No. _____

IN THE

Supreme Court of the United States

PAYMAN BORHAN,

Petitioner,

v.

RON DAVIS,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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INDEX TO APPENDICES

FILED

APR 23 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAYMAN BORHAN, Petitioner-Appellant, v. RON DAVIS, Respondent-Appellee.	No. 17-55736 D.C. No. 2:06-cv-06278-CAS-AS Central District of California, Los Angeles ORDER

Before: McKEOWN and N.R. SMITH, Circuit Judges.

The motion for reconsideration (Docket Entry No. 7) is denied. *See* 9th Cir. R. 27-10.

No further filings will be entertained in this closed case.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 12 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

PAYMAN BORHAN, Petitioner-Appellant, v. RON DAVIS, Respondent-Appellee.	No. 17-55736 D.C. No. 2:06-cv-06278-CAS-AS Central District of California, Los Angeles ORDER

Before: CANBY and SILVERMAN, Circuit Judges.

The appellant's motion to file an overlength motion for a certificate of appealability (Docket Entry No. 4) is granted.

The request for a certificate of appealability (Docket Entry No. 4) is denied because appellant has not shown that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also* 28 U.S.C. § 2253(c)(2); *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Any pending motions are denied as moot.

DENIED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

PAYMAN BORHAN, Petitioner, v. RON DAVIS, Warden, Respondent.	NO. CV 06-06278-CAS (AS) **ORDER DENYING CERTIFICATE OF APPEALABILITY**

Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts requires a district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant.

Under 28 U.S.C. § 2253(c)(2), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." The Supreme Court has held that this standard means a showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed

further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (internal quotations omitted).

Here, after duly considering Petitioner's contentions regarding the trial court's denials of his motion for a continuance of the trial to retain counsel and motion for substitute counsel, the trial court's admission of propensity evidence, ineffective assistance of trial counsel in failing to interview and call witnesses, advising Petitioner not to testify and failing to request a lesser-included instruction, the trial court's failure to *sua sponte* instruct the jury on a lesser included offense, and a challenge to his sentence under the cruel and unusual punishment clause of the Eighth Amendment, as alleged in the Petition, the Court concludes that Petitioner has not made the requisite showing for the issuance of a certificate of appealability.

Accordingly, a Certificate of Appealability is denied in this case.

DATED: May 8, 2017

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

PAYMAN BORHAN, Petitioner, v. RON DAVIS, Warden, Respondent.	NO. CV 06-06278-CAS (AS) **ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Final Report and Recommendation of United States Magistrate Judge. After having made a *de novo* determination of the portions of the initial Report and Recommendation to which objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Final Report and Recommendation and the Judgment herein on counsel for Petitioner and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: May 8, 2017.

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

PAYMAN BORHAN, Petitioner, v. RON DAVIS, Warden, Respondent.	NO. CV 06-06278-CAS (AS) **JUDGMENT**

Pursuant to the Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the Petition is denied and dismissed with prejudice.

DATED: May 8, 2017.

Christina A. Snyder

CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

PAYMAN BORHAN, Petitioner, v. RON DAVIS, Warden, Respondent.	Case No. CV 06-06278-CAS (AS) **FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

This Final Report and Recommendation is submitted to the Honorable Christina A. Snyder, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

I. INTRODUCTION

On September 22, 2006, Payman Borhan ("Petitioner"), a California state prisoner who is represented by counsel, filed a Petition for Writ of Habeas Corpus("Petition") pursuant to 28 U.S.C. § 2254 in the United States District Court for the Southern District of California. (Docket

Entry No. 1). The Petition was subsequently transferred to this Court. (Docket Entry No. 2).

On October 15, 2014, (following an evidentiary hearing and the consideration of various briefs filed by the parties, including Respondent's Return to the Petition ("Return"); see Docket Entry No. 174), the Court found that Petitioner was entitled to equitable tolling of the statute of limitations and that the Petition should not be dismissed as untimely filed.[1] See Amended Findings and Conclusion; Docket Entry No. 180. The Court incorporates the "proceedings" section of the Amended Findings and Conclusion, setting forth the procedural history of this action. Id.

On November 13, 2014, Respondent filed Objections to the Amended Findings and Conclusion. (Docket Entry No. 183).

On January 5, 2015, Petitioner filed a Reply in Support of the Amended Findings and Conclusion Granting Equitable Tolling (Docket Entry No. 187), and a Traverse. (Docket Entry No. 188).

In the Traverse, Petitioner discussed the merits of three of the five claims alleged in the Petition and requested that the brief he had filed in support of the Petition ("Brief") on November 13, 2006 (see Docket Entry No. 8), be deemed filed *nunc pro tunc* on the day the

[1] Former Magistrate Judge Stephen Hillman held an evidentiary hearing and made credibility findings in support of the Court's Amended Findings and Conclusion. After Judge Hillman's retirement, the matter was transferred to the undersigned Magistrate Judge on April 14, 2015.

Petition was filed.[2] Alternatively, Petitioner requested that the Court grant his Motion to Amend the Petition, which had been filed on July 6, 2007 (seven months after the Court advised Petitioner about filing an amended petition), and the proposed First Amended Petition and Brief in Support of the First Amended Petition, which was also lodged on July 6, 2007 (see Docket Entry No. 23).[3] Petitioner's requests concerned his desire to pursue the claim that his trial counsel was ineffective for failing to request a lesser-included offense instruction. (See Traverse at 2-3 n.1, 7-8, 24-28).

On January 7, 2015, the Court ordered Respondent to file a Response addressing Petitioner's requests, and noted that Respondent's

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[2] The Brief provided points and authorities supporting the five claims alleged in the Petition and also raised two claims that were *not* alleged in the Petition, namely, ineffective assistance of counsel based on trial counsel's failure to request a lesser-included offense instruction, and appellate counsel's failure to raise claims on appeal.

On November 16, 2006, the Court rejected the Brief for filing because (1) it was not submitted with the Petition; (2) it was submitted *after* Respondent had already filed an Answer to the Petition; and (3) it alleged claims that were not alleged in the Petition. Petitioner was advised that if he wished to file an amended petition, he must file a motion to amend the Petition, accompanied by an amended petition, within twenty days. (Docket Entry No. 11). The Court's subsequent minute orders - dated January 26, 2007 and May 16, 2007 - noted that Petitioner had *not* filed a motion to file an amended petition. (Docket Entry Nos. 12, 20).

[3] Petitioner's motion to amend the Petition included the following new claims: Petitioner received ineffective assistance of counsel based on his trial counsel's failure to request the lesser-included offense instruction and his appellate counsel's failure to raise on appeal the trial court's failure to *sua sponte* instruct on the lesser-included offense and the trial court's admission of propensity evidence.

On October 12, 2007, the Court denied the Motion to Amend the Petition, finding that because the new claims alleged in the proposed First Amended Petition did not relate back to the Petition, the proposed First Amended Petition would be time barred. (Docket Entry No. 35).

Objections to the Amended Findings and Conclusion did not cause the Court to change its finding regarding Petitioner's entitlement to equitable tolling. (Docket Entry No. 189). The Court incorporates the Amended Findings and Conclusion Following Evidentiary Hearing, including former Magistrate Judge Hillman's credibility findings in this Report and Recommendation.

On February 24, 2015, Respondent filed a Response to the Traverse. (Docket Entry No. 195).[4]

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[4] Petitioner's request that the Brief be deemed filed *nunc pro tunc* on the day the Petition was filed is DENIED. Although Petitioner requests a *nunc pro tunc* order based on the failure of his counsel (Lisa Bassis) to file the Brief at the time the Petition was filed, which he claims his counsel intended to do (see Traverse at 2-3; Supporting Reply at 2-7), he has failed to cite any authority supporting the issuance of such an order under the circumstances in this case.

As noted in footnote 2 *supra*, the Court rejected the Brief for filing because it contained claims that were not alleged in the Petition and therefore needed to be raised in an amended petition. Since the rejection for filing of the Brief was not the result of the Court's mistake or inadvertence, a *nunc pro tunc* order is not warranted. See United States v. Sumner, 226 F.3d 1005, 1010 (9th Cir. 2000)("'*Nunc pro tunc* amendments are permitted primarily so that errors in the record may be corrected. The power to amend *nunc pro tunc* is a limited one, and may be used only where necessary to correct a clear mistake and prevent injustice.' . . . It does not imply the ability to alter the substance of that which actually transpired or to backdate events to serve some other purpose . . . Rather, its use is limited to making the record reflect what the district court actually intended to do at an earlier date, but which it did not sufficiently express or did not accomplish due to some error or inadvertence."). The Court declines to revisit its earlier ruling.

Petitioner's alternative request that the Court grant the Motion to Amend the Petition is also DENIED. As the Court has already found (see Docket Entry No. 35), the proposed First Amended Petition (which was lodged approximately nine or ten months after the filing of the Petition, depending on whether the filing date was October 2, 2006 or September 5, 2006, see Amended Findings and Conclusion at 13-14 n.12) contained claims, including the ineffective assistance of trial counsel claim Petitioner now seeks to pursue, which do not relate back to the claims alleged in the Petition. See also Schneider v. McDaniel, 674 F.3d 1144, 1150-51 (9th Cir. 2012). Although the Court has found that (continued...)

On March 2, 2015, Petitioner filed an Application for Leave to File a Reply to the Traverse. (Docket Entry No. 197).

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[4] (...continued)
the Petition was not untimely based on Petitioner's entitlement to equitable tolling through the date of the filing of the Petition (based on attorney misconduct amounting to abandonment), Petitioner has not asserted, or attempted to show, that equitable tolling is warranted through the date on which the proposed First Amended Petition was lodged. Indeed, the reasons given by Petitioner for needing extensions of time to file a Motion to Amend the Petition included problems with his counsel's mail delivery, a death in his counsel's family, and his counsel's involvement in an automobile accident, all of which are unrelated to attorney misconduct. Since the new claims alleged in the proposed First Amended Petition would be time barred, amendment of the Petition would be futile. See Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995)("Futility of amendment can, by itself, justify the denial of a motion for leave to amend."); Waldrip v. Hall, 548 F.3d 729, 732 (9th Cir. 2008).

In any event, to the extent that Petitioner is really seeking to pursue the claim that he received ineffective assistance of counsel based on his trial counsel's failure to request a lesser-included offense instruction, the Court - out of an abundance of caution - will address that claim on the merits, even though this claim is not technically before the Court. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); See Berghuis v. Thompkins, 560 U.S. 370, 390 (2010) ("Courts can . . . deny writs of habeas corpus under § 2254 by engaging in *de novo* review when it is unclear whether AEDPA deference applies, because a habeas petitioner will not be entitled to a writ of habeas corpus if his or her claim is rejected on *de novo* review"); Norris v.Morgan, 622 F.3d 1276, 1290 (9th Cir. 2010) (affirming denial of habeas corpus petition when claim failed even under de novo review).

In the Objections, Petitioner challenges the Court's decisions to reject the Brief for filing, to deny Petitioner's request that the Brief be deemed filed *nunc pro tunc* on the day the Petition was filed, and to deny Petitioner's alternative request that the Court grant the Motion to Amend the Petition. (see Objections at 2-8). Petitioner's assertions do not cause the Court to alter its decisions. Moreover, as noted above, the Court does address Petitioner's claim that his trial counsel provided ineffective assistance in failing to request a lesser-included offense instruction. Finally, since Petitioner does not discuss the claim alleging ineffective assistance of appellate counsel in the Brief or proposed First Amended Petition, the Court finds that Petitioner has apparently abandoned that claim.

On March 4, 2015, the Court granted Petitioner's Application for Leave to File a Reply to the Traverse, and ordered Petitioner to specify which new claim(s) he now wishes to pursue and the exact page and lines of the California Supreme Court pleadings on which the new claim(s) were alleged. (Docket Entry Nos. 197-198). On March 6, 2015, the Court ordered Petitioner to also address the following in his Reply to the Traverse: (1) whether the cumulative impact of counsel's deficiencies is being alleged as a stand-alone claim, and if so, the exact page and lines of the California Supreme Court pleadings on which such claim was alleged; and (2) if Petitioner is not alleging that this is a stand-alone claim, the authority supporting the Court's ability to address this claim. (Docket Entry No. 199).

