 21 **Cal.Jur.** 492; 42 **Am.Jur.** 38.

(2) Process § 56--Service--Private Corporations--Delivery to Agent or Secretary of State.
Inasmuch as the word "delivery" in Civ. Code, § 373, means delivery by hand when used in referring to service on an officer or agent of a domestic corporation, such word must be given the same meaning when used in another portion of the same statute in referring to service on the Secretary of State in lieu of service on the corporation. Moreover, in providing that service upon the Secretary of State may be made by delivery of the process not only to him but also "to ***206** any person employed in his office in the capacity of assistant or deputy," the purpose was to make a number of persons available for the service of process, a purpose which would be unnecessary if the Legislature had intended delivery of process to be made by mail or express.

See 6A **Cal.Jur.** 1382; 42 **Am.Jur.** 92.

(3) Process § 56--Service--Private Corporations--Construction of Statutes Governing.
Inasmuch as Code Civ. Proc., § 411, and Civ. Code, § 373, both provide for the manner of summons upon a domestic corporation and they are closely bound together by the reference in one to the other, they are *in pari materia* and as such must be construed together.

(4) Process § 56--Service--Private Corporations--Secretary of State in Lieu of Corporation--Mailing.
Civ. Code, § 373, authorizing the Secretary of State, on receipt of process against a domestic corporation, to mail the process to the principal office of the corporation, refers to an act which follows service on the Secretary of State, and does not recognize mailing as one method of delivery in making service of process.

(5) Process § 56--Service--Mode--Delivery--Statutes Governing.
While "delivery" constituting personal service within Code Civ. Proc., § 1011, may be effected by mailing the notice or paper to be served, the service of summons and complaint in an action is not governed by that section, but by Code Civ. Proc., § 411, which carries into effect the common-law rule of personal delivery.

(6) Administrative Law--Administrative Construction of Statute.
The rule that courts will give great weight to an administrative construction of a statute by executive officers may not be successfully invoked by a litigant, where he has presented no evidence of an interpretation which is in his favor, and where the particular officer charged with the duty of executing a statute has consistently followed the procedure outlined therein.

(7) Process § 56--Service--Private Corporations--Secretary of State in Lieu of Corporation--Admission of Service.
In an action against a domestic corporation, a letter written by the Secretary of State to plaintiff's counsel merely stating that "pursuant to Section 373, Civil Code ... we have, today, transmitted, by registered letter" a copy of the summons and complaint to the corporation, was not a written admission of service, as it was not stated when or how the process was received.

See 42 **Am.Jur.** 31.

(8) Process § 56--Service--Private Corporations--Secretary of State in Lieu of Corporation.
In an action against a domestic corporation, ***207** the mere fact that the Secretary of State received a copy of the process did not preclude an inquiry as to the means by which he obtained such notice, as this would ignore the requirement of personal service of summons.

SUMMARY

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APPEAL from a judgment of the Superior Court of Los Angeles County. Kurtz Kauffman, Judge pro tem. Reversed.

Action to foreclose a mortgage. Judgment for plaintiffs reversed.

COUNSEL

Dryer, Richards & Page and P. H. Richards for Appellant.

Crail, Crail & Crail, Jacob Shearer, George W. Manierre and G. M. Cuthbertson for Respondents.

EDMONDS, J.

A decree of foreclosure which orders the sale of real property to satisfy a note secured by a mortgage, and also gives the mortgagee a judgment for any deficiency, is challenged solely upon jurisdictional grounds. The determinative question for decision is whether service of process may be made upon a domestic corporation, within the authorization of section 373 of the Civil Code, by mailing a copy of the summons and complaint to the Secretary of State.

The appellant, Estate Development Corporation, a domestic corporation, is the maker of the note and mortgage sued upon. The instruments were executed on behalf of the corporation by H. Ellis Martin, president, and L. J. Martin, secretary. Harry E. Martin, as an individual, also signed them.

Nine months after the complaint for foreclosure was filed and the summons issued thereon, John H. Nutt, one of the attorneys for the respondent mortgagee, made an ex parte application for an order directing that service in the action be made upon the mortgagor by delivering to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, a copy of the summons and complaint in the action. As the basis for such an order, Nutt stated in an affidavit that although due diligence had been exercised, personal service of process could not be made upon the appellant in any other manner. In further support of the application, Nutt presented an affidavit made by the *208 respondent, and another by S. N. West, stating in detail the efforts which had been made by them to secure personal service of process upon the appellant's officers.

The superior court granted the application and directed that service of the summons and complaint in the action be made "by delivering to the Secretary of State of the State of California, or to any person employed in his office in the capacity of assistant or deputy, one copy of said summons and complaint, pursuant to the provisions of Section 373 of the Civil Code of the State of California." An affidavit of service was later filed in which Nutt averred that on July 20, 1938, he had "caused to be mailed, by registered mail, a copy of the summons and complaint in the action ... to Frank C. Jordan, Secretary of State of the State of California, Sacramento, California, in pursuance of said order of this court." Thereafter, his affidavit continued, he "received a letter from Frank C. Jordan, Secretary of State of the State of California, signed by Robert Jordan, Assistant Secretary of State ... [which] sets forth the fact that process above mentioned was duly received by said Secretary of State and was duly forwarded by him to Estate Development Corporation, care of H. E. Martin, 812 South Detroit Street, Los Angeles, California."

On November 29, 1938, the corporation's default was entered. Two and one- half years later, it moved to quash service of the summons and complaint. This motion was denied. Four months later, the court rendered the default judgment from which the mortgagor is prosecuting the present appeal.

The appellant proceeds upon the theory that the judgment against it is void for the reason that no service of process was ever made upon it; therefore, since it did not voluntarily appear in the action, the court was without jurisdiction to enter its default or to render judgment against it. The attack is based upon the manner of the purported service, the sufficiency of the affidavits to justify the order permitting substituted service, and the sufficiency of the affidavit of proof of service. However, the determinative question is whether the statutory requirements are satisfied by mailing to the Secretary of State a copy of the summons and complaint.

(1) At the date of the order directing substituted service upon the appellant, the summons in a civil action was required to be served "by delivering a copy thereof as follows: *209 1. If the suit is against a domestic corporation: to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, general manager, or a person designated for service of process or authorized to receive service of process ... If no such officer or

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agent of the corporation can be found within the state after diligent search, then to the secretary of state as provided in section 373 of the Civil Code." (Code Civ. Proc. sec. 411.) It may be stated as a certainty that the words "by delivering" as used in this statute require personal service upon the designated persons. (See *Holiness Church v. Metropolitan Church Assn.*, 12 Cal.App. 445 [107 P. 633].)

The complementary Civil Code section then read: "Every domestic corporation may file with the Secretary of State a designation of a natural person, stating his residence or business address in this State, as its agent for the purpose of service of process, and the delivery to such agent of a copy of any process against such corporation shall constitute valid service on such corporation. ... If such designation has not been filed with the Secretary of State, and if personal service of process against such domestic corporation cannot be made with the exercise of due diligence in any other manner provided by law and the fact appears by affidavit to the satisfaction of the court or a judge thereof, such court or judge may make an order that the service be made upon such corporation by delivering to the Secretary of State, or to any person employed in his office in the capacity of assistant or deputy, one copy of such process for each defendant to be served. Service in such manner shall be and constitute personal service upon such corporation. Upon the receipt of such copy of process, the Secretary of State shall give notice of the service of such process to the corporation at its principal office in this State, by forwarding to such office, by registered mail with request for return receipt, such copy of such process. The defendant shall appear and answer within thirty days after delivery of such process to the Secretary of State." (Civ. Code, sec. 373.)

There is then this situation: Section 411 of the Code of Civil Procedure, which is the general statute providing for the manner of service upon a domestic corporation, requires personal delivery of process to a designated person. That section is supplemented by section 373 of the Civil Code, ***210** which is specifically referred to as stating the method to be used to effect service when an officer or agent of the corporation cannot be found within the state. In the Civil Code enactment, the Legislature has twice used the word "delivery." First, it has provided that service may be made by "the delivery to ... [its designated] agent of a copy of any process." Next it has authorized, under certain circumstances, service "by delivering [a copy of the process] to the Secretary of State."