On March 25, 2015, Petitioner filed a Reply in Support of his Traverse ("Supporting Reply"). (Docket Entry No. 200).

On July 13, 2015, Respondent filed a Response to the Supporting Reply. (Docket Entry No. 210).[5]

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[5] The Court finds that the claim Petitioner wishes to pursue -- ineffective assistance of counsel based on his trial counsel's failure to request a lesser-included offense instruction -- *was* presented in a habeas petition filed with the California Supreme Court on October 7, 2004 (Case No. S128321). See Supporting Reply at 3-4, citing inter alia Respondent's July 24, 2007 Notice of Lodging No. 15 at 5, 39 and 41). The California Supreme Court summarily denied that habeas petition without citation to authority on June 8, 2005. (See Respondent's July 24, 2007 Notice of Lodging No. 16). As set forth *infra* (Section V), Petitioner also raised this claim in a habeas petition filed in the California Supreme Court on July 9, 2007 (Case no. 154266), which was denied with a citation to In re Robbins and In re Clark on January 3, 2008. (See Respondent's July 24, 2007 Notice of Lodging, Nos. 23-24; Respondent's September 24, 2014 Notice of Lodging No. 5).

Since Petitioner is not alleging the cumulative impact of counsel's deficiencies as a stand-alone claim (see Supporting Reply at

(continued...)

On March 28, 2017, the Court issued a Report and Recommendation, recommending the denial of the Petition on the merits. (Docket Entry No. 14).

On May 2, 2017, Petitioner filed Objections to the Report and Recommendation ("Objections"). (Docket Entry No. 218).

The Court now issues this Final Report and Recommendation to address the Objections. For the reasons discussed below, it is recommended that the Petition be DENIED and that this action be DISMISSED with prejudice.

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[5] (...continued)
11-12), the Court will not address it separately.

In the Objections, Petitioner challenges the Court's decision not to separately address Petitioner's claim concerning the cumulative impact of his trial counsel's deficiencies. (See Objections at 11-14). Petitioner's assertions do not cause the Court to change its decision. Moreover, even if the Court were to examine the cumulative impact of trial counsel's alleged deficiencies -- namely, trial counsel ineffectiveness for failing to interview and/or call witnesses, advising Petitioner not to testify, and failing to request a lesser-included offense instruction –- the Court has found that Petitioner has not suffered any "prejudice" as a result of these alleged deficiencies (see Final Report and Recommendation at pages 51-58), and the Court would find that the combined effect of these deficiencies did not result in "prejudice." See Villafuerte v. Stewart, 111 F.3d 616, 632 (9th Cir. 1997) ("Villafuerte has failed to demonstrate that he suffered prejudice as a result of any such alleged deficiencies. The combined effect of any deficiencies also did not result in prejudice."); Sully v. Ayers, 725 F.3d 1057, 1075 (9th Cir. 2013) ("Given that the California Supreme Court was not necessarily unreasonable in concluding that Sully was not prejudiced by any of alleged [counsel's] errors in isolation, it was also not necessarily unreasonable in concluding that Sully was not prejudiced by the alleged errors in the aggregate.").

II. PRIOR PROCEEDINGS

On December 10, 2002, a Los Angeles County Superior Court jury found Petitioner guilty of two counts of committing a lewd act upon a child under the age of fourteen years in violation of California Penal Code ["P.C."] § 288(a).[6] In addition, the jury found true the special allegations that Petitioner had committed the offenses on more than one victim at the same time and in the same course of conduct (P.C. §§ 1203.066(a)(7), 667.61(b)). (See Clerk's Transcript ["CT"] 149-53; 4 Reporter's Transcript ["RT"] 1204-06). On March 11, 2003, after denying Petitioner's motion for a new trial, the trial court sentenced Petitioner to state prison for concurrent terms of 15 years to life. (See CT 187-88, 193-94; 4 RT 1802-04, 1806-07).

The Court incorporates the statements from the "Procedural History" section of the Amended Findings and Conclusion.[7]

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[6] P.C. § 288(a) provides that "any person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child is guilty of a felony[.]"

[7] In the Amended Findings and Conclusion, the Court failed to state that Petitioner's July 19, 2004 California Supreme Court habeas petition (Case No. S126391) alleged inter alia the same claim as the third claim alleged in the Petition. On June 8, 2005, the California Supreme Court summarily denied the petition. (See Respondent's July 24, 2007 Notice of Lodging Nos. 13-14). Therefore, Petitioner's claims of ineffective assistance of trial counsel for failure to interview and/or call witnesses, and for advising Petitioner not to testify were presented to the California Supreme Court and are therefore exhausted.

Respondent has lodged a document reflecting that the California Supreme Court denied Petitioner's July 9, 2007 California Supreme Court habeas petition with citation to In re Robbins, 18 Cal.4th (continued...)

III. FACTUAL BACKGROUND

Petitioner is not challenging the sufficiency of the evidence to support his conviction. The following summary is taken from the "Factual Background" section of the California Court of Appeal's Opinion on direct appeal. (Respondent's July 24, 2007 Notice of Lodging ["July 24, 2007 Lodgment"] No. 8 at 2-6)[8]:

A. The charged offenses

> . . . On approximately March 1, 2000, Valene L. and Gelesia M. were 10 years old. Valene and Gelesia were cousins. Defendant installed a water filtration system at Valene's father's home that day. Defendant told Valene: "You are a beautiful young lady. Would you like to be in a commercial?" Valene responded affirmatively. Defendant later came to Valene's mother's home for an interview and "audition." Defendant demonstrated dance steps for Valene to use in the alleged commercial. After about 10 minutes, Valene's mother left to do laundry. However, Valene's 16-year-old sister, Vanessa was present. Valene's brother was also present for part of the time. At one point, defendant had Valene sit on his lap and say, "I love you, Daddy." Defendant instructed Valene to do a "cheerleading kind of

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[7] (...continued)
770, 780 (1998) and In re Clark, 5 Cal.4th 750 (1993). (See Respondent's September 24, 2014 Notice of Lodgement No. 5).

[8] Factual determinations by the state court are presumed correct and can be rebutted only by clear and convincing evidence. Pirtle v. Morgan, 313 F.3d 1160, 1168 (9th Cir. 2002).

routine." Thereafter, defendant danced with Valene. As they danced, defendant placed his leg between her legs. The top of defendant's knee touched Valene's vaginal area for approximately seven seconds. Valene believed defendant intentionally touched her. Valene became uncomfortable and scared because she knew she should not be touched there.

Shortly thereafter, Valene saw Gelesia arrive. Valene called Gelesia into the kitchen. Defendant told Valene and Gelesia to stand straight. Defendant told the two girls they were not standing up straight. Thereafter, defendant placed his open hands, palm up underneath Valene's breasts and pushed upwards for six or seven seconds. Valene was very uncomfortable. Valene also believed defendant intentionally touched her breasts. Valene also believed defendant intentionally touched Gelesia's breasts. Defendant also placed one hand on Valene's upper breast area and his other hand on her back shoulder blade to straighten her posture. Valene testified as to what happened next, "I told him that I wanted to go and tell my mother something." Valene then testified, "I went outside and told my mother." Valene's mother told defendant they had to go somewhere. Thereafter, Valene's mother telephoned the police.

Gelesia recalled being present from the beginning of Valene's audition. Valene's mother encouraged Galesia to join in the "audition." Gelesia saw defendant touch Valene inappropriately with his leg. Gelesia also saw defendant

place both of his hands underneath Valene's breasts and lift up. Defendant was smiling at the time. Gelesia thought Valene appeared uncomfortable. During the skit, defendant had Valene repeatedly say, "Oh, Daddy." Defendant simultaneously placed his leg between Valene's legs and touched her "private parts" or vaginal area with his knee. Valene looked very uncomfortable again. Defendant also told Gelesia to stand up straight and placed his hands underneath her breasts and lifted up. Gelesia felt "very weird" and uncomfortable that someone unknown to her had touched her. Gelesia knew that what defendant was doing was wrong. Gelesia believed defendant's acts were intentional. Gelesia did not say anything because she was scared and nervous.

Vanessa L. is Valene's sister. Vanessa saw defendant place his hand underneath Valene's breast for approximately five seconds. Defendant looked happy at the time. Vanessa also saw defendant place his leg between Valene's legs. It appeared to Vanessa that defendant's knee area touched Valene's private area for five or six seconds. Valene looked very serious and uncomfortable. Vanessa was not present during the entire time defendant was auditioning her sister.

Jose Gonzalez was the president of Continental Water Softener Company in March 2000. Defendant was a subcontractor for Mr. Gonzalez's company at that time selling water purification systems. The company was not in the process of making any commercials or advertisements at that time.

Defendant was not authorized to audition anyone for commercials or modeling advertisements.

B. The uncharged crimes

In July 1998, Cynthia T. was 23 years old. Defendant drove by Ms. T's home. Defendant told her he was a talent scout for the Ford Modeling Agency looking for models for commercials. Defendant gave Ms. T. his business card. Defendant later auditioned Ms. T. at her home. Defendant showed Ms. T. a portfolio of photos of different "girls" with whom he worked. Defendant had Ms. T. read a few lines and walk back and forth. Defendant got behind her. Defendant moved his hands up and down Ms. T.'s body and instructed her how to move. Defendant cupped Ms. T.'s breasts then moved his hands up and down her chest and waist area. Ms. T. was uncomfortable. Defendant also touched Ms. T.'s breast as he ostensibly tried to straighten her posture. Later, defendant had Ms. T. do a love scene where she was to kiss him. Defendant repeatedly told Ms. T. to kiss him. Defendant kissed Ms. T. and placed his tongue in her mouth. Ms. T. backed off in surprise. Ms. T.'s mother entered the room. Ms. T.'s mother screamed at defendant and told him to leave.

In August 1998, Song L. was approached by defendant as he drove in her neighborhood. Defendant stopped Ms. L. as she was on the sidewalk. Defendant said he owned a water business and was looking for actresses for a commercial. Ms. L. was 21 years old. Defendant went to Ms. L.'s apartment to audition

her. Defendant told her he was going to do a dance routine with her because that would be used in a commercial for a water company. After a few dance spins and dips, defendant stood behind Ms. L. and placed one hand over her chest and inside her bra. Defendant placed his other hand on her groin area. When Ms. L. asked what he was doing, defendant responded: "Oh, it's okay. It's okay." Ms. L. managed to free herself from that position. Ms. L. told defendant she no longer wanted to participate in the "audition." Ms. L. believed defendant grabbed her breast intentionally as he restrained her. Defendant had also asked her to rehearse kissing him. Ms. L. did not want to do so. Ms. L. also believed defendant intentionally pressed down hard on her pubic area. Defendant had also attempted to straighten Ms. L.'s posture.

Also during August 1998, defendant went to the home of Brenda C. for an audition for commercials. Ms. C. met defendant through her sister, whom he had initially approached. Ms. C.'s parents were present when defendant arrived at 9 p.m. Following instructions, defendant asked Ms. C.'s parents to leave the room so they would not influence the audition. Defendant had a photo portfolio with pictures of other young women. Defendant showed Ms. C. how to walk and stand up straight by using his hand behind her back. Defendant used his other hand to lift her breast. Defendant lifted her breast up several times. Initially, Ms. C. did not feel anything was "weird." Defendant also showed Ms. C. how

to tango. As he held her back he placed his leg between her legs. At another time during the dancing, defendant's hand slipped into her shirt under her bra. Defendant's hand touched Ms. C.'s right breast. Ms. C. felt uncomfortable but thought it was "procedure." Ms. C. believed defendant intentionally put his hand under her bra and grabbed her. Ms. C. pushed defendant away. Defendant then had Ms. C. to act excited about having won a car, run up to him, and then hug him. After repeating that several times, defendant told Ms. C. to tell him how much she loved him and hold his face next to hers. When Ms. C. did so, he grabbed her face and stuck his tongue in her mouth. Ms. C. was "disgusted" and pushed him away. When Ms. C. refused to repeat that "move," defendant told her she had passed the audition.