(2) It will not be seriously argued that by the use of the word "delivery" in the sentence referring to service upon an agent, the Legislature intended that it should be made in any other manner than by hand. And in addition to the rule that a word which is used more than once in a statute is to be given the same meaning in each instance, unless a contrary intention clearly appears, (*Coleman v. City of Oakland*, 110 Cal.App. 715 [295 P. 59]), the context of section 373 requires a definition of "delivery" as excluding any means other than manual. For the service upon the Secretary of State may be made by delivery of the process not only to him but also "to any person employed in his office in the capacity of assistant or deputy." The obvious purpose of this provision is to make a number of persons available for the service of process, a purpose which would be entirely unnecessary if the Legislature had intended delivery of a copy of the process to be made by mail or express addressed to the Secretary of State and received in the course of the routine business of the office.

The contentions of the respondent would lead to this curious result: Although the word "delivery' must be construed as meaning delivery by hand when used in section 411 of the Code of Civil Procedure and one provision of section 373 of the Civil Code, whose terms are incorporated into the general statute by reference, it should be so broadly defined in the next sentence of the same section as allowing a delivery by mail. There is no reasonable basis in law or logic for such a construction.

(3) Another elementary rule also compels this conclusion. The two code sections both provide for the manner of service of summons upon a domestic corporation and they are closely bound together by the reference in one to the other. Unquestionably they are *in pari materia* and as such must be construed together. Accordingly, there being no contrary intention ***211** expressed by the Legislature, the word "delivery" must be given the same meaning in each enactment. (*Jameson Petroleum Co. v. State*, 11 Cal.App.2d 677, 680 [54 P.2d 776]; *Old Homestead Bakery, Inc. v. Marsh*, 75 Cal.App. 247, 258, 259 [242 P. 749]; *People v. Wells*, 11 Cal. 329; and see *City of Long Beach v. Payne*, 3 Cal.2d 184, 191 [44 P.2d 305]; *Dalton v. Lelande*, 22 Cal.App. 481, 486 [135 P. 54].)

(4) In support of her assertion that mailing is one method of delivery recognized by section 373, the respondent calls attention to the fact that the statute

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specifically authorizes mailing of the process by the Secretary of State to the principal office of the corporation. The answer to this contention is that service is complete when the process is delivered to the Secretary of State, and its subsequent mailing to the corporation is an act which follows service. As a matter of fact, the use in the section of the word "delivery" in connection with service, and of the word "mailing" with reference to a later act strongly indicates a legislative differentiation between the formality of delivery in making service of process and the method of giving notice by mailing, after service has been made upon the Secretary of State.

(5) That "delivery" constituting personal service within the meaning of section 1011 of the Code of Civil Procedure may be effected by mailing the notice or paper to be served under that section is well settled. (Code Civ. Proc., sec. 1012; *Heinlen v. Heilbron*, 94 Cal. 636, 640 [30 P. 8] (notice of appeal); *Shearman v. Jorgensen*, 106 Cal. 483, 485 [39 P. 863] (notice of ruling on demurrer); and see *Colyear v. Tobriner*, 7 Cal.2d 735, 743 [62 P.2d 741, 109 A.L.R. 191] (notice of termination of tenancy).) But the service of the summons and complaint in an action is not governed by that section but by section 411 of the same code, which carries into effect the common law rule of personal delivery.

(6) The respondent also argues that a course of administrative procedure which depends upon the construction of a statute by executive officers of the state charged with the duty of executing it is entitled to consideration and is given great weight by the courts. (*County of Los Angeles v. Superior Court*, 17 Cal.2d 707, 712 [112 P.2d 10]; *Bodinson Mfg. Co. v. California Emp. Com.*, 17 Cal.2d 321, 325, 326 [109 P.2d 935].) But she presented no evidence of an interpretation of the law by the Secretary of State which is ***212** in her favor. On the contrary, according to the appellant, the Secretary of State has consistently followed the procedure which it contends is required by the applicable code provisions.

In support of its contention, the corporation, in its brief, quotes a statement of former Secretary of State Paul Peek, addressed to the legal profession and published in legal newspapers, reading as follows: " 'It is true that this office is endeavoring to cooperate with the attorneys in effecting service under said section 373, and where process is received by mail with an express request that it be turned over to someone in the office for personal delivery to the Secretary of State, his assistant or a deputy, we are complying with such requests and furnishing affidavits of personal service by the individuals who actually make the service, but this procedure is available only as to process currently received. As to process previously received by mail, and not known to have been delivered to the Secretary of State, his assistant or a deputy by any given person, it is probable such defective service may be cured only by new service on one of the said authorized State officers personally.' "

(7) Although the respondent concedes that the Secretary of State may not waive any defect in service, she relies upon a letter written by him to her counsel as a written admission of service. In the leading case of *Bennett v. Supreme Tent, K. of M.*, 40 Wash. 431 [82 P. 744, 2 L.R.A. N.S. 389], the court held that since service of summons and complaint in an action against a foreign corporation could not be made by mailing them to the insurance commissioner, the statutory agent for service of process, he could not give validity to the service by admitting or waiving service upon him. "To hold that such agent can admit or waive service of summons, where no service has been in fact made, is to add materially to the powers conferred upon him by the statute." This decision is generally regarded as being well-grounded in principle. (See note, 2 L.R.A. (N.S.) 389; 21 R.C.L., Process, sec. 112, pp. 1360, 1361; and see *Lower v. Wilson*, 9 S.D. 252 [68 N.W. 545, 62 Am.St.Rep. 865]; 42 Am.Jur., Process, sec. 33, n. 10, p. 31; 50 C. J., Process, sec. 87, p. 487.) The letter of the Secretary of State in the present case, however, does not even purport to be an admission of service; it merely states that "pursuant to Section 373, Civil Code of the State of California, we have, today, transmitted, by registered letter" ***213** a copy of the summons and complaint to the corporation. When or how the process was received is not stated; indeed, the fact of receipt itself is left to implication from the statement that the copies had been mailed to the appellant.

(8) But the respondent insists that because the Secretary of State received a copy of the process, the court should not concern itself with the means by which he obtained it. That argument ignores the necessity of personal service of summons in any case where it is required. Surely no one would contend that if a natural person received a copy of process in an action against him by any means other than personal delivery, in the absence of an admission in writing of service in accordance with section 415 of the Civil Code, the court would have jurisdiction to enter a default judgment against him.

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The burden of service by personal delivery to the Secretary of State, or one of his deputies, is no greater than that imposed upon a plaintiff seeking to serve a defendant personally. Indeed it is much less, for, under ordinary circumstances, one of the persons named in the statute will always be found at the State Capitol during business hours. And any argument based upon the allegedly needless expense of requiring manual delivery rather than mailing is one to be addressed to the Legislature and not to the courts.

The judgment is reversed.

Gibson, C. J., Shenk, J., Curtis, J., and Traynor. J., concurred.

CARTER, J.

I dissent.

The question presented by this appeal is whether the delivery of a summons by mail to and receipt of it by the Secretary of State followed by the mailing of it by the latter to the defendant corporation, in an action against the corporation, is sufficient compliance with the law on the subject. The case presented is properly one for substituted service and comes within the terms of section 373 of the Civil Code, as it read prior to 1941, as follows:

"Every domestic corporation may file with the Secretary of State a designation of a natural person, stating his residence or business address in this State, as its agent for the purpose of service of process, and the delivery to such agent of a copy of any process against such corporation shall constitute ***214** valid service on such corporation. Such corporation shall file with the Secretary of State notice of any change in the address of the person thus designated, and may revoke any such designation by filing notice of the revocation thereof with the Secretary of State.

"If such designation has not been filed with the Secretary of State, and if personal service of process against such domestic corporation cannot be made with the exercise of due diligence in any other manner provided by law and the fact appears by affidavit to the satisfaction of the court or a judge thereof, such court or judge may make an order that the service be made upon such corporation *by delivering to the Secretary of State,* or to any person employed in his office in the capacity of assistant or deputy, one copy of such process for each defendant to be served. Service in such manner shall be and constitute personal service upon such corporation. Upon the receipt of such copy of process, the Secretary of State shall give notice of the service of such process to the corporation at its principal office in this State, by forwarding to such office, by registered mail with request for return receipt, such copy of such process. The defendant shall appear and answer within thirty days after delivery of such process to the Secretary of State." (Emphasis added.)