IV. PETITIONER'S CLAIMS

Petitioner raises the following claims for federal habeas relief:

Ground One: The trial court's denial of Petitioner's motion for a continuance to retain counsel and motion for substitute retained counsel violated Petitioner's Sixth Amendment rights. (Petition at 5; Traverse at 32-38).

Ground Two: The trial court's admission of propensity evidence under California Evidence Code § 1108 violated Petitioner's rights to due process and a fair trial. (Petition at 5).

Ground Three: Petitioner received ineffective assistance of counsel based on (A) his trial counsel's failure to interview and/or call witnesses; and (B) his trial counsel's advising Petitioner not to testify. (Petition at 6; Traverse at 4-24).[9]

Ground Four: The trial court's failure to *sua sponte* instruct the jury on the lesser-included offense of annoying or molesting a child violated Petitioner's rights to due process and a fair trial. (Petition at 6).

Ground Five: Petitioner's sentence constituted cruel and unusual punishment under the Eighth Amendment. (Petition at 6; Traverse at 38-42).

V. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant habeas relief on a claim adjudicated on its merits in state court unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as

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[9] Although Petitioner also alleged that his trial counsel was ineffective for inhibiting Petitioner's ability to seek new counsel (see Petition at 6), Petitioner has apparently abandoned that portion of his ineffective assistance of trial counsel claim (see Traverse at 7-8).

As set forth in footnote Nos. 4-5, *supra*, the Court will address the merits of Petitioner's claim that he received ineffective assistance counsel based on his trial counsel's failure to request a lesser-included offense instruction (Ground Three (C). (See Traverse at 8, 24-28; Supporting Reply at 9-11).

determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "This is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt[.]'" Cullen v. Pinholster, 563 U.S. 170, 181 (2011) (citations omitted).

The term "clearly established Federal law" means "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003); see also Cullen v. Pinholster, 563 U.S. at 182; Williams v. Taylor, 529 U.S. 362, 412 (2000)("clearly established Federal law" consists of holdings, not dicta, of Supreme Court decisions "as of the time of the relevant state-court decision"). However, federal circuit law may still be persuasive authority in identifying "clearly established" Supreme Court law or in deciding when a state court unreasonably applied Supreme Court law. See Stanley v. Cullen, 633 F.3d 852, 859 (9th Cir. 2011); Tran v. Lindsey, 212 F.3d 1143, 1154 (9th Cir. 2000).

A state court decision is "contrary to" clearly established federal law if the decision applies a rule that contradicts the governing Supreme Court law or reaches a result that differs from a result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); Williams, 529 U.S. at 405-06; see also Cullen v. Pinholster, supra ("To determine whether a particular decision is 'contrary to' then-established law, a federal

court must consider whether the decision 'applies a rule that contradicts [such] law' and how the decision 'confronts [the] set of facts' that were before the state court."). When a state court decision adjudicating a claim is contrary to controlling Supreme Court law, the reviewing federal habeas court is "unconstrained by § 2254(d)(1)." Williams, 529 U.S. at 406. However, the state court need not cite the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early, supra.

A state court decision involves an "unreasonable application" of clearly established federal law "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams, 529 U.S. at 407; Cullen v. Pinholster, supra; Woodford v. Visciotti, 537 U.S. 19, 24-27 (2002)(per curiam); Moore v. Helling, 763 F.3d 1011, 1016 (9th Cir. 2014)(courts may extend Supreme Court rulings to new sets of facts on habeas review "only if it is 'beyond doubt' that the ruling apply to the new situation or set of facts."), cert. denied, 135 S.Ct. 2361 (2015). A federal habeas court may not overrule a state court decision based on the federal court's independent determination that the state court's application of governing law was incorrect, erroneous or even "clear error." Lockyer, 538 U.S. at 75; Harrington v. Richter, 562 U.S. 86, 101 (2011)("A state court's determination that a claim lacks merit precludes federal relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision."). Rather, a decision may be rejected only if the state court's application of Supreme Court law was "objectively unreasonable." Lockyer, supra; Woodford, supra;

Williams, 529 U.S. at 409; see also Taylor v. Maddox, 366 F.3d 992, 999-1000 (9th Cir. 2004)("objectively unreasonable" standard also applies to state court factual determinations).

When a state court decision is found to be contrary to or an unreasonable application of clearly established Supreme Court law, a federal habeas court "must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." Panetti v. Quarterman, 551 U.S. 930, 953 (2007). In other words, if a § 2254(d)(1) error occurs, the constitutional claim raised must be considered *de novo*. Frantz v. Hazey, 513 F.3d 1002, 1012-15 (9th Cir. 2008); see also Rompilla v. Beard, 545 U.S. 374, 390 (2005). *De Novo* review is also required when a claim is rejected by the state court on procedural rather than substantive grounds, see Pirtle v. Morgan, 313 F.3d 1160, 1167 (9th Cir. 2002), and when it is clear that the state court has not decided an issue. Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006).

When the state court has not provided a reasoned explanation for its denial of the Petitioner's claims, a federal court has no basis other than the record for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context. See Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000). Thus, "[f]ederal habeas review is not de novo when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. . . . Only by that examination may we determine whether the state

court's decision was objectively reasonable." Id. at 982.

Petitioner raised the claims raised in Ground One, Ground Two, and Ground Five in his October 7, 2004 habeas petition to the California Supreme Court (Case No. S128321) (see July 24, 2007 Lodgment No. 15), and Ground Three (A) and (B) in his July 19, 2004 habeas petition to the California Supreme Court (Case No. S126391) (see July 24, 2007 Lodgment No. 13), which denied these claims without citation to authority on June 8, 2005 (see July 24, 2007 Lodgment Nos. 14, 16). The Court "looks through" the California Supreme Court's silent denial to the last reasoned decision as the basis for the state court's judgment. See Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) ("Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground."); Cannedy v. Adams, 706 F.3d 1148, 1159 (9th Cir. 2013) ("[W]e conclude that Richter does not change our practice of 'looking through' summary denials to the last reasoned decision – whether those denials are on the merits or denials of discretionary review."; footnote omitted), as amended, 733 F.3d 794 (9th Cir. 2013). Therefore, in addressing Grounds One, Two and Three (A) and (B), the Court will consider the California Court of Appeal's reasoned opinion on direct appeal (see Lodgment No. 8). See Berghuis v. Thompkins, 560 U.S. 370, 380 (2010).

The California Court of Appeal denied Ground Two on procedural grounds. (See July 24, 2007 Lodgment No. 8). Petitioner raised the claims in Ground Three (C) and Ground Four in his July 9, 2007 habeas petition to the California Supreme Court (Case No. 154266) (see July 24,

2007 Lodgment Nos. 23-24), which, on January 3, 2008, denied the claims with citations to In re Robbins, 18 Cal.4th 770, 780 (1998) and In re Clark, 5 Cal.4th 750, 767-69 (1993) (see Respondent's September 24, 2014 Lodgment No. 5). Accordingly, the Court will conduct a de novo review of Grounds Two and Four and also determine, alternatively, whether Grounds Two and Four are procedurally defaulted.

However, since no state court has provided a reasoned opinion addressing the merits of Ground Three (C) and Ground Five, this Court must conduct "an independent review of the record" to determine whether the California Supreme Court's ultimate decision to deny these claims was contrary to, or an unreasonable application of, clearly established federal law. See Murray v. Schriro, 745 F.3d 984, 996-97 (9th Cir. 2014); Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013).

VI. DISCUSSION

A. Denials of Motion for a Continuance to Retain Counsel and Motion for Substitute Counsel

In Ground One, Petitioner contends that the trial court denied his motion for a continuance to retain counsel and his motion for substitute counsel in violation of his Sixth Amendment rights. (Petition at 5; Traverse at 32-38).

1. The Record Below

At the conclusion of the preliminary hearing on August 12, 2002,

Petitioner's retained counsel made a request to be relieved. When the court asked whether counsel was retained for purposes of the preliminary hearing only, counsel responded that he was retained by the family, and that all he could say due to attorney-client privilege was that he needed to be relieved as a result of some conflict. The court denied counsel's request to be relieved without prejudice, based on Petitioner's failure to specify the nature of the conflict. (See CT 3-77).

On August 26, 2002 (the date on which the arraignment was scheduled), a deputy public defender was appointed to represent Petitioner. At that hearing, Petitioner waived time for trial and arraignment. (See CT 83).

At the arraignment on September 4, 2002, Petitioner was represented by Deputy Public Defender Kenneth Wenzl. Jury trial was scheduled for October 21, 2002. (See CT 84).

At a readiness hearing on October 17, 2002, Petitioner was represented by Mr. Wenzl. Jury trial was continued to November 19, 2002. (See CT 85).

At another readiness hearing on November 15, 2002, Petitioner was represented by Mr. Wenzl. Petitioner failed to appear, but he had a sufficient excuse. The jury trial remained scheduled for November 19, 2002. (See CT 86).

On November 19, 2002, Petitioner was present "in lock up" and

represented by Mr. Wenzl. Jury trial was trailed to November 26, 2002. (See CT 87).

On November 26, 2002, Petitioner was present "in lock up" and represented by Mr. Wenzl. Pursuant to a defense motion, jury trial was trailed to December 3, 2002. (See CT 88).

On December 3, 2002, Petitioner was present "in lock up" and represented by Mr. Wenzl. Jury trial was trailed to December 4, 2002. (See CT 89).

On December 4, 2002, Petitioner was present "in lock up" and represented by Mr. Wenzl. The matter was transferred to Division 7 for a jury trial. (See CT 90).

That afternoon, the case was called for a jury trial. In Petitioner's presence, a panel of prospective jurors were given a perjury admonishment. Immediately thereafter, Petitioner stated he needed to speak to the trial court. The trial court told Petitioner, "We'll get to that," and continued to address the prospective jurors about procedures. Petitioner interrupted the trial court, stating, "My family's bringing a private lawyer. I really do not wish to go to the trial." The trial court responded, "This case is going to be tried in this courtroom and tried today." Petitioner again spoke out: "Excuse me. It has -- it has not been communicated -- [¶] [¶] He has not seen me since yesterday. My public defender has not come to see me sir. I have been wanting to talk to him since yesterday that I don't want to go through to trial because last night -- night -- I talked [to] my family.

My mother of my daughter from Mexico called, and she's bringing –[.]" The trial court appeared to interrupt, stating, "Sir, we're going to try this lawsuit in this courtroom. Today. And I don't want you to say another word now while the jurors are in the courtroom. Not one more word." Because Petitioner continued to interrupt, the trial court asked the prospective jurors to leave the courtroom. (See CT 91; 2 RT 2-3).

Out of the prospective jurors' presence, the trial court advised Petitioner that the trial would go forward. The trial court then stated: "You happen to be represented by one of the best public defenders in our district who's been in my court for years numerous times, and I'm not going to accept any comments from you on the date of trial about the ineffective assistance of your lawyer." The trial court continued: "[Y]ou are telling me today that on the day of trial, the last day of trial, that you've got somebody that's ostensibly bringing in another attorney to represent you. It's not accepted by me. This matter came from another department. It -- it was answered ready. It's going to be tried." The trial court admonished Petitioner not to speak out when court was in session, and that any further misbehavior by Petitioner would result in his removal from the courtroom. The trial court stated, "I'm not going to hear anything else about continuance of this trial on this." (See 2 RT 3-4).

When Petitioner was given the opportunity to speak, he mentioned a past manic-depression diagnosis and two past felony convictions (which he stated could have been two misdemeanor convictions, but for his refusal to agree to the plea because of his mental condition), and stated, "Yesterday, okay, Mr. Wenzl came and brought me the -- . . . I

had not seen Mr. Wenzl since about two months, or two months ago." After mentioning that he had received psychiatric treatment and medication following an attempted suicide, Petitioner stated, "So yesterday I see Mr. Wenzl after two months, and he comes and he say, oh, we finally got the doctor report; and doctor suggests . . . send[ing] you to a [psychiatric] program. . . . We are going to get you to a program." Petitioner stated that Mr. Wenzl told him that it would take perhaps one year to get Petitioner into a program and that he would talk to the deputy district attorney about it. However, when Mr. Wenzl spoke to the deputy district attorney about the program, he was told that Petitioner would have to face a trial because of his two prior felony convictions. After Petitioner stated that there was a conflict of interest between himself and Mr. Wenzl, the trial court asked the prosecutor to leave the courtroom in order to conduct a Marsden[10] hearing. (See 2 RT 4-7).

At the hearing, Petitioner claimed there was a conflict of interest for the following reasons: (1) he had asked Mr. Wenzl to interview four people, but Mr. Wenzl had only interviewed one person (who did not provide the answers Petitioner was looking for); (2) he wanted Mr. Wenzl to have a psychiatrist testify at trial but Mr. Wenzl did not want this since it would not help Petitioner's case; and (3) Petitioner wanted Mr. Wenzl to bring a "95" motion for dismissal or reduction and Mr. Wenzl refused to do so. Petitioner moved for the appointment of another public defender and, alternatively, for permission to hire a private

[10] People v. Marsden, 2 Cal.3d 118, 122-24 (1970). In California, a motion for substitute counsel is called a "Marsden motion." Schell v. Witek, 218 F.3d 1017, 1021 (9th Cir. 2000).

attorney. After the trial court confirmed that Petitioner was moving to discharge Mr. Wenzl and obtain another attorney, the trial court denied the motion.

Mr. Wenzl denied Petitioner's assertion that he had not seen Petitioner for two months. Mr. Wenzl stated that he had spoken to Petitioner yesterday about part of a confidential psychiatrist's report, which recommended Petitioner's participation in a program. After speaking to Petitioner, he spoke to the prosecutor about the psychiatrist's report to see if she would agree to give Petitioner a suspended sentence and entry into the program, but the prosecutor did not feel the program was appropriate. Mr. Wenzl stated that he then told Petitioner that the prosecutor did not feel the program was appropriate and that Petitioner's options were to either accept the prosecutor's 10-year offer or proceed to trial. Mr. Wenzl stated that Petitioner had refused the 10-year offer. Following Mr. Wenzl's statements, the trial court stated, "Motion to appoint another attorney is denied. Motion to continue is denied. I'm denying those motions, and I'm not going to hear anymore (sic) motions." (See 2 RT 8-12; see also 2 RT 14; CT 91).

Petitioner then asked if he could retain a private attorney, stating that his daughter's mother in Mexico had told him last night that she would send him money (obtained from the sale of machines), and that his fiancé in Canada had also told him she would send him money (borrowed). After the trial court responded, "Not timely," Petitioner stated that he did not know there was going to be a trial until yesterday (when he was apparently told he was not going to be accepted

into a program). Petitioner talked about his mental health and his family concerns. After listening to Petitioner's rambling statements, the trial court stated, "I'm going to instruct my reporter to not report anything else that [Petitioner] says. He's attempting to obstruct these proceedings -- he's attempting to obstruct the proceeding. We're going to call the jury back inside. We're going to select the jury . . . We're going to select a jury and call witnesses, and then the trial will ensue; and the trial will begin, and the trial will end. And I'm not going to continue the case, and I'm not going to let you bring another lawyer on the last day of ten days of ten." Petitioner stated, "All I want is two months." The trial court replied, "I don't care what you want. It's denied. And I don't want to hear another word from you." Petitioner stated that the trial could not start, and alluded to his prior case in which he was forced to accept a felony charge for a misdemeanor. The trial court stated that, since it appeared Petitioner was going to obstruct proceedings, Petitioner needed to be taken to another place. (See 2 RT 13-16; CT 91-92).

Following a recess, the trial court told Petitioner that his options were to either sit quietly during the trial, or to continue to interfere and then be gagged in front of the jury panel or be removed from the courtroom. Petitioner again stated that he wanted to have another lawyer. The trial court responded, "You can't have another lawyer. You can't continue this case." The trial court added that Petitioner had not stated any grounds for discharging Mr. Wenzl. Petitioner then repeated that he wanted a psychologist to testify at trial. The trial court responded that it was Mr. Wenzl's decision. After Petitioner stated that he had asked Mr. Wenzl if Petitioner could

bring in a private attorney to work jointly with Mr. Wenzl, the trial court stated it did not care whether somebody else came in, since Mr. Wenzl was his attorney. Petitioner stated that last night he had called about bringing another attorney to help or replace Mr. Wenzl, and that Petitioner was trying to get the money to do so. Jury selection continued. (See 2 RT 17-20; CT 91-92).

The following day, Petitioner immediately stated, "Pardon me, your Honor. Excuse me. I see the private counsel my family brought has left. I'm putting my trust in God, and I am going to continue." (See 2 RT 301).

2. Legal Authority

a. Motion for a Continuance to Retain Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). A defendant who can afford to retain counsel has a qualified right of choice of counsel. See Wheat v. United States, 486 U.S. 153, 159 (1988); see also United States v. Gonzalez-Lopez, 548 U.S. 140, 147-48 (2006)("Where the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation."). "[W]hile the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each

criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat, supra. The right to counsel of choice is "circumscribed in several important respects. . . . [A] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant." Id. Moreover, a "defendant's exercise of this right cannot unduly hinder the fair, efficient and orderly administration of justice." United States v. Walters, 309 F.3d 589, 592 (9th Cir. 2002).

Trial courts are accorded broad discretion on matters regarding continuances. See Morris v. Slappy, 461 U.S. 1, 11-12 (1983); Ungar v. Sarafite, 376 U.S. 575, 589 (1964). "[O]nly an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' " violates a defendant's rights. See Morris, supra; Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985). In Armant, the Ninth Circuit recited the four factors to be considered in determining whether the trial court abused its discretion in denying a requested continuance: (1) the degree of diligence by the Petitioner prior to seeking the continuance; (2) whether the continuance, if granted, would have served a useful purpose; (3) weighing the inconvenience caused to the court or the prosecution if the continuance was granted; and (4) the amount of prejudice suffered by the Petitioner. Armant, 772 F.2d at 556-57. At a minium, Petitioner must show some prejudice suffered from the denial of the continuance. See also Gallego v. McDaniel, 124 F.3d 1065, 1072 (9th Cir. 1997).

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b. Motion for Substitute Counsel

In conducting federal habeas review of a claim directed to the denial of a motion for substitute counsel, the question is not whether the trial court abused its discretion in denying the motion, but rather whether "the conflict between [the Petitioner] and his attorney had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment." Schell v. Witek, 218 F.3d 1017, 1026 (9th Cir. 2000). When a defendant complains about an irreconcilable conflict with counsel, the Sixth Amendment requires that the trial court make a thorough inquiry into the reasons for the defendant's dissatisfaction to determine whether the conflict between the defendant and his attorney "prevented effective assistance of counsel." Id.

3. The California Court of Appeal's Opinion

The California Court of Appeal rejected Petitioner's claim directed to the trial court's denial of his motion for a continuance to retain private counsel, stating:

> In this case, [Petitioner] waited until the jury was present to request a continuance for purposes of retaining counsel. [Petitioner] did not have the name of the lawyer or any way of verifying the attorney could go forward with the trial in a short period of time. [Petitioner] did not demonstrate sufficient circumstances supporting his request

> to continue the trial. The record does not suggest [Petitioner] made a good faith, diligent effort to retain counsel before trial. As a result, defendant has not met his burden to show the trial court abused its discretion in denying his request for a continuance to secure new counsel.

(July 24, 2007 Lodgment No. 8 at 11).

The California Court of Appeal also rejected Petitioner's claim directed to the trial court's denial of the motion for substitute counsel, stating:

> At the time the *Marsden* hearing was conducted, [Petitioner's] reasons for requesting the appointment of new counsel related to Mr. Wenzl's: inability to convince a prosecutor, Ms. Cady, to accept a plea and psychiatric placement; refusal to call the psychiatrist as a witness; failure to interview all the witnesses [Petitioner] suggested; and refusal to make what appears to be a section 995 motion. Mr. Wenzl refuted the claim there had been no meeting for over two months with [Petitioner]. (This occurred after [Petitioner] contradicted his two-month story.) It was also apparent Mr. Wenzl had been involved in [Petitioner's] case and made tactical decisions regarding that representation. In this instance, the trial court provided defendant with the opportunity to set forth any complaints about Mr. Wenzl. The trial court further took comments from Mr. Wenzl, who explained what had occurred regarding the psychiatric report

> and plea discussions. The trial court could reasonably conclude that Mr. Wenzl's representation of [Petitioner] was neither inadequate nor marked by irreconcilable conflict. The trial court did not abuse its discretion by denying [Petitioner's] substitution of counsel motion.

(July 24, 2007 Lodgment No. 8 at 12-13).

4. Analysis

The California Court of Appeal found that Petitioner was not diligent in seeking retained counsel before trial. See Armant, 772 F.2d at 556. Although Petitioner was present at the August 26 2002 hearing at which he was appointed counsel (see CT 83), the September 4, 2002 hearing at which his jury trial was initially scheduled to begin on October 21, 2002 (see CT 84), and a readiness hearing on October 17, 2002 (see CT 85),[11] he waited until the day before trial commenced (December 4, 2002) to try to obtain funds from his family members to retain private counsel (see 2 RT 2, 14, 19). He also apparently waited until just before trial to have his mother contact attorney Stephen Blanchfill (see July 24, 2007 Lodgment No. 13, Exhibit I-A [Declaration of Stephen I. Blanchfill]) -- who represented him at the August 12, 2002 preliminary hearing (see CT 3) -- for purposes of representing him at trial. Petitioner's claim that "attorney Stephen Blanchfill was present

[11] In the Objections, Petitioner correctly notes that the Court mistakenly stated in the Report and Recommendation that Petitioner was present at a readiness hearing on November 15, 2002. (See Objections at 20). Petitioner was present at a readiness hearing on October 17, 2002, but was not present at a readiness hearing on November 15, 2002. (See CT 85-86).

in the courtroom and ready to substitute as [Petitioner's] lawyer," when Petitioner moved for a continuance (see Traverse at 34), is questionable given Stephen Blanchfill's declared statement that when he went to court, "the jury was already impaneled" and contradicts the record which reflects that the jury was not already impaneled when Petitioner announced that private counsel had left the courtroom (see 2 RT 301). Even if Petitioner's assertions were true, Petitioner did not ever provide the trial court with the name of any lawyer who was willing to represent him, or tell the trial court that a private lawyer would be ready to proceed with the trial in a short period.

Moreover, it not clear that a continuance would have served a useful purpose. See Armant, supra. This is because Petitioner did not tell the trial court that he had obtained funds to retain private counsel, or guarantee that he would obtain funds to retain private counsel. In fact, it can be inferred that private counsel left the courtroom due to Petitioner's inability to obtain the necessary funds. (See 2 RT 301).

Although it is also not clear whether a continuance would have inconvenienced the trial court or the prosecution, it does not appear that Petitioner's defense suffered as a result of the trial court's denial of his request. See Armant, 772 F.2d at 556-57. In any event, Petitioner has failed to allege or show how he was prejudiced by the denial. Thus, the California Court of Appeal's findings are supported by the record.

The record also supports the California Court of Appeal's reasoning

and its findings concerning the trial court's denial of Petitioner's motion for substitute counsel. The trial court conducted a hearing on Petitioner's motion for substitute counsel during which Petitioner voiced his complaints about counsel, the trial court inquired about Petitioner's complaints and considered the responses provided by Petitioner's counsel before denying the motion.

Petitioner's complaints against his counsel stemmed from his disagreements with counsel over strategic trial decisions. See Schell, 218 F.3d at 1026 n.8 (quoting Brookhart v. Janis, 384 U.S. 1, 8 (1966) (Harlan, J., dissenting in part))("'[A] lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval.'"); United States v. Smith, 282 F.3d 758, 763 (9th Cir. 2002)(affirming district court's denial of motion for substitute counsel based, in part, on fact that the disagreement between defendant and counsel was about "strategic purposes."). Petitioner has neither alleged nor shown that any strain in his and his counsel's relationship resulted in a total breakdown of communication or a significant impediment to the attorney client relationship. Moreover, there is no indication in the record that Petitioner's counsel did not competently represent Petitioner at trial. See Morris, 61 U.S. at 13-14 (1983)(The Sixth Amendment requires competent representation and does not guarantee a meaningful relationship between a defendant and counsel); King v. Rowland, 977 F.2d 1354, 1357 (9th Cir. 1992).