The majority opinion holds that the delivery of the summons to the Secretary of State must be a personal one and not by mail. Indulgence in such technicality should not be permitted to thwart the ends of substantial justice. It must be remembered that the service involved is *substituted* service and not personal service. It is made effective as a means of acquiring jurisdiction in personam by statutory declaration. Such service does not necessarily give the defendant personal notification of the action. It need merely be designed to be likely to have that effect. Jurisdiction is acquired if compliance is had with the statutory requirements, even though the defendant never in fact receives a copy of the summons. Requiring the defendant to be subjected to jurisdiction over its person in that manner is a reasonable regulation when it fails to designate an agent upon whom process may be served or give the names and addresses of its officers. The purpose of requiring personal delivery of a summons to a natural person is to leave no doubt that he receives notice of the action. In substituted service only a reasonable probability of that result is required. Hence, delivery by mail to the Secretary ***215** of State is sufficient. To require personal delivery to the Secretary of State is contrary to the very nature of substituted service which rather than being personal service is a substitute therefor. It follows that when the Legislature established a method of substituted service it did not intend to require personal delivery of the summons to the Secretary of State. That *personal service* was not contemplated clearly appears from the case of Holiness Church v. Metropolitan Church Assn., 12 Cal.App. 445 [107 P. 633], which holds that service on a foreign corporation by delivery to the Secretary of State is *not personal service;* it is substituted service. If it is not personal service then no personal delivery is required. A delivery by mail accomplishes all that is required, that is, substituted service.

If the Legislature had intended to require service by

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personal manual delivery rather than delivery by mail, it would have so provided. It should be noted that in specifying how summons shall be served generally it is stated that: "The summons must be served by delivering a copy thereof as follows: ... 7. In all other cases to the defendant *personally.*" (Code of Civ. Proc., sec. 411.) No requirement of *personal* delivery to the Secretary of State is made in section 373 of the Civil Code, the statute here in question. Likewise in section 413 of the Code of Civil Procedure providing that personal service out of the state may be made in lieu of mailing. The service specified is *personal* service. Also to the same effect are sections 1011 and 1019 of the Code of Civil Procedure.

In my opinion, the service of summons in this case was in substantial compliance with the statutory provisions relating to substituted service of summons on a domestic corporation which has not designated a person on whom service of process can be made, and the judgment should therefore be affirmed.

Peters J. pro tem., concurred.

Respondent's petition for a rehearing was denied June 14, 1943. Carter, J., voted for a rehearing. ***216**

Cal.,1943.

Hunstock v. Estate Development Corp.

END OF DOCUMENT

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JOSEPH A. LODER, Plaintiff and Appellant,
v.
THE MUNICIPAL COURT FOR THE SAN DIEGO JUDICIAL DISTRICT OF SAN DIEGO COUNTY et al., Defendants and Respondents; THE PEOPLE, Real Party in Interest and Respondent

L.A. No. 30406.

Supreme Court of California

September 2, 1976.

SUMMARY

The trial court entered judgment denying plaintiff's petition for a writ of mandate to compel erasure or return of the record of an arrest which did not result in conviction. Defendants named in the action were the presiding judge of the municipal court, the city chief of police, and the records custodian. The charges against plaintiff, which arose out of his attack on a city police officer who was beating plaintiff's wife with a nightstick, had been dismissed for lack of prosecution. In consideration of the dismissal, plaintiff had executed a covenant not to sue, agreeing not to pursue any claim for damages against the officer involved. (Superior Court of San Diego County, No. 341574, William T. Low, Judge.)

The Supreme Court affirmed, holding that plaintiff had failed to show any duty imposed by statute or ordinance on any defendant to expunge the record and that the limited retention and dissemination of arrest records permitted under California law does not violate the right of privacy. The court held that the right of privacy, set forth in Cal. Const., art. I, § 1, does not purport to prohibit all incursion into individual privacy but requires that any such intervention be justified by a compelling interest, and that the multiple purposes for which police, prosecutors, courts, and probation and parole authorities may consult records of arrest not resulting in conviction constitute a substantial governmental interest. The court pointed out that California has enacted a substantial body of legislation to protect the individual from the improper use of arrest records and it held that further regulation of the ***860** use and abuse of such records is primarily a legislative matter. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Mandamus and Prohibition § 6--Mandamus--Conditions Affecting Issuance-- Acts and Duties Enforceable.
Under Code Civ. Proc., § 1085, a writ of mandate will lie only "to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust or station," and the two basic requirements essential to the issuance of the writ are a clear, present and usually ministerial duty upon the part of the respondent, and a clear, present and beneficial right in the petitioner to the performance of that duty.

(2) Arrest § 6--Privileges and Exemptions--Arrest Records--Right to Expungement.
One who had been charged with battery and other offenses, subsequently dismissed for lack of prosecution, was not entitled to a writ of mandate to compel the presiding judge of the municipal court, the city police chief, and the records custodian to expunge or return to him the record of his arrest, where he failed to point out any statute or ordinance imposing on any defendant, as required by Code Civ. Proc., § 1085, providing for the writ of mandate, "a duty resulting from [his] office" to comply with such a demand. Moreover, an arrest record is a document within the scope of Gov. Code, § 6200, which imposes criminal sanctions on an officer having custody of such a record for "wilfully . . removing ... the whole or any part" of it.

[Right of exonerated arrestee to have fingerprints, photographs, or other criminal identification or arrest records expunged or restricted, note, 46 **A.L.R.3d** 900. See also **Cal.Jur.3d,** Criminal Law, § 325; **Am.Jur.2d,** Criminal Law, § 369; Privacy, § 17.]

(3a, 3b) Privacy § 5--Matters of Public Interest--Arrest Records.
A city's retention and dissemination of an individual's arrest record in connection with criminal charges that were subsequently dismissed for lack of prosecution did not violate the right of privacy guaranteed by Cal. Const., art. I, § 1. The constitutional provision ***861** does not purport to prohibit all incursion into individual privacy, but requires that any such intervention be justified by a

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compelling interest, and the multiple purposes for which police, prosecutors, courts, and probation and parole authorities may consult records of arrest not resulting in conviction constitute a substantial governmental interest. Moreover, California has enacted a substantial body of legislation to protect the individual from improper use of arrest records, and further regulation of the use and abuse of such records is primarily a legislative matter.

(4) Privacy § 5--Matters of Public Interest--Arrest Records.
A suspect's right of privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest. It is generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime, and it may also persuade eyewitnesses and character witnesses to testify.

COUNSEL

Jean Leonard Harris for Plaintiff and Appellant.

Sheldon Portman, Public Defender (Santa Clara), Frank D. Berry, Jr., Deputy Public Defender, Joseph Remcho, Deborah Hinkel, Ellen Lake, Susan Sawyer, Amital Schwartz, Fred Okrand, Anthony G. Amsterdam, Daniel M. Luevano, Rosalyn M. Chapman, Philip L. Goar, Richard A. Paez, Kenneth Hecht, Judith Kurtz, Les A. Hausrath, Stefan Rosenzweig and Henry Hewitt as Amici Curiae on behalf of Plaintiff and Appellant.

John W. Witt, City Attorney, Stuart H. Swett, Chief Deputy City Attorney, Paul E. Robinson and Peter L. Dean, Deputy City Attorneys, for Defendants and Respondents and for Real Party in Interest and Respondent.

Evelle J. Younger, Attorney General, Jack R. Winkler, Chief Assistant Attorney General, Daniel J. Kremer, Assistant Attorney General, and Jeffrey A. Joseph, Deputy Attorney General, as Amici Curiae on behalf of Defendants and Respondents and Real Party in Interest and Respondent. *862

MOSK, J.

Plaintiff appeals from a judgment denying a writ of mandate to compel erasure or return of the record of an arrest which did not result in conviction. As will appear, we conclude that he is not entitled to the relief sought and hence that the judgment should be affirmed.