The Court finds that the trial court satisfied its obligation to make a thorough inquiry into the reasons for Petitioner's

dissatisfaction with his trial counsel. The Court further finds that Petitioner has failed to show that, as of the date of the hearing, "the conflict between him and his attorney had become so great that it resulted in a total lack of communication or other significant impediment." Schell, 218 F.3d at 1026.

Accordingly, the California Supreme Court's rejection of Petitioner's claim directed to the trial court's denials of his motion for a continuance to retain counsel and his motion for substitute counsel was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

B. Evidentiary Error and Instructional Error

Petitioner contends that the trial court's admission of propensity evidence under California Evidence Code § 1108 (Ground Two),[12] and the

[12] Respondent notes that in the state courts Petitioner challenged the trial court's admission of propensity evidence under two different theories. (See Return at 11, 28-29). However, it appears, from the face of the Petition, that the evidentiary error claim alleged in the Petition is the same claim that Petitioner raised on direct appeal to the California Court of Appeal and in his Petition for Review to the California Supreme Court. (See Respondent's September 24, 2014 Notice of Lodging No. 2 at 22-27; compare July 24, 2007 Notice of Lodgment No. 9 at 13-18).

To the extent that Petitioner is contending that the trial court improperly admitted propensity evidence under California law, his claim is not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). To the extent that Petitioner is contending that the trial court erred in admitting prior uncharged sexual misconduct as propensity evidence, the Court concurs with Respondent (see Return at 29-33) that Petitioner's claim arguably is barred by Teague v. Lane, 489 U.S. 288, 316 (1989)(a new constitutional rule of criminal procedure cannot be retroactively applied in a habeas proceeding, unless the new rule falls within one of two narrow exceptions). See Estelle v. McGuire, 502 U.S. at 75 n.5 ("[W]e express (continued...)

trial court's failure to *sua sponte* instruct the jury on the lesser-included offense of annoying or molesting a child (P.C. § 647.6(a)) (Ground Four) violated his federal constitutional rights to a fair trial and to due process. (Petition at 6).[13]

Respondent alleges that the evidentiary error and instructional error claims alleged in the Petition are procedurally defaulted. (See Return at 29, 33-38, 60, 62-63).[14]

In order for a claim to be procedurally barred for federal habeas corpus purposes, the opinion of the last state court rendering a

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[12] (...continued)
no opinion on whether a state law would violate the Due Process Clause if it permitted the use of "prior crimes" evidence to show propensity to commit a charged crime."); Groen v Busby, 886 F.Supp.2d 1150, 1158-59 (C.D. Cal. July 27, 2012)(Petitioner's challenge to the admission of his two prior sexual offenses under P.C. § 1108 was barred by Teague).

[13] To the extent that Petitioner is contending that the trial court had a duty to *sua sponte* instruct the jury on the lesser-included offense of annoying or molesting a child, the Court concurs with Respondent (see Return at 60-62) that Petitioner's claim is barred by Teague. See Keeble v. United States, 412 U.S. 205, 213 (1973)(Supreme Court made clear that it had never explicitly held, and was not holding, that the Fifth Amendment due process clause guaranteed the right of a defendant to have the jury instructed on a lesser included offense); see also, e.g., Solis v. Garcia, 219 F.3d 922, 928-29 (9th Cir. 2000); Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998)("Under the law of this circuit, the failure of a state court to instruct on lesser included offenses in a non-capital case does not present a federal constitutional question."); Turner v. Marshall, 63 F.3d 807, 819 (9th Cir. 1995)(the Ninth Circuit "has declined to find constitutional error arising from the failure to instruct on a lesser included offense in a noncapital case," and to hold otherwise would create a new rule in violation of Teague), overruled on other grds, Tolbert v. Page, 182 F.3d 677 (9th Cir. 1999).

[14] Since Petitioner did not challenge Respondent's contention that the evidentiary error and instructional error claims are procedurally barred in the Traverse, and did not even address those claims on the merits, Petitioner has apparently conceded that those claims are procedurally defaulted.

judgment in the case must clearly and expressly state that its judgment rests on a state procedural bar. Harris v. Reed, 489 U.S. 255, 263 (1989); see also Coleman v. Thompson, 501 U.S. 722, 729-30 (1991); Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992).[15]

Under California law, the failure to interpose a specific and timely objection in the trial court on the ground advanced on review independently serves as a procedural bar to consideration of the issue by the appellate courts. See, e.g., People v. Boyette, 29 Cal.4th 381, 430 (2002); People v. Alvarez, 14 Cal.4th 155, 186 (1996); People v. Rodrigues, 8 Cal.4th 1060, 1193 (1994); People v. Saunders, 5 Cal.4th 580, 590 (1993).

Here, the California Court of Appeal "clearly and expressly" invoked the contemporaneous objection procedural bar when it rejected Petitioner's evidentiary error claim, stating: "Preliminarily, defendant's constitutional contention was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, and procedural default." (See July 24, 2007 Lodgment No. 8 at 14-15).[16]

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[15] When a state court rejects a claim as procedural defaulted, that ruling is binding on the federal court even if the state court also addresses the merits of the federal claim in an alternative holding. See Harris v. Reed, 489 U.S. 255, 264 n.10; Carringer v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992)(en banc).

[16] The California Supreme Court's summary denials of Petitioner's July 19, 2004 habeas petition and Petitioner's Petition for Review (see July 24, 2007 Lodgment Nos. 12, 14), both of which alleged Ground Two (see Lodgment Nos. 9, 13), constitutes an adoption of the California Court of Appeal's rejection of Petitioner's claim on procedural grounds. See Thomas v. Goldsmith, supra ("If the intermediate appellate court judgment rests on procedural default and the state Supreme Court denies review without explanation, the federal courts will consider the claim procedurally defaulted.").

This rule is an independent and adequate procedural ground and has been regularly and consistently applied. See Tong Xiong v. Felker, 681 F.3d 1067, 1075 (9th Cir. 2012); Fairbanks v. Ayers, 650 F.3d 1243, 1256-57 (9th Cir. 2011)(California consistently applies its contemporaneous objection rule when a party fails to object to the admission of evidence).

The California Supreme Court "clearly and expressly" invoked the procedural bar of untimeliness when it rejected Petitioner's instructional error claim (alleged in his July 9, 2007 California Supreme Court habeas petition (Case No. 154266), see July 24, 2007 Notice of Lodging Nos. 23-24) with citations to In re Robbins, 18 Cal.4th 770, 780 (1998) and In re Clark, 5 Cal.4th 750 (1993) (see Respondent's September 24, 2014 Notice of Lodging No. 5). See Walker v. Martin, 526 U.S. 307, 313 (2011) ("A summary denial citing Clark and Robbins means that the petition is rejected as untimely"). California's timeliness rule is firmly established and consistently applied. See id. at 317-20.

The failure to comply with a state's contemporaneous objection rule and/or timeliness rule results in a procedural default which bars federal consideration of the issues, unless Petitioner can demonstrate both "cause" for his failure to file a timely habeas petition and "prejudice" accruing from the error. See Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir. 1989).

In order to demonstrate "cause" for a procedural default, Petitioner must show "that some objective factor external to the defense

impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986).

Here, Petitioner has not even attempted to show "cause" for his procedural defaults. Because Petitioner must demonstrate *both* cause and prejudice, see Murray, 477 U.S. at 494, his inability to demonstrate the requisite "cause" for his procedural default obviates the need for the Court to even reach the issue of whether Petitioner has demonstrated the requisite "prejudice." See Thomas v. Lewis, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991).

The Supreme Court has recognized an exception to the requirement that the Petitioner demonstrate both "cause" and "prejudice," where the Petitioner can demonstrate that failure to consider the procedurally defaulted claims will result in a fundamental miscarriage of justice because he is actually innocent of the crimes of which he was convicted. See, e.g., Coleman, 501 U.S. at 750; Murray, 477 U.S. at 496; Noltie v. Peterson, 9 F.3d 802, 806 (9th Cir. 1993). However, in order to qualify for this "miscarriage of justice" exception, the Petitioner must "support his allegations of constitutional error with new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 324 (1995)(recognizing that such evidence "is obviously unavailable in the vast majority of cases"). Further, to establish the requisite probability that a constitutional violation probably has resulted in the conviction of one who is actually innocent, "the Petitioner must show that it is more likely than not that no reasonable juror would have

convicted him in light of the new evidence." Id. at 327. Here, Petitioner has not even purported to adduce any new reliable evidence or make the requisite showing of actual innocence.

The Court finds that Petitioner's evidentiary error and instructional error claims are procedurally defaulted. This determination renders it unnecessary for the Court to address those claims on their merits.

C. Ineffective Assistance of Counsel

In Ground Three, Petitioner contends that his trial counsel was ineffective for failing to interview and/or call witnesses (Ground Three (A)), and for advising Petitioner not to testify (Ground Three (B)). (Petition at 6; Traverse at 4-28).

In the Traverse and Supporting Reply, Petitioner contends that his trial counsel was ineffective for failing to request a lesser-included offense instruction (Ground Three (C)). (See Traverse at 8, 24-28; Supporting Reply at 9-11).

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that there are two components to an ineffective assistance of counsel claim: "deficient performance" and "prejudice."

"Deficient performance" in this context means unreasonable representation falling below professional norms prevailing at the time of trial. See id. at 688-89. To show "deficient performance,"

Petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." See id. at 690. Further, Petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. The Court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." Id.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, Petitioner must affirmatively "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694; see also Williams v. Taylor, 529 U.S. 362, 390-91 (2000).

1. Failing to Interview and/or Call Witnesses to Testify

Although the Petition does not identify the witnesses that Petitioner contends his trial counsel failed to interview and call to testify at trial, Petitioner identified the following witnesses for his defense in his state court pleadings (See July 24, 2007 Notice of Lodging No. 2 at 4-5, 10-11, No. 13 at 4-5, 14-15, No. 15 [Supplemental Memorandum] at 17, 31): Pedram Borhan (Petitioner's brother); Makda Gheysar (Petitioner's fiancée); Delia Villaneuva (Petitioner's former employee and the mother of his daughter); "witnesses who could have verified Petitioner's dance training or his former work as a

professional dance instructor;" "psychiatric witnesses or witnesses to Petitioner's psychiatric state;" "the parents of the complaining witnesses;" and Jose Gonzalez. (Petition at 6; Traverse at 16-24).[17]

In order to show ineffective assistance of counsel based on the failure to call witnesses, Petitioner must show that particular witnesses were willing to testify (see United States v. Harden, 846 F.2d 1229, 1231-32 (9th Cir. 1988)), what their testimony would have been (see United States v. Berry, 814 F.2d 1406, 1409 (9th Cir. 1987)); and that their testimony would have been sufficient to create a reasonable doubt as to guilt (see Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990)).

In a habeas petition filed in the California Court of Appeal on November 14, 2003 and his July 19, 2004 California Supreme Court habeas petition, Petitioner claimed the following: (1) Pedram Borham (his brother) would have testified as to "Petitioner's status as president of a water filtration company, Petitioner's participation in ongoing family

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[17] Although Petitioner attached an undated Declaration of John Pantermuehl to his October 7, 2004 California Supreme Court habeas petition, the Court will not separately address Mr. Pantermuehl because it does not appear that Petitioner discussed Mr. Pantermuehl or Mr. Pantermuehl's testimony in that habeas petition (see July 24, 2007 Notice of Lodging No. 15). In any event, the statements in the Declaration of Mr. Pantermeuhl essentially mirror the statements in the Declaration of Jose Gonzalez which are discussed *infra*.

To the extent that Petitioner's allegations of ineffective assistance of trial counsel asserted in the Traverse were not presented to the California courts, the Court will disregard them. In addition, the Court is not able to consider any documents that were included in the Traverse but were not presented to or considered by the state courts (see Traverse at 20, Exhibit 2 ["The Royal Ballet School's Policy on Appropriate Physical Contact in Dance"]). See Cullen v. Pinholster, 563 U.S. at 180-85.

and individual therapy sessions, and his own availability and the availability of Petitioner's mother to testify as to Petitioner's good character." (See July 24, 2007 Notice of Lodgment No. 2 at 4, No. 13 at 5; see also Traverse at 18-19, 21);[18] (2) Makda Gheysar (his fiancée) would have testified as to "Petitioner's good character, specifically as it relates to his treatment of women, and to the depression Petitioner suffered during the time of his prior offenses." (See July 24, 2007 Notice of Lodgment No. 2 at 4, No. 13 at 5);[19] and (3) Delia Villaneuva

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[18] The Declaration of Pedram Borhan, dated October 8, 2003, attached to Petitioner's state habeas petitions, includes the following statements:

> 3. During the time of the incidents for which my brother was charged and convicted, I was aware that he was president of Diamond Water Treatment, Inc., which had over forty employees, including salespeople, telemarketers and convassers. I had briefly worked with my brother in that company.
> 4. While working with my brother, I was aware he was financing water filters with three different companies from 1995 to 2000; he financed only twenty filters with prosecution witness, Jose Gonzales, President of Continental Water Softener Company, during the three months he did business with Mr. Gonzalez's company.
> 5. My brother suffered from severe depression in 1998; I was aware he was seeing a psychologist from 1999 to 2000 on a weekly basis, in addition to our weekly family therapy, which included my brother, myself, and our mother.
>
> * * * * *
>
> 9. I gave Mr. Wenzl the names of a number of witnesses who could have testified for my brother, including Delvia Silva, the mother of his six-year-old daughter; his fiancee, Makda Gheysar; and Flavio Rodriguez, a ballroom dance instructor and modeling agency manager.

(See July 27, 2007 Notice of Lodgment No. 2, Exhibit "F," No. 13, Exhibit "F.")

[19] The Declaration of Makda Gheysar, dated September 11, 2003, attached to Petitioner's state habeas petitions, includes the following statements:

> 1. . . . I would be available to testify and give the jury an indication of his character and the changes he has gone through the past few years . . . .

(continued...)

(Petitioner's former employee and Petitioner's daughter's mother) would have "attest[ed] to Petitioner's good character and his status as president of his own water filtration company."[20]

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[19] (...continued)

2. I have been in contact with [Petitioner] during the past two years and we are planning to start our lives together when he is released. I have witnessed the changes he has gone through to make himself a valuable and essential part of the society.
3. He went through a deep depression which led him to the Long Beach case with regards to sexual misconduct. He seeked (sic] appropriate medical treatment and with reading, meditation and concentration on his faults and shortcomings, he has made enormous changes. [¶] He is ashamed of his past life and behavior and has become an individual with deep integrity, honesty, accepting, respectful with an open mind and soul.

(See July 24, 2007 Notice of Lodgment No. 2, Exhibit "G-1", No. 13, Exhibit "G-1").

According to Petitioner, Makda Gheysar's testimony, "together with the evidence that [Petitioner] did not have a sexual intent during the instant offense, would have negated the propensity inference from the prior incidents by explaining that his mental state at the time of those incidents was vastly different than it was by the year 2000, when the charged conduct occurred." (See Traverse at 23).

The Court construes the references to Petitioner's prior offenses by the various witnesses he claims trial counsel failed to call as references to the uncharged 1998 offenses (evidence of which was introduced at trial), rather than Petitioner's 1999 sexual battery conviction (see sealed Probation Report at 5).

[20] The Declaration of Delia Villaneuva, dated August 13, 2003, attached to Petitioner's state habeas petitions, includes the following statements:

1. I worked and lived with [Petitioner] in 1997. He was president of Diamond Water Treatment Inc. with many employees and sales people. He was very kind and helpful to all employees. He bought and financed his filters from few different supplies (sic) and manufacturess (sic).

2. When we separate (sic), I came to Guadalajara where our daughter was borned (sic). In year 2000 he came to Guadalajara to be with his daughter.

(continued...)

Petitioner alleged that without any character witnesses, "Petitioner's jury heard only of Petitioner's criminal disposition, and knew nothing of his exemplary character as brother, father, or fiancee, which would have militated against the disposition evidence adduced by the State." Petitioner further alleged that absent witnesses to testify that "Petitioner owned his own water filtration company or worked as a sales representative for several other companies, both of which would have established Petitioner as a legitimate businessman and the legitimacy of the need to audition potential commercial models," "the prosecutor was able to argue, without contravening evidence, Petitioner was a fraud, and his business fictitious, conjured simply to facilitate preying on young women." (See July 24, 2007 Notice of Lodgment No. 2 at 5, 10, No. 13 at 5, 15; see also Traverse at 18-19).

In a habeas petition filed with the California Court of Appeal on November 14, 2003 and his July 19, 2004 California Supreme Court habeas petition, Petitioner also claimed that he was harmed by his trial counsel's failure to (1) call "witnesses who could have verified Petitioner's dance training or his former work as a professional dance instructor," because "Petitioner had a potential factual defense in demonstrating that the way he touched the complainant's chests was a common technique used by dance instructors to correct a dancer's posture," (see July 24, 2007 Notice of Lodgment No. 2 at 10, No. 13 at

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[20] (...continued)
(See July 24, 2007 Notice of Lodgment No. 2, Exhibit "G-2", No. 13, Exhibit "G-2").

14);[21] (2) call "psychiatric witnesses or witnesses to Petitioner's psychiatric state, to attested (sic) to his depression at the time of the prior offenses, showing them anomalous incidents rather than dispositive traits," (see July 24, 2007 Notice of Lodgment No. 2 at 10-11, No. 13 at 15); and (3) call Valene's parents to testify, even though Petitioner had "explained to counsel his belief [that] the allegations of misconduct were prompted by a contract dispute with the water filtration company Petitioner was representing." (See July 24, 2007 Notice of Lodgment No. 2 at 11, No. 13 at 15). Petitioner claims that Valene's father "could have offered testimony that would establish that [Petitioner] conducted the audition, not under a ruse to commit sexual misconduct, but to secure a business relationship with the parents because they were refusing to sign the financing contract for the installed filter until [Petitioner] had completed his promise to hold the audition for their daughter." (See Traverse at 22).

In his October 7, 2004 California Supreme Court habeas petition, as supplemented by a May 2, 2005 memorandum, Petitioner appeared to claim that Jose Gonzalez, the President of Continental Water Softener Company, would have testified that Petitioner was the President of Diamond Water Treatment, Inc., as opposed to just being a salesman for Continental

[21] Petitioner claims that testimony that Petitioner was "trained as a ballroom dance instructor for one year at the Fred Astaire and Arthur Murray dance studios" and testimony about "the importance of correct posture, or of the touching ordinarily done to correct posture, would have shown [Petitioner's] actions were typical of dance instructors," and "provided the jury with a legitimate and non-sexual basis for [Petitioner's] contact with Valene and Gelesia during the audition." (See Traverse at 20, quoting statements in Petitioner's Declaration dated October 3, 2003 [see July 24, 2007 Notice of Lodgment No. 2, Exhibit "E", No. 13, Exhibit "E"]).

Water Softener Company. (See July 24, 2007 Notice of Lodgment No. 15 [Supplemental Memorandum] at 16-17, 31; see also Traverse at 18-19).[22] According to Petitioner, such testimony would have mitigated the damaging effect of Jose Gonzalez's trial testimony that in 2000 Petitioner, a subcontractor/salesman for Continental Water Softener Company, was not authorized to audition anybody for commercials or modeling advertising jobs (see 3 RT 903-04), because such testimony would show that Petitioner, as the president of his own company, "had a legitimate purpose for conducting an audition." (See Traverse at 18-19).

There is nothing in the record to support Petitioner's claim that Jose Gonzalez, unidentified dance instructors (except for Flavio Rodriguez who was identified in the Declaration of Pedram Borham), unidentified psychiatrists/psychologists, and Valene's father would have testified at trial in conformity with Petitioner's representations. Moreover, Petitioner has failed to show that the testimony of any of the above witnesses would have been sufficient to create a reasonable doubt as to Petitioner's guilt. See Tinsley v. Borg, 895 F.2d 520, 532 (9th Cir. 1990).

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[22] The Declaration of Jose Gonzalez, dated November 11, 2003, attached to Petitioner's October 7, 2004 California Supreme Court habeas petition, includes the following statements:

1. [Petitioner] was the President of Diamond Water Treatment, Inc.
2. [Petitioner] had his own office, his own marketing staff/convassers. He trained independently.
3. [Petitioner] sold water filters from Continental Water Softener from time to time on an independent contractor basis. Records of customers are available on request.

(See July 24, 2007 Notice of Lodgment No. 15, Exhibit "D").

Moreover, as set forth below, testimony from Pedram Borhan, Makda Gheysar, and/or Delia Villaneuva about Petitioner's good character with women and/or Petitioner's psychiatric state, whether at the time of the present offenses (2000) or at the time of his 1998 uncharged offenses, would have had little, if any, relevance to Petitioner's case.

First, it is unclear whether Pedram Borhan (Petitioner's brother) would have been able to testify as to Petitioner's psychiatric state in 2000 or in 1998. According to Pedram Borham's declaration, Petitioner suffered from severe depression in 1998, and he was aware Petitioner was seeing a psychologist in 1999 and 2000 at least twice a week. (See July 24, 2007 Notice of Lodgment No. 2, Exhibit "F"). However, he does not state that Petitioner suffered "severe depression" in 2000, or that Petitioner's psychiatric state was a factor in the commission of the 2000 or 1998 offenses.

Second, it does not appear that Makda Gheysar (Petitioner's fiancée) would have been able to testify as to Petitioner's character or psychiatric state in 2000 or in 1998. In her declaration, dated September 11, 2003, Geysar stated that she had "been in contact with [Petitioner] during the past 2 years." (See July 24, 2007 Notice of Lodgment No. 2, Exhibit "G-1"). Moreover, Gheysar did not state how Petitioner's "deep depression" contributed to his committing the 2000 or 1998 offenses. Similarly, it is unclear whether Delia Villanueva (Petitioner's former employee and mother of his daughter) would have been able to testify about Petitioner's character or psychiatric state in 2000 or in 1998. In her declaration, Villanueva fails to state when she separated from and moved away from Petitioner or even indicate that

she knew of Petitioner's character or psychiatric state in 2000 or in 1998. (See July 24, 2007 Notice of Lodgment No. 2, Exhibit "G-2").

Third, although Petitioner does not specify the testimony that would have been given about his good character, it is likely that any testimony about his good character with women would have opened the door to damaging rebuttal evidence, to include Petitioner's 1997 misdemeanor convictions for sexual battery and lascivious act against a child under 14 years of age, as well as his 1999 conviction for sexual battery (see Return at 51-52, citing to 2 RT 313 and the sealed Probation Report at 2-3). See People v. Kennedy, 36 Cal.4th 595, 634 (2005)("[T]he prosecution may cross-examine a defense character witness about acts inconsistent with the witness's testimony as long as the prosecution has a good faith belief that such acts actually occurred."), disapproved on other grounds by, People v. Williams, 49 Cal.4th 405 (2010); Cal. Evid. Code 1102(c).

Fourth, it is unlikely that any testimony by Pedram Borhan, Makda Gheysar and/or Delia Villaneuva or any psychiatrist or psychologist about Petitioner's psychiatric state, whether at the time of the present offenses or the prior offenses, would have been helpful to Petitioner's defense, in light of the trial court's instruction to the jury that a finding, by a preponderance of the evidence, that Petitioner committed the prior sexual offenses was not sufficient by itself to prove beyond a reasonable doubt that Petitioner committed the present offenses (see 4 RT 969-72; CT 130-35). Moreover, Petitioner has failed to allege how an improvement in Petitioner's psychiatric state since the time of the prior offenses would have resulted in a different outcome at the trial

of his present offenses.