The principal factual allegations of plaintiff's petition for writ of mandate are as follows: on July 22, 1972, plaintiff attacked San Diego Police Officer Gosnell as the latter was beating plaintiff's wife with a nightstick. Plaintiff was arrested for battery, obstructing a police officer, and disturbing the peace, and a criminal complaint was filed charging him with these offenses.

Officer Gosnell was thereafter reported for the incident and temporarily suspended from duty. The city attorney decided not to press the charges against plaintiff, and on November 22, 1972, the criminal complaint was dismissed by the municipal court for lack of prosecution. Concurrently therewith plaintiff executed a covenant not to sue, agreeing in consideration of the dismissal not to pursue any claim for damages against Officer Gosnell.

At the time of the dismissal plaintiff moved for an order "by way of mandamus" directing all police agencies to erase all records of his arrest. The municipal court denied the motion, finding no statutory authority for such an order. Plaintiff's appeal to the appellate department of the superior court was dismissed on the ground the ruling was non-appealable.

Plaintiff then wrote directly to the chief of police and the records custodian of the San Diego Police Department, requesting them to erase his arrest record and refrain from sending it to federal law enforcement agencies. When no action was taken in response, plaintiff filed the present action for writ of mandate in the superior court. He named as respondents the presiding judge of the municipal court and the San Diego Chief of Police and records custodian, and prayed that they be compelled (1) to erase all record of the arrest of July 22, 1972, and (2) to ***863** notify all agencies which received a copy of that record that it has been erased, and request them to do likewise. [FN1]

FN1 The remainder of the prayer is ambiguous. It states, "or in the alternative return to petitioner all evidence of said arrest record and henceforth desist from dissemination of any information in its

regard. ..." It is unclear whether this alternative is directed to respondents or to the agencies which received a copy of plaintiff's arrest record. In view of our disposition herein, the question is moot.

After a hearing the court found that respondents will not disseminate the record of plaintiff's arrest to the public in general, and concluded in reliance on *Sterling v. City of Oakland* (1962) 208 Cal.App.2d 1 [24 Cal.Rptr. 696], that respondents are under no duty to erase or return the record to plaintiff. The court therefore denied the writ, and plaintiff brought this appeal.

(1) A writ of mandate will lie only "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; ..." (Code Civ. Proc., § 1085.) More particularly, "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citation]." (*People* ex rel. *Younger* v. *County of El Dorado* (1971) 5 Cal.3d 480, 491 [96 Cal.Rptr. 553, 487 P.2d 1193].) (2) Inasmuch as plaintiff fails to satisfy the first of these requirements, we need not reach the second.

Plaintiff points to no statute or ordinance - and we have found none - which imposes on respondent presiding judge of the municipal court or on either of respondent police officials "a duty resulting from [his] office" to comply with plaintiff's demand for erasure or return of the record of his arrest. On the contrary, such an act appears to be forbidden by Government Code section 6200, which provides in pertinent part that "Every officer having the custody of any record ... or of any paper or proceeding of any court, filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of ... wilfully destroying, mutilating, defacing, altering or falsifying, removing or secreting the whole or any part of such record, ... paper, or proceeding, or who permits any other person to do so," is punishable by a prison term of up to 14 years. An arrest record is clearly a document which may properly be kept by a public officer in the discharge of his duties, and hence is within the scope of the statute. (See *People v. Pearson* (1952) 111 Cal.App.2d 9, 31 [244 P.2d 35].) And inasmuch as no showing of specific ***864** intent is required by the statute, an officer who knowingly removes or destroys such a document is punishable even though he acts without a criminal purpose. (*Id.*, at p. 18; accord, *People* v. *O'Brien* (1892) 96 Cal. 171, 175-179 [31 P. 45]; *People* v. *Tomalty* (1910) 14 Cal.App. 224, 229-230 [111 P. 513].)

(3a) Lacking legislative authority, plaintiff turns to two broad constitutional provisions. He asserts that official retention and dissemination of his arrest record violates his right of privacy (Cal. Const., art. I, § 1) and deprives him of due process of law (Cal. Const., art. I, § 7, subd. (a); U.S. Const., 5th & 14th Amends.). He notes that each of the respondents took an oath to uphold the federal and state Constitutions, and he concludes that each therefore has a clear and present duty resulting from his office to prevent the claimed violations. As will appear, the constitutional premises of the argument are faulty.

The right of privacy added to the California Constitution by a 1972 amendment of article I, section 1, is not absolute. In *White* v. *Davis* (1975) 13 Cal.3d 757, 775 [120 Cal.Rptr. 94, 533 P.2d 222], we observed that "the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest." For example, in *County of Nevada v. MacMillen* (1974) 11 Cal.3d 662, 672 [114 Cal.Rptr. 345, 522 P.2d 1345], we held that the right of privacy does not prevail over "the right of the public to an honest and impartial government," as implemented by legislation requiring a variety of public officials and candidates to disclose their financial interests. (Gov. Code, § 3600 et seq.)

In the case at bar respondents assert a similar compelling interest in limited retention and dissemination of arrest records. The interest may be characterized generally as the promotion of more efficient law enforcement and criminal justice; more specifically, the state's purpose is to protect the public from recidivist offenders.

This interest is manifested at a number of stages of the criminal process. First, at the time of arrest the suspect's right of privacy is obviously outweighed by the necessity of identifying him correctly, and does not give him the right to refuse to disclose his name and address to the arresting officer. Not only may such information be taken down, it may be immediately put to use: the officer may transmit the data to his headquarters in order to determine whether the arrestee is wanted on ***865** any other charge or is a fugitive, or whether he presents a threat to the officer's safety. If the arrestee is thereafter

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transported to the police station and booked, the identification process may lawfully extend to taking his fingerprints and photograph, and recording his vital statistics. (See Pen. Code, § 7, subd. 21.)

(4) In addition, the suspect's right of privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest: "It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eyewitnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest." (*Briscoe v. Reader's Digest Association, Inc.* (1971) 4 Cal.3d 529, 536 [93 Cal.Rptr. 866, 483 P.2d 34, 57 A.L.R.3d 1]; see also *Kapellas v. Kofman* (1969) 1 Cal.3d 20, 38 [81 Cal.Rptr. 360, 459 P.2d 912].)

Next, the information derived from the arrest may be used by the police in several ways for the important purpose of investigating and solving similar crimes in the future. We have held, for example, that a photograph taken pursuant to even an illegal arrest may be included among those shown to a witness who is asked to identify the perpetrator of a subsequent crime. (*People v. McInnis* (1972) 6 Cal.3d 821, 825-826 [100 Cal.Rptr. 618, 494 P.2d 690].) This is a fortiori permissible in the case of a lawful arrest; and the same identification function is served, of course, by the arrestee's fingerprints and other recorded physical description.

Even if no such direct connection with the later offense can be made, an arrest record may under appropriate conditions be a valuable investigative tool for the discovery of further evidence. Often the prior arrest is not an isolated event but one of a series of arrests of the same individual on the same or related charges. This is especially true when the crime in question is typically subject to recidivism, such as the use of addictive drugs, child molesting, indecent exposure, gambling, bookmaking, passing bad checks, confidence frauds, petty theft, receiving stolen goods, and even some forms of burglary and robbery. In these circumstances a pattern may emerge - for example, a distinctive modus ***866** operandi - which has independent significance as a basis for suspecting the arrestee if the crime is committed again.

At the very least, the suspicion thus focussed will justify additional investigation. If it is coupled with independent evidence of criminal involvement, it may amount to probable cause to arrest: "Although previous arrests of a suspect in connection with illicit drug transactions will certainly not suffice to constitute probable cause for search or arrest, and while, indeed, arrests without convictions may be of little probative value, still a suspect's reputation as being involved in illicit drug traffic based on prior arrests may be considered." (*People v. Buchanan* (1972) 26 Cal.App.3d 274, 292 [103 Cal.Rptr. 66], and cases cited.) When the investigating officer knows of such a pattern, "that knowledge can be used, in connection with other information, to support a finding of probable cause for arrest." (*People v. Martin* (1973) 9 Cal.3d 687, 692, fn. 5 [108 Cal.Rptr. 809, 511 P.2d 1161].)

While a record of arrests not resulting in conviction is generally inadmissible at trial, it may serve significant functions in both pretrial and post-trial proceedings. First, among the circumstances often taken into account in the exercise of prosecutorial discretion is the arrest record of the defendant. For example, prosecutors have considered that record, or information developed therefrom, in deciding whether to file a formal charge against the defendant, or whether to prosecute as a felony or as a misdemeanor a crime which can be either class of offense, or whether to agree to a bargain for a specified penalty or a plea to a lesser offense. In particular, when the defendant is charged with a crime involving possession of narcotics or restricted dangerous drugs, the district attorney is vested with statutory authority to decide whether he is eligible to be "diverted" into an alternate program of treatment and rehabilitation. (Pen. Code, § 1000.) The code requires a determination of ineligibility if the district attorney finds, inter alia, "evidence" that the defendant has a history of narcotics offenses other than simple possession. In *Sledge* v. *Superior Court* (1974) 11 Cal.3d 70, 75, footnote 4 [113 Cal.Rptr. 28, 520 P.2d 412], we recognized that such "evidence" may include prior narcotics arrests of the defendant not resulting in a conviction, listed on his rap sheet. [FN2] ***867**

FN2 Even a juvenile arrest or detention record, declared by statute to be confidential and immune from disclosure to prospective employers and other third parties, may serve an important function in evidencing a pattern of suspicious behavior in appropriate

cases. In *T. N. G. v. Superior Court* (1971) 4 Cal.3d 767 [94 Cal.Rptr. 813, 484 P.2d 981], two juveniles were taken into custody for loitering near a school in violation of Penal Code section 653g, but were released in a few hours without charges being filed. We sustained the trial court's denial of a petition to seal the records of the detention without waiting the statutory five years (Welf. & Inst. Code, § 781), holding that their confidentiality was sufficiently protected in the interim by numerous provisions of the Juvenile Court Law. We recognized that if the petitioners had been similarly released after being charged as adults, they would have been entitled to immediate sealing (Pen. Code, § 851.7); but we rejected their claim of violation of equal protection, reasoning that "A legitimate and substantial interest supports the policy of permitting juvenile court personnel to retain information about a juvenile's detention, even when such detention does not result in a wardship proceeding. In such a case the retention of the record of detention still rests upon a rehabilitative purpose. As the juvenile court in the instant matter pointed out, the detention record will assist the court's personnel in assessing any later conduct by the juvenile. A single incident may not reveal a pattern of behavior which would require action by the juvenile court. But the past record of the juvenile with the juvenile court may enable a probation officer to recognize a development which requires informal probation, a petition for wardship, or other appropriate treatment." (*Id.*, at p. 783.) We summed up the point by stating that "the retention of the records of *even the innocent* juvenile serves certain salutary purposes." (Italics added; *Id.*, at p. 771.)

After the defendant has been appropriately charged, the court is usually called upon to determine the question of pretrial release. Again arrest records may be relevant. The form by which the defendant applies to be released on his own recognizance or on bail often provides for him to list his prior arrests and their dispositions. (See, e.g., 1 Cal. Criminal Law Practice (Cont.Ed.Bar 1964) § 2.24.) These matters may then be considered by the court in conjunction with all other relevant information, in deciding whether to release the defendant on recognizance or in fixing the appropriate amount of bail. [FN3]

FN3 In fixing the amount of bail the court is directed by statute to take into account "the previous criminal record of the defendant." (Pen. Code, § 1275.) And Penal Code section 1204.5 prohibits the court, prior to a plea or finding of guilty, from considering "any information reflecting the arrest or conviction record of a defendant" *except* in connection with "any application for an order fixing or changing bail ...."

Upon conviction, the case of each eligible felony defendant is referred to the probation officer. That officer must investigate the circumstances of the crime and "the prior history and record of the person," and report his findings and recommendations to the court. (Pen. Code, § 1203, subd. (a).) Any prior arrest record of the defendant is routinely obtained and included in the report as part of his criminal history. (2 Cal. Criminal Law Practice (Cont.Ed.Bar 1969) § § 18.63, 18.80.) In *People* v. *Peterson* (1973) 9 Cal.3d 717, 725-726 [108 Cal.Rptr. 835, 511 P.2d 1187], we reaffirmed the principle that upon conviction, evidence which would be inadmissible on the issue of guilt may be received for the purpose of determining whether and upon what conditions to grant probation, provided the proceedings remain fundamentally fair. For this purpose it has been held that the court may properly consider not only current arrests of the defendant giving rise to charges still pending (***868***People* v. *Escobar* (1953) 122 Cal.App.2d 15, 18 [264 P.2d 571]), but also prior arrests which did not result in conviction (*People* v. *White* (1952) 109 Cal.App.2d 296, 298 [240 P.2d 728], and cases cited; but see *People v. Calloway* (1974) 37 Cal.App.3d 905, 908-909 [112 Cal.Rptr. 745] (dictum)). And it has also been held that if the defendant is sentenced to prison, the Adult Authority may take his arrest record into account in determining when to release him on parole. (*Azeria* v. *California Adult Authority* (1961) 193 Cal.App.2d 1, 5 [13 Cal.Rptr. 839].)

(3b) Taken together, the multiple purposes for which police, prosecutors, courts, and probation and parole authorities may consult records of arrests not resulting in conviction thus constitute a substantial governmental interest. (See also Pen. Code, § 13100, eff. July 1, 1978.) Against this, we must weigh the arrestee's legitimate concern to protect himself from improper uses of his record. [FN4] According to the

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extensive literature on the topic, the principal dangers are inaccurate or incomplete arrest records, dissemination of arrest records outside the criminal justice system, and reliance on such records as a basis for denying the former arrestee business or professional licensing, employment, or similar opportunities for personal advancement. [FN5] *869

FN4 This concern appears to be the nub of plaintiff's vaguely worded claim of a potential denial of due process of law. Because of the legislative and administrative safeguards discussed hereinafter, the claim is not persuasive and we shall not further advert to it.

FN5 See, for example, Haskel, *The Arrest Record and New York City Public Hiring: An Evaluation* (1973) 9 Colum.J.L. & Social Prob. 442, 445-448; Karabian, *Record of Arrest: The Indelible Stain* (1972) 3 Pacific L.J. 20, 21-24; Steele, *A Suggested Legislative Device for Dealing with Abuses of Criminal Records* (1972) 6 U.Mich.J.L. Reform 32, 38-42; Schiavo, *Condemned by the Record* (1969) 55 A.B.A.J. 540, 541-542; Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction* (1967) 13 Crime & Del. 494, 495-498; Comment, *Arrest Records - Protecting the Innocent* (1974) 48 Tul.L.Rev. 629, 634-636; Comment, *Maintenance and Dissemination of Criminal Records: A Legislative Proposal* (1972) 19 U.C.L.A.L.Rev. 654, 664-665; Comment, *Retention and Dissemination of Arrest Records: Judicial Response* (1971) 38 U.Chi.L.Rev. 850, 853; Comment, *Arrest Records as a Racially Discriminatory Employment Criterion* (1970) 6 Harv.Civ. Rights-Civ.Lib.L.Rev. 165, 168-171; Comment, *Guilt by Record* (1965) 1 Cal. Western L. Rev. 126-129; Note, *The Dissemination of Arrest Records and the Iowa TRACIS Bill* (1974) 59 Iowa L.Rev. 1162, 1163-1166; Note, *Removing the Stigma of Arrest: The Courts, The Legislatures and Unconvicted Arrestees* (1972) 47 Wash.L.Rev. 659, 660-662; Note, *A Constitutional Right to the Return of Fingerprints and Photographs on Acquittal* (1972) 37 Mo.L.Rev. 709, 713-714; Note, *Discrimination on the Basis of Arrest Records* (1971) 56 Cornell L.Rev. 470-475; Note, *Menard v. Mitchell* (1971) 46 Notre Dame Law. 825, 830; see generally Alexander & Walz, *Arrest Record Expungement in California: The Polishing of Sterling* (1974) 9 U.S.F.L.Rev. 299; Kogon & Loughery, *Sealing and Expungement of Criminal Records - The Big Lie* (1970) 61 J.Crim.L.C. & P.S. 378; Baum, *Wiping Out a Criminal or Juvenile Record* (1965) 40 State Bar J. 816; Booth, *The Expungement Myth* (1963) 38 L.A. Bar Bull. 161; Comment, *Criminal Records of Arrest and Conviction: Expungement From the General Public Access* (1967) 3 Cal. Western L.Rev. 121; Note, *Menard v. Saxbe* (1975) 8 Loyola L.A. L.Rev. 238; Note, *Maintenance and Dissemination of Records of Arrest Versus The Right to Privacy* (1971) 17 Wayne L.Rev. 995.