Fifth, testimony from Valene's father concerning the reason for making an allegation of misconduct against Petitioner (according to Petitioner, it was related to a contract dispute between Valene's parents and a filtration company Petitioner was representing, see Traverse at 22, 30) would not have been relevant to the issue of Petitioner's guilt. The evidence presented at trial was that *after* Petitioner had met with Valene's father at Valene's father's house in La Puenta concerning water filter installation, the father sent Petitioner to Valene's mother's house in Irwindale (where Valene lived) presumably about an audition for a commercial and a couple of days later, Petitioner showed up at Valene's mother's house to conduct an audition. (See 3 RT 618-21, 627, 644-45, 699). Not only is there no competent evidence about a contract dispute involving Valene's father, but there is also no evidence that Valene, Galesia, Vanessa, and/or Valene's mother were aware of any alleged contract dispute involving Valene's father. In any event, even if testimony from Valene's father about a contract dispute was relevant (i.e., as motivation for making an allegation against Petitioner, or as providing Petitioner with a "legitimate, non-sexual reason to conduct an audition – to further his own business," see Traverse at 22, 30), the jury nonetheless would have been presented with overwhelming evidence of Petitioner's guilt.

Sixth, although testimony about Petitioner's status as President of Diamond Water Treatment, Inc., his work as a sales representative for other companies, and his training as a dance instructor may have been relevant to Petitioner's defense that his "touchings were misconstrued

and were within the realm of proper touching for dance instruction" (see July 24, 2007 Notice of Lodgment No. 2, Exhibit "E" [Petitioner's Declaration] at ¶ 4; see also 4 RT 987-1000 [Petitioner's trial counsel argued that the prosecutor did not establish specific sexual intent, and that Petitioner's touching (which counsel called "inadvertent") during an audition was for a legitimate purpose]), such testimony would not have been sufficient to create a reasonable doubt as to Petitioner's guilt, given the following testimony: (1) Valene's and Galesia's testimony about Petitioner's inappropriate touching of them (see 3 RT 618-42, 652, 654-56, 660-63, 666 [Valene's testimony], 668-82, 686-90, 695 [Galesia's testimony]; (2) Vanessa's testimony corroborating Valene's account (see 3 RT 698-708, 713, 720-27); and (3) the testimony of three young women (Song Lor, Cythia Tejada and Brenda Castillo) about Petitioner's inappropriate touching of them in 1998 under similar circumstances (see 4 RT 910-17, 921-28, 937-44).

Seventh, even if testimony about Petitioner's status as President of Diamond Water Treatment, Inc., and his work as a sales representative for other companies would have lessened the damaging effect of Jose Gonzalez's trial testimony that Petitioner was not authorized by Continental Water Softener Company to audition anybody for commercials or modeling advertising jobs, there simply was no evidence presented at trial - and no witness has claimed that they would testify - that at the time of the present offenses Petitioner was conducting dance auditions for the purpose of making commercials for Diamond Water Treatment, Inc. Moreover, any such testimony would have been undermined by the fact that Petitioner told Valene that the dance was part of a commercial for a company called Golden Water (see 3 RT 619, 627), Petitioner told Cynthia

Tejada that he was a talent scout for an agency (see 4 RT 922-24), and Petitioner told Brenda Castillo that he was a modeling contractor (see 4 RT 939). Thus, contrary to Petitioner's assertion (see Traverse at 29-30), such testimony would not have lessened the impact of the prosecutor's argument that Petitioner's audition was a pretext and did not serve any legitimate purpose (see 4 RT 985).

Finally, any testimony that Petitioner's touching was part of a legitimate dance instruction would not have been credible, in light of the trial testimony that (1) Petitioner told Valene to sit on his lap and tell him, "I love you daddy" (see 3 RT 639-40); (2) Petitioner intentionally pressed his knee to Valene's vaginal area during a dip (see 3 RT 626, 628-30, 639-40, 660-61, 673-76, 681, 695, 704-07, 720-25); (3) Petitioner intentionally and with cupped hands touched Valene's and Gelesia's breasts (see 3 RT 641, 670-73, 675-77, 681-82, 686-87, 695, 700-02, 708, 725-27); (4) Petitioner was enjoying himself during his "touching" encounters with both Valene and Galene (see 3 RT 635-37, 661-62, 672-73, 675, 678, 702-03); and (5) Petitioner's inappropriate touching of the three other young women during what were purported to be auditions.

The California Court of Appeal's finding that Petitioner failed to show a reasonable probability that, but for his trial counsel's failure to call the above witnesses to testify, the result of his trial would have been different is amply support by the record (see July 24, 2007 Lodgment No. 3).

Petitioner's failure to make the requisite showing of "prejudice"

with respect to his ineffective assistance of trial counsel claim renders it unnecessary for the Court to address the "deficient performance" issue. See Strickland, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed."); see also Williams v. Calderon, 52 F.3d 1465, 1470 n.3 (9th Cir. 1995).

Accordingly, the California Supreme Court's rejection of Petitioner's ineffective assistance of counsel claim based on his trial counsel's failure to call Pedram Borhan, Makda Gheysar, Delia Villaneuva, dance instructors, psychiatric witnesses, and Valene's father to testify at trial was neither contrary to, nor involved an unreasonable application of, clearly established federal law.[23]

Furthermore, the Court finds, based on an independent review of the

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[23] Contrary to Petitioner's assertion (see Traverse at 9-10, 16), this Court's review of Petitioner's ineffective assistance of trial counsel claim is not de novo. The California Court of Appeal denied Petitioner's ineffective assistance of counsel claim, at least with respect to the claim that trial counsel failed to call certain witnesses -- (Pedram Borhan, Makda Gheysar, Delia Villaneuva, "witnesses who could have verified Petitioner's dance training or his former work as a professional dance instructor", "psychiatric witnesses or witnesses to Petitioner's psychiatric state," and "the parents of the complaining witnesses" to testify at trial) and the claim that trial counsel advised Petitioner not to testify at trial, see July 24, 2007 Notice of Lodgment No. 2, No. 13) -- in a reasoned decision (see July 24, 2007 Notice of Lodgment No. 3), and the California Supreme Court summarily denied Petitioner's habeas petition raising these claims without citation to authority (see July 24, 2007 Notice of Lodgement No. 14).

Petitioner's raised his ineffective assistance of counsel claim based on his trial counsel's failure to call other witnesses (Jose Gonzalez and John Pantermuehl) to testify at trial in his October 7, 2004 habeas petition to California Supreme Court (see July 24, 2007 Notice of Lodgement No. 15), which was summarily denied without citation to authority on June 8, 2005 (see July 24, 2007 Notice of Lodgment No. 16).

record, that the California Supreme Court's rejection of Petitioner's ineffective assistance of counsel claim based on his trial counsel's failure to call Jose Gonzalez to testify at trial was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

2. Advising Petitioner Not to Testify

Petitioner contends that his trial counsel was ineffective for advising him at the "eleventh hour" not to testify even though there was no other affirmative defense available. (See Petition at 6; Traverse at 24). In his November 14, 2003 California Court of Appeal habeas petition and his July 19, 2004 California Supreme Court habeas petition, Petitioner alleged, "Petitioner wanted to testify, but Mr. Wenzl refused to let him do so." (See July 24, 2007 Notice of Lodgment No. 2 at 4, No. 13 at 4).[24]

However, Petitioner does not state what testimony he would have given at trial in his declaration dated October 10, 2003. Petitioner also fails to allege, in his Petition and Traverse, how his testimony would have impacted the case. Even if Petitioner had testified at trial about a number of the issues discussed in his petition, including his status in his company, his past and present psychiatric issues, his dance training, and the motivation for Valene's parents to make an

[24] Petitioner's Declaration (with Petitioner's name misspelled) dated October 10, 2003, (attached to Petitioner's state petition) states, "Mr. Wenzl continuously assured me I could testify and explain my actions to the jury. When the time came, Mr. Wenzl refused to let me take the stand." (See July 24, 2007 Notice of Lodgment No. 2, Exhibit "E", No. 13, Exhibit "E.").

allegation against him), he would have been faced with significant impeachment evidence, including (1) Petitioner's statements at the Marsden hearing, discussed above, that he had no recollection of the events (see 1 RT 8, 14); and (2) Petitioner's 1999 sexual battery conviction (see 2 RT 313 and the sealed Probation Report at 2). Under these circumstances, and given the overwhelming evidence of Petitioner's guilt presented at trial, Petitioner cannot show that he suffered "prejudice" as a result of his trial counsel's alleged advice not to testify.

The California Court of Appeal's finding that Petitioner failed to establish "prejudice" with respect to this ineffective assistance of trial counsel claim (see July 24, 2007 Notice of Lodgment No. 3) was supported by the record.[25]

Accordingly, the California Supreme Court's rejection of this ineffective assistance of trial counsel claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

3. Failing to Request the Lesser-Included Offense Instruction

Petitioner contends that his trial counsel was ineffective for failing to request that the trial court instruct the jury with P.C. §

[25] The Court's determination that Petitioner has failed to show "prejudice" renders it unnecessary for the Court to address Petitioner's assertions about who made the decision for Petitioner not to testify (see Traverse at 24, citing to July 24, 2007 Notice of Lodgment No. 13, Exhibit "D-1").

647.6(a) (a misdemeanor),[26] a lesser-included offense of P.C. § 288(a). Petitioner claims that "[h]ad counsel requested a child annoyance instruction, there is at least a reasonable probability that the jury would have acquitted [Petitioner] of the greater charge and he would have avoided a mandatory life sentence." (See Traverse at 8, 24-28; Supporting Reply at 9-11).

"*Any* touching of a child under the age of 14 violates [P.C. § 288(a)], even if the touching is outwardly innocuous or inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim." People v. Lopez, 19 Cal.4th 282, 289 (1998)(italics in original). On the other hand, P.C. 647.6(a) "does not require a touching . . . but does require (1) conduct a normal person would unhesitatingly be irritated by . . . and (2) conduct motivated by an unnatural or abnormal sexual interest in the victim." Id. (internal citations and internal quotations omitted).

There are two separate tests to determine whether P.C. § 647.6(a) is a lesser-included offense of P.C. § 288(a) -- the elements test ("[If a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former") -- and the accusatory pleading test ("[A] lesser included offense is included within the greater charged offense if the charging allegations of the accusatory pleading include language describing the offense in

[26] P.C. § 647.6(a)(1) provides that "Every person who annoys or molests any child under 18 years of age shall be punished by a fine not exceeding five thousand dollars ($5,000), by imprisonment in a county jail, not exceeding one year, or by both the fine and imprisonment."

such a way that if committed as specified the lesser offense is necessarily committed."). Id. at 288-89 (internal quotation marks omitted).

Under the elements test, P.C. § 647.6(a) is not a lesser-included offense of P.C. § 288(a). See id. at 290-92 ("The criminal conduct that section 288, subdivision (a), prohibits could occur without necessarily also violating section 647.6, subdivision(a). Section 288, subdivision (a) requires a touching, even one *innocuous or inoffensive* on its face, done with lewd intent. Section 647.6, subdivision (a), on the other hand, requires *an act objectively and unhesitatingly viewed as irritating or disturbing*, prompted by an abnormal sexual interest in children. Clearly, not every touching with lewd intent will produce the objective irritation or annoyance necessary to violate section 647.6.").

Whether P.C. § 647.6(a) is a lesser-included offense of P.C. § 288(a) under the accusatory pleading test is not as clear. In Lopez, supra, the California Supreme Court examined language in the Information -- that the petitioner violated P.C. § 288(a) when he "'touch[ed] victim's vaginal area outside of her underwear' for purposes of his sexual gratification" –- to determine whether P.C. § 647.6(a) was a lesser-included offense of P.C. § 288(a). The court found that such "language does not necessarily allege an *objectively* irritating or annoying act of child molestation, and it could indicate a nonforcible or apparently consensual touching" such as what would occur if "'[a] female child who rides on her father's shoulders might have contact between her vaginal area and her area and her father's neck or shoulders, but that contact would not unhesitatingly irritate or disturb

a reasonable person.'" Id. at 293-94.