We do not underestimate the adverse effects on an individual's later life if these dangers materialize. But we are convinced that in California the risks have been greatly diminished in recent years by significant legislative and executive action. We shall summarize the principal features of that response.

First. The Legislature has provided in effect that a substantial proportion of arrests not resulting in conviction shall not be recorded as arrests but simply as "detentions." Penal Code section 849.5 states that "In any case in which a person is arrested and released and no accusatory pleading is filed charging him with an offense, ... the arrest shall not be deemed an arrest, but a detention only." [FN6] (See also § 849, subd. (c).) This directive is implemented by section 851.6, subdivision (b), which declares that in every such instance "the person shall be issued a certificate by the law enforcement agency which arrested him describing the action as a detention," and subdivision (d) of the same section, which mandates that "Any reference to the action as an arrest shall be deleted from the arrest records of the arresting agency and of the Bureau of Criminal Identification and Investigation of the Department of Justice. Thereafter, any such record of the action shall refer to it as a detention." [FN7]

FN7 It is true that in construing the Juvenile Court Law we expressed the view that the word "detained" has come to involve "only slightly less stigma" than the word "arrest." (

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FN6 In the remainder of this opinion all statutory references, unless otherwise specified, are to the Penal Code. T. N. G. v. Superior Court (1971) *supra*, 4 Cal.3d 767, 779.) But the stigma may be measurably less when the person is an adult; and in any event, we cite the above sections of the Penal Code as only one of several legislative efforts to minimize the possible adverse consequences of an arrest record on a person's later life. Other statutory developments discussed hereinafter may well be more effective in achieving this goal.

Second. The Legislature has taken a number of steps to insure that a record of arrest or detention be complete, i.e., that it also show the final disposition of the charge. To begin with, the record of any arrest deemed to be a detention must include "a record of release." (§ 849.5.) More specifically, each law enforcement agency which makes an arrest and reports it to the Department of Justice or the Federal Bureau of Investigation must "furnish a disposition report to such agencies" whenever the person is transferred to another agency or is released without charges being filed. (§ 11115.) If the arrest is thus deemed to be a detention only, the disposition report must state "the specific reason" for ***870** the release, e.g., exoneration of the person detained, withdrawal of the complaint, or insufficient evidence to proceed. (*Ibid.*)

In cases in which formal charges are filed, section 11116 requires the clerk of the court to furnish a disposition report to the law enforcement agency primarily responsible for investigating the offense. The statute lists no less than 18 possible dispositions, [FN8] and directs that the report specify as many as are appropriate or "Any other disposition by which the case was terminated." In addition, the statute provides that when the case is dismissed on any of several general grounds (e.g., pursuant to § § 995 or 1385) the court shall state not only the disposition label but also "the particular reasons" for the disposition.

FN8 On various grounds these dispositions include compromise, suspension of proceedings, dismissal, discharge, acquittal, conviction, mistrial, and arrest of judgment.

Such disposition reports must be forwarded to the Department of Justice and the Federal Bureau of Investigation within 30 days after the release of the person arrested or detained or the termination of court proceedings. (§ 11117.) [FN9] In turn, the Department of Justice must add such reports to "all appropriate criminal records" (*ibid.*; see also § 11116.6). And each law enforcement agency receiving such a report is required to transmit a copy thereof "to all the bureaus to which arrest data has been furnished." (§ 11115, last par.) [FN10]

FN9 As of July 1, 1978, all court dispositions will be required to be reported to the Department of Justice by the appropriate agency within 10 days. (§ 13151, eff. July 1, 1978.)

FN10 Special statutes contain similar provisions. Thus in cases in which a narcotics defendant has been diverted into a drug rehabilitation program, Penal Code section 1000.5 directs that any record filed with the Department of Justice indicate the ultimate disposition of the proceeding; and in all juvenile cases, Welfare and Institutions Code section 504 prohibits the Department of Justice from transmitting to any person or agency any record of the arrest or detention of a minor "unless such information also includes the disposition resulting therefrom."

In addition, a person who is the subject of a disposition report is guaranteed access thereto. In any case in which the offense charged was punishable by imprisonment for more than 90 days, the court upon request must furnish the person with a certificate setting forth the particular ground of disposition. (§ § 11116.7-11116.9.) And in all cases, the person is granted the right to use the disposition label on his record "as an answer to any question regarding his arrest or detention history or any question regarding the outcome of a criminal proceeding against him." (§ 11116.5.) We shall see other examples of statutes expressly authorizing a former arrestee to answer "questions" about his criminal history by reference to the final version of his record. ***871**

Third. The Legislature has created a detailed mechanism whereby the person may inspect all

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criminal records pertaining to him and maintained by the Department of Justice. (§ § 11120-11125.) As the individual most directly concerned, he evidently has the most incentive to insure that the record is correct. If he believes any record is inaccurate or incomplete he may request the department to correct it, and the department must forward the request to the agency which originated the information; if that agency agrees the record is inaccurate or incomplete, it must correct it and notify the department to do likewise; if the agency disagrees, the person is entitled to have the dispute resolved by administrative adjudication, followed by judicial review. (§ 11126.)

Fourth. In a growing number of contexts the Legislature has mandated that at a certain stage of the proceedings arrest records are to be physically sealed. The first group of statutes to authorize this procedure dealt with juvenile offenders. Thus section 851.7 provides that any minor arrested for a misdemeanor is entitled upon request to "an order sealing the records in the case, including any records of arrest and detention," if he was released without formal charge, or the proceedings were subsequently dismissed, or he was acquitted. In that event "the arrest, detention, and any further proceedings in the case shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence." [FN11] The same relief is available to any minor convicted of a misdemeanor who has successfully served his sentence or fulfilled the conditions of his parole (§ 1203.45), [FN12] or, upon a showing of rehabilitation, to any minor five years after termination of the juvenile court's jurisdiction over him, or on reaching the age of 18 (Welf. & Inst. Code, § 781).

FN12 Again the statute (subd. (c)) is not applicable to sex offenses, vehicular violations, and narcotics crimes; and again the latter exclusion was held to violate equal protection. (*People v. Ryser* (1974) 40 Cal.App.3d 1 [114 Cal.Rptr. 668]; see also *McMahon v. Municipal Court* (1970) 6 Cal.App.3d 194, 200 [85 Cal.Rptr. 782] (statute must apply, on equal protection grounds, to minor arrested for a felony-misdemeanor but not charged with any offense).)

Plaintiff herein, an adult, cannot claim that the limitation of section 1203.45 to juvenile offenders denies him equal protection: "There is nothing arbitrary or capricious in affording persons treated as juveniles the right to have records sealed and denying that right to persons treated as adults." (

FN11 The statute provides (subd. (e)) that it does not apply to sex offenses, vehicular violations, and narcotics crimes. The exclusion of the latter category of misdemeanors was held unconstitutional as a violation of equal protection of the laws in *People v. Pruett* (1975) 51 Cal.App.3d 329 [124 Cal.Rptr. 273]. *McMahon v. Municipal Court, supra*, at p. 198 of 6 Cal.App.3d; see also *T. N. G. v. Superior Court* (1971) *supra*, 4 Cal.3d 767, 782-784.)

Recent legislation has extended the remedy of sealing to certain adult defendants. Thus, arrest records and all other documents in the case may ***872** now be sealed upon request whenever a person charged with any offense has been acquitted and it appears to the judge that he was "factually innocent"; and in that event, the court must "inform the defendant that he may thereafter state that he was not arrested for such charge and that he was found innocent of such charge by the court." (§ 851.8.) The clerk of the court is required to report the order of sealing to the Department of Justice (§ 11116, last par.); and upon receipt of that report, the Bureau of Criminal Identification and Investigation must send notice of the sealing to all officers and agencies it had previously advised of the arrest (§ 11105.5). [FN13]

FN13 Similarly, upon successful completion of a narcotic drug diversion program "the arrest upon which the diversion was based shall be deemed to have never occurred. The divertee may indicate in response to any question concerning his prior criminal record that he was not arrested or diverted for such offense." (§ 1000.5.)

Also relevant here is the California Criminal Record Purge Program administered by the Department of Justice. Under that program the department voluntarily "purges" - by physically destroying - criminal records in its files after they have been retained for various periods of time. The present timetable is generally as follows: (1) records of arrests for minor traffic offenses, violations of local ordinances, public drunkenness, and disorderly conduct will not be retained at all; (2) records of

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misdemeanor arrests not resulting in conviction or later deemed to be "detentions" will be retained for 5 years; (3) records of misdemeanor convictions and felony arrests will be retained for 7 years; and (4) records of felony convictions will be retained until the offender reaches age 70 and has not been arrested during the previous 10 years. Special rules govern juveniles and certain other offenders. The department is currently applying these standards both to its existing files and to all new records it receives. (Cal. Dept. of Justice, Criminal Record Purge Handbook (1975) *passim*.)

Fifth. The Legislature has established multiple safeguards against the improper dissemination of arrest records. Section 11076 declares generally the principle that "Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute." (See also § 11081.) Section 11105 then sets forth two categories of agencies and persons authorized by law to receive criminal record information compiled at the state level by the Attorney General. [FN14] The first category is comprised of agencies and persons to whom the Attorney General is required to furnish this information "when needed in the course of their duties." (§ 11105, subd. (b).) It includes the courts, certain classes of peace officers performing traditional law enforcement functions, district attorneys, probation and parole officers, defense attorneys when so authorized, and state or local agencies or officers in *873 strictly limited circumstances. [FN15] The second category is composed of other agencies or officers to whom the Attorney General "may" furnish this information, but he is permitted to do so only "upon a showing of a compelling need." (Subd. (c).) [FN16]

FN14 An essentially identical statute has been enacted governing dissemination of criminal record information compiled by local law enforcement agencies. (§ 13300, eff. July 1, 1978.)

FN15 The latter limitations are two-fold. First, the agency or officer must be authorized by statute or by resolution of a local governing board to have access to the criminal record information (subds. (b)(10) & (12)); agencies and officers of the state are, however, deemed to be so authorized (subd. (b)(9)). Second, in all such cases the information must be "required" to implement a statute or regulation which "expressly" refers to "specific" criminal conduct of the subject of the record and contains requirements or exclusions or both that are "expressly" based on such conduct. (Subds. (b)(9), (10) & (12).)

FN16 For example, the category includes those officials who are technically designated as "peace officers" but do not perform traditional law enforcement functions, such as university police, airport security officers, and health and safety investigators. (Subd. (c) (2).) According to guidelines prepared by the Department of Justice, criminal record information may be released to such officials only if the subject of their inquiry is under arrest or under criminal investigation, or is seeking employment as a peace officer.

To enforce these restrictions the Legislature has decreed criminal penalties for unauthorized dissemination of records. It is a misdemeanor for an employee of the Department of Justice (§ 11141) or "Any person authorized by law to receive a record" or information therefrom (§ 11142) to knowingly furnish that record or information to an unauthorized person. Indeed, such materials are virtually treated as contraband, as it is further declared that any unauthorized person who knowingly "buys, receives, or possesses" such a record or information is also guilty of a misdemeanor. (§ 11143.) [FN17] In addition, a statutory civil penalty is provided: in all cases in which criminal record information is unlawfully disseminated in violation of sections 11141 to 11143, the injured party may sue to recover his actual damages or $200, whichever is greater, together with costs and attorney's fees. (Lab. Code, § 432.7, subd. (b).)

FN17 The sections refer to records compiled at the state level by the Attorney General. (§ 11140, subd. (a).) Essentially identical legislation has been enacted penalizing unauthorized dissemination of records

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compiled by local law enforcement agencies. (§ § 13301-13304, eff. July 1, 1978.)

For further implementation the Legislature called upon the expertise of the executive branch. Section 11077 makes the Attorney General "responsible for the security" of criminal record information, and mandates that he (1) establish regulations to assure that such information shall not be disclosed to unauthorized persons or without a demonstration of necessity, (2) coordinate the California record security program with interstate systems for the exchange of such information, and (3) undertake a continuing educational program of all authorized personnel ***874** in the proper use and control of such information. In response the Attorney General created the Criminal Records Security Unit of the Department of Justice, which has promulgated regulations implementing Penal Code sections 11075-11081 (Cal. Admin. Code, tit. 11, ch. 1, subch. 7) and conducts repeated training sessions in records security for both state and local agencies. In addition, the Department of Justice has prepared a preliminary plan for compliance with recent federal regulations governing the collection, storage, and dissemination of criminal record information. (28 C.F.R. ch. 1, pt. 20.)

Sixth. The Legislature has moved vigorously to prevent criminal record information from being improperly used as a basis for denying the former arrestee opportunities for personal advancement. These efforts are variously phrased. Among the statutes we have discussed herein, for example, Penal Code section 1000.5 prescribes that the record of a narcotics arrest resulting in successful completion of a diversion program shall not, without the divertee's consent, "be used in any way which could result in the denial of any employment, benefit, license, or certificate."

Simultaneously with these particularized enactments, the Legislature has mounted a broader attack on the problem on two fronts. First, it has prohibited the prior practice whereby state and local agencies denied or revoked a business or professional license on the ground that a record of arrest or conviction demonstrated a lack of "good moral character." Chapter 1321 of the Statutes of 1974 substantially rewrote the provisions of law governing denial, suspension, and revocation of such licenses. (Bus. & Prof. Code, div. 1.5.) A license cannot now be denied or revoked because of a lack of "good moral character" or on any similar ground relating to the applicant's reputation. (Bus. & Prof. Code, § 475, subd. (c).) Indeed, even a conviction can no longer support a denial or revocation of a license unless the crime is "substantially related to the qualifications, functions or duties of the business or profession" in question. (Bus. & Prof. Code, § § 480, subd. (a), & 490.)

To implement the prohibition against denial of license because of an arrest record, the Legislature thereafter decreed that no public agency may "ask ... or require" on an initial application form that the applicant reveal any record of arrest not resulting in conviction. (Bus. & Prof. Code, § 461.) The section governs applications for "any license, certificate or registration provided for by any law of this state or local government," and a violation of its command is punishable as a misdemeanor. ***875**

Next, in Labor Code section 432.7 the Legislature extended this technique of prohibiting any inquiry into an applicant's arrest record from the field of public licensing to the even wider field of public *and private* employment. Substantially rewritten in 1975, section 432.7 now declares that "No employer whether a public agency or private individual or corporation shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention which did not result in conviction ...." Supplementing this rule, the statute further forbids any employer (1) to "seek" any such record of arrest "from any source whatsoever," and (2) to "utilize" such a record "as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment ...." (Subd. (a).) [FN18]

FN18 The statute is inapplicable to persons seeking employment as peace officers (subd. (d)), and applies only in part to prospective employees of a health facility (subd. (e)).
A parallel provision forbids an automobile liability insurer to ask an applicant for such insurance whether he has been arrested for any Vehicle Code violation not resulting in conviction. (Ins. Code, § 11580.08.)

Various penalties are provided for violation of section 432.7. If an employer unintentionally contravenes its terms, the applicant may bring a civil

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action against him to recover his actual damages or $200, whichever is greater, together with costs and attorney's fees; an intentional violation entitles the applicant to treble damages or $500, whichever is greater, plus costs and attorney's fees. (Subd. (b).) In the latter event the employer is also guilty of a misdemeanor. (*Ibid.*) And it is again declared illegal to knowingly disclose such information to unauthorized persons "with intent to affect a person's employment," and for unauthorized persons to "receive or possess" such information. (Subd. (f).) [FN19]

FN19 Finally, both of the foregoing revisions of the law governing the use of arrest records in licensing and employment are expressly incorporated by reference in the current version of section 11105, the general statute restricting dissemination of criminal record information. Subdivisions (b) and (c) of that statute each provide that "when information is furnished to assist an agency, officer, or official of state or local government, a public utility, or any entity, in fulfilling employment, certification, or licensing duties, the provisions of Chapter 1321 of the Statutes of 1974 and of Section 432.7 of the Labor Code shall apply ...." (See also § 13300, subds. (b) & (c), eff. July 1, 1978.)

Fourteen years ago, in the only prior reported California decision directly in point, the Court of Appeal rejected an arrestee's demand for return or destruction of booking photographs and fingerprints after a *876 misdemeanor charge against her had been dismissed without conviction. (*Sterling v. City of Oakland* (1962) *supra*, 208 Cal.App.2d 1.) The court reasoned that regulation of the use and abuse of arrest records was primarily a matter for the Legislature, and found no statute authorizing the relief requested. (*Id.*, at pp. 6-7.) The court's view of the primacy of the legislative branch in this respect has been reiterated in a number of our sister jurisdictions, [FN20] and we adopt it here.

FN20 See, expressly or by implication, each of the cases cited in footnote 24, *infra*.

Plaintiff emphasizes that since the date of *Sterling* the right of privacy has been accorded increasing recognition, a process culminating in its adoption into our Constitution in 1972. But the Legislature has kept pace with this development. Statutes governing arrest records were scarce at the time of *Sterling*, as the court pointed out; yet in recent years, as we have seen, that scarcity has been remedied by an elaborate structure of complementary and interlocking enactments on the topic.

We are mindful that some gaps in the structure may still appear. Thus plaintiff contends that the absence of a provision for expungement in his case is just such an oversight. But legislative history strongly suggests the omission was deliberate. [FN21] In these circumstances we should defer to the implied determination of the lawmakers that the compelling state interests identified hereinabove outweigh the speculative significance of a dismissal "for lack of prosecution," a disposition which may be predicated on many grounds other than factual innocence.

FN21 As introduced on January 28, 1975, the bill which ultimately enacted Penal Code section 851.8 (Sen. Bill No. 299, § 1) provided for mandatory sealing of arrest records in all cases in which the defendant was released without charge for insufficient evidence, or the charge was dismissed - i.e., for any reason - without a conviction, or he was acquitted. An amendment to the bill on May 12, 1975, however, conditioned such relief on specific findings by the court that the interests of justice require sealing and there is not a preponderance of evidence establishing the defendant's guilt. Finally, an amendment to the bill on May 29, 1975, deleted the foregoing provisions in their entirety and substituted the present scheme of permitting sealing only in cases in which the defendant is acquitted and it appears to the judge that he was "factually innocent."

Indeed, even if the absence of an expungement provision in this connection were unintentional, we should nevertheless allow the Legislature to address in the first instance the difficult task of striking the proper balance between these competing concerns. There is no reason to believe that task will long go unfilled, as the Legislature has demonstrated a continuing desire and ability to fashion statutory responses to legitimate demands for privacy of the arrestee. In either event, therefore, judicial intervention is unwarranted. *877

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We need not lengthen this opinion by discussing each of the authorities relied on by plaintiff. Some are distinguishable because they arise in jurisdictions which lack a body of protective legislation such as California now enjoys, [FN22] while others additionally involve wholesale arrests of unpopular groups for purposes of harassment - clearly not a lawful state interest. [FN23] On the other hand, since the date of *Sterling* numerous state and federal courts have reaffirmed the rule that limited retention and dissemination of arrest records does not violate the right of privacy. [FN24] For the reasons stated herein, we join those jurisdictions and hold that the trial court properly denied the relief requested.

FN22 See, e.g., *Menard v. Saxbe* (D.C.Cir. 1974) 498 F.2d 1017 [162 App.D.C. 284]; *Menard* v. *Mitchell* (D.C.Cir. 1970) 430 F.2d 486 [139 App.D.C. 113]; *Kowall* v. *United States* (W.D.Mich. 1971) 53 F.R.D. 211; *United States v. Kalish* (D.P.R. 1967) 271 F.Supp. 968; *Davidson* v. *Dill* (1972) 180 Col. 123 [503 P.2d 157]; *Eddy v. Moore* (1971) 5 Wash.App. 334 [487 P.2d 211, 46 A.L.R.3d 889]; but see *Monroe v. Tielsch* (1974) 84 Wn.2d 217 [525 P.2d 250]. The distinction was recognized by a New York court: "Whereas other jurisdictions were without legislative pronouncements in this area and judicial determination therefore made possible [citing Davidson v. Dill], our legislature has mandated what relief may be granted to persons in petitioner's position." (*In re Foster* (1973) 72 Misc.2d 1029 [340 N.Y.S.2d 758, 760].)

FN23 See, e.g., *United States v. McLeod* (5th Cir. 1967) 385 F.2d 734, 750 (civil rights workers); *Wilson* v. *Webster* (9th Cir. 1972) 467 F.2d 1282, 1283-1284) (same) (dictum); *Wheeler v. Goodman* (W.D.N.C. 1969) 306 F.Supp. 58, 65-66, vacated on other grounds, 401 U.S. 987 [28 L.Ed.2d 524, 91 S.Ct. 1219] (hippies); *Hughes v. Rizzo* (E.D.Pa. 1968) 282 F.Supp. 881, 885 (same); *Sullivan v. Murphy* (D.C.Cir. 1973) 478 F.2d 938, 968-973, on remand see *Sullivan* v. *Murphy* (D.D.C. 1974) 380 F.Supp. 867 (political demonstrators); *Bilick v. Dudley* (S.D.N.Y. 1973) 356 F.Supp. 945, 950-953 (political meeting).

FN24 See, e.g., *United States v. Linn* (10th Cir. 1975) 513 F.2d 925; *Herschel* v. *Dyra* (7th Cir. 1966) 365 F.2d 17; *United States v. Seasholtz* (N.D.Okla. 1974) 376 F.Supp. 1288; *United States v. Dooley* (E.D.Pa. 1973) 364 F.Supp. 75; *United States v. Rosen* (S.D.N.Y. 1972) 343 F.Supp. 804; *Beasley* v. *Glenn* (1974) 110 Ariz. 438 [520 P.2d 310]; *Walker v. Lamb* (Del.Ch. 1969) 254 A.2d 265, affd. per curiam (Del. 1969) 259 A.2d 663; *Spock* v. *District of Columbia* (D.C.Mun.App. 1971) 283 A.2d 14; *Purdy v. Mulkey* (Fla.App. 1969) 228 So.2d 132; *People* v. *Lewerenz* (1963) 42 Ill.App.2d 410 [192 N.E.2d 401]; *Application of Raynor* (1973) 123 N.J.Super. 526 [303 A.2d 896]; *In re Foster* (County Ct. 1973) *supra*, 340 N.Y.S.2d 758; *Statman* v. *Kelly* (1965) 47 Misc.2d 294 [262 N.Y.S.2d 799], affd. per curiam (App.Div. 1965) 264 N.Y.S.2d 1008; *State* v. *Bellar* (1972) 16 N.C.App. 339 [192 S.E.2d 86].
There is apparently no right of privacy in arrest records under the federal Constitution. (*Paul v. Davis* (1976) 424 U.S. 693 [47 L.Ed.2d 405, 96 S.Ct. 1155].)

The judgment is affirmed.

Wright, C. J., McComb, J., Tobriner, J., Sullivan, J., Clark, J., and Richardson, J., concurred. ***878**

Cal.,1976.

Loder v. Municipal Court for San Diego Judicial Dist. of San Diego County

END OF DOCUMENT

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Original List Date: 5/18/2000
Last Updated: 4/17/2003
List Print Date: 07/22/2003
Claim Number: 99-TC-08
Issue: Crime Victims' Domestic Violence Incident Reports

Mailing Information: Draft Staff Analysis

Mailing List

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