Here, the Information charging Petitioner alleges, in two separate counts, that Petitioner violated P.C. § 288(a) by "willfully, unlawfully, and lewdly commit[ting] a lewd and lascivious act upon and with the body and certain parts and members thereof of [ ], a child under the age of fourteen years, with the intent of arousing, appealing to, and gratifying the lust, passions, and sexual desires of the said defendant(s) and the said child." (See CT 80-81). Petitioner contends that the broad language in his case distinguishes his case from Lopez: "The pleading . . . includes any 'lewd' or 'lascivious' act, in contrast to the pleading in *Lopez* that specifies only the generic touching of the vaginal area over the victim's clothes. One cannot 'lewdly' or 'lasciviously' touch a reasonable person without irritating or disturbing that person." (See Traverse at 27-28).

Assuming arguendo that P.C. § 647.6(a) was a lesser-included offense of P.C. § 288(a) under the accusatory pleading test,[27] the Court nonetheless finds that Petitioner is not entitled to federal habeas relief on this claim. Based on the overwhelming evidence of Petitioner's guilt of the P.C. § 288(a) offenses, as discussed above, Petitioner has failed to meet his burden of showing there is a reasonable probability that, but for his trial counsel's failure to request that the trial court instruct the jury with P.C. § 647.6(a), the outcome of his trial would be different. The evidence at trial

[27] The Court notes that Respondent did not address the issue of whether P.C. § 647.6(a) was a lesser-included offense of P.C. § 288(a) under the accusatory pleading test (see Return at 63-64; Response to the Traverse at 8-10; Response to the Supporting Reply at 7).

established that Petitioner did far more than merely irritate the victims; in fact, the evidence clearly established that Petitioner touched the victims with the intent to arouse his sexual desires.

Accordingly, based on an independent review of the record,[28] the Court finds that the California Supreme Court's rejection of Petitioner's ineffective assistance of counsel claim based on trial counsel's failure to request a lesser-included offense instruction was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

D. Cruel and Unusual Punishment

In Ground Five, Petitioner contends that his 15-years to life sentence, under California's "One-Strike law" (because his sexual offenses involved two victims),[29] constituted cruel and unusual punishment under the Eighth Amendment. Petitioner claims that his sentence was disproportionate to the crimes, because the crimes were non-violent and involved, at most, Petitioner touching two girls on the outside of their clothing for 7-10 seconds, during a ten-to-twenty minute audition, and one of the victims -- Galesia –- "really didn't realize what [Petitioner] was trying to do" (see 3 RT 680). As support for his claim, Petitioner notes that California punishes people

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[28] For the same reasons, the Court also finds that Petitioner's claim would fail even under *de novo* review.

[29] Under California law, a person who is convicted of committing a lewd or lascivious act under P.C. § 288(a) against more than one victim "shall be punished by imprisonment in the state prison for 15 years to life." See P.C. §§ 667.61(b), (c)(8), (e)(4).

convicted of second degree murder and other offenses (including voluntary manslaughter, kidnapping, mayhem, assault with intent to commit mayhem or rape, assault with caustic chemicals, with intent to injure or disfigure, arson that causes great bodily injury, shooting at an inhabited dwelling, and willful infliction of "unjustifiable physical pain" on a child under circumstances or conditions likely to produce great bodily harm or death) less severely. Petitioner further supports his claim by noting that he rejected the prosecution's three-year offer prior to the preliminary hearing, and rejected the prosecution's ten-year offer immediately prior to the commencement of trial. (Petition at 6; Traverse at 38-42).[30]

In Rummel v. Estelle, 445 U.S. 263, 274 (1980), the Supreme Court stated that "for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." Noting that it would only employ a proportionality principle in an extreme case (see id. at 274 n.11), the Supreme Court upheld against an Eighth Amendment challenge a mandatory sentence of life imprisonment with the possibility of parole imposed on a Texas recidivist[31] who had been convicted of obtaining

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[30] Petitioner alleged his Eighth Amendment cruel and unusual punishment claim in his October 7, 2004 California Supreme Court habeas petition, as supplemented by his May 2, 2005 Memorandum. (See July 24, 2007 Notice of Lodgment No. 15 at 13, Supplemental Memorandum at 27-28). The California Supreme Court summarily denied that habeas petition without citation to authority. (See July 24, 2007 Notice of Lodgment No. 16).

[31] The purpose of a recidivist statute was described as follows: ". . . Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses (continued...)

$120.75 under false pretenses, after prior convictions for fraudulent use of a credit card to obtain $80 worth of goods or services, and for passing a forged check for $28.36. Id. at 285.

Three years after the Rummel decision, in Solem v. Helm, 463 U.S. 277, 281 (1983), the Supreme Court ruled that the Eighth Amendment prohibited a life sentence without the possibility of parole for a seventh nonviolent felony where the triggering offense was uttering a no account check for $100. The Supreme Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted," and that "a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Id. at 290-92. However, the Supreme Court specifically stated in Solem that it was not overruling Rummel, whose facts the Court characterized as "clearly distinguishable." Id. at 288 n.13, 303-04 n.32.

Although there was no majority opinion on the proportionality issue in the Supreme Court's subsequent decision rejecting an Eighth Amendment challenge in Harmelin v. Michigan, 501 U.S. 957 (1991), the Supreme Court construed the Rummel, Solem and Harmelin trilogy of cases as

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[31] (...continued)
serious enough to be punished as felonies, to segregate that p erson from the rest of society for an extended period of time. This segregation and its duration are based not merely on the person's most recent offense but also on the propensities he has been convicted of and sentenced for other crimes." Rummel, 445 U.S. at 284.

standing for the "clearly established" rule that "[a] gross disproportionality principle is applicable to sentences for terms of years." Lockyer v. Andrade, 538 U.S. 63, 72 (2003). The Supreme Court further observed that the precise contours of the gross disproportionality principle "are unclear, applicable only in the 'exceedingly rare' and 'extreme' case." Id.; see also Graham v. Florida, 560 U.S. 48, 59-60 (2010).

In Andrade, supra, the Supreme Court rejected a state habeas petitioner's Eighth Amendment challenge to a 50 years to life sentence imposed under California's Three Strikes Law, finding that "it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison" for two counts of petty theft. Andrade, 538 U.S. at 77. In Ewing v. California, 538 U.S. 11 (2003), a companion case to Andrade decided the same day, the Court held that a 25 years to life sentence following a third strike conviction for shoplifting three golf clubs worth approximately $1,200, did not violate the Eighth Amendment's prohibition on cruel and unusual punishments, stating, "[i]n weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." Id. 538 U.S. at 29. The Court concluded that "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record," and that "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" See id. at 29-31.

Although the Supreme Court has "exhibit[ed] a lack of clarity regarding what factors may indicate gross disproportionality", see Andrade, 538 U.S. at 72, the Court has identified three factors to be considered as part of the disproportionality analysis, as noted above. See Solem, 463 U.S. at 292. However, the Supreme Court has not mandated a comparative analysis within and between jurisdictions. See Ewing, 538 U.S. at 23; Solem, 463 U.S. at 291-92. Where a comparison of the gravity of the offense with the harshness of a sentence does not raise an "inference of gross disproportionality," there is no need to consider the other factors. Harmelin, 501 U.S. at 1005 ("[I]ntrajurisdictional and interjursdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

Federal courts should be "reluctant to review legislatively mandated terms of imprisonment for crimes concededly classified and classificable as felonies." Hutto v. Davis, 454 U.S. 370, 374 (1982); see also Rummel, 445 U.S. at 274. "A punishment within legislatively mandated guidelines is presumptively valid." United States v. Mejia-Mesa, 153 F.3d 925, 930 (9th Cir. 1998), citing Rummel, 445 U.S. at 272. "Generally, so long as the sentence imposed does not exceed the statutory maximum, it will not be overturned on eighth amendment grounds." United States v. McDougherty, 920 F.2d 569, 576 (9th Cir. 1990); see also United States v. Cupa-Guillen, 34 F.3d 860, 864 (9th Cir. 1994)("[A] sentence within the limits set by a valid statute may not be overturned on appeal as cruel and unusual punishment unless the sentence is so 'grossly out of proportion to the severity of the crime' as to shock our sense of justice.").

"The one strike law was enacted to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction." People v. Palmore, 79 Cal.App.4th 1290, 1296 (2000). The one strike law "reflects the Legislature's zero tolerance toward the commission of sexual offenses against particularly vulnerable victims." People v. Alvarado, 87 Cal.App.4th 178, 200-01 (2001).

Although Petitioner's current offenses involved the touching of the two girls on the outside of their clothing for a brief period of time, they are more serious than the obtaining money under false pretenses conviction in Rummel, the petty theft convictions in Andrade, and the shoplifting conviction in Ewing, all of which resulted in longer sentences than what Petitioner received. Moreover, like the Petitioner in Andrade, Petitioner had a criminal history involving sexual misconduct, i.e., 1997 misdemeanor convictions for lewd or lascivious act with a child under the age of 14 and for sexual battery, 1999 conviction for sexual battery (see sealed Probation Report at 2), and other sexual misconduct for which he was not charged.

While Petitioner's sentence may be harsh, Petitioner's case simply is not one of the rare cases where a comparison of the offenses committed and the sentence imposed leads to an inference of gross disproportionality. In light of United States Supreme Court decisions, the Court is unable to find that Petitioner's sentence constituted cruel and unusual punishment in violation of the Eighth Amendment. See Villaneuva v. Frauenheim, 2014 WL 4245914, *7-*11 (C.D. Cal. April 7, 2014)(four consecutive sentences of fifteen years to life for convictions involving four separate acts of forcible lewd conduct on

three children was not cruel and unusual punishment, even where Petitioner had no criminal record and his actions involved forcible kissing as opposed to more serious forms of sexual misconduct); Simental v. McEwan, 2014 WL 360191, *14 (C.D. Cal. Jan. 29, 2014)(three consecutive sentences of fifteen years to life for convictions involving three separate acts of child molestation upon two children was not cruel and unusual punishment); Tessier v. Runnels, 2009 WL 1530670, *5-*9 (C.D. Cal. May 26, 2009)(three consecutive sentences of fifteen years to life for convictions involving the molestation of three children did not constitute cruel and unusual punishment, even where Petitioner had no criminal record and his actions did not involve violence); see also Norris v. Morgan, 622 F.3d 1276, 1293 (9th Cir. 2010)(a sentence of life without parole under a "two strike" recidivist statute for a child molestation conviction which involved the touching of the victim's genitalia over her clothing for at most "a couple of seconds" was not cruel and unusual punishment).

Accordingly, based on an independent review of the record, the Court finds that the California Supreme Court's rejection of Petitioner's cruel and unusual punishment claim was neither contrary to, nor involved an unreasonable application of, clearly established federal law.

VII. RECOMMENDATION

For the reasons discussed above, it is recommended that the district court issue an Order: (1) accepting this Final Report and Recommendation; (2) denying the Petition for Writ of Habeas Corpus; and

(3) directing that Judgment be entered dismissing this action with prejudice.

DATED: May 5, 2017.

/s/
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

S128321

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re PAYMAN BORHAN on Habeas Corpus

Petition for writ of habeas corpus is DENIED.

Chief Justice

Tate

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAYMAN BORHAN,

Defendant and Appellant.

B166670

(Los Angeles County
Super. Ct. No. KA048417)

APPEAL from a judgment of the Superior Court of Los Angeles County, Theodore D. Piatt, Judge. Affirmed with modifications.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Alan D. Tate, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Payman Borhan, appeals from his convictions for two counts of lewd acts upon a child under the age of 14. (Pen. Code,[1] § 288, subd. (a).) The jury also found that defendant committed the offenses on more than one victim at the same time and in the identical course of conduct. (§§ 667.61, subd. (b), 1203.066, subd. (a)(7).) Defendant argues the trial court improperly denied his motion to substitute retained counsel and admitted propensity evidence. The Attorney General argues the defendant's presentence credits must be adjusted. We affirm and modify the judgment to alter the presentence credit award.

II. FACTUAL BACKGROUND

A. The charged offenses

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Osband* (1996) 13 Cal.4th 622, 690; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On approximately March 1, 2000, Valene L. and Gelesia M. were 10 years old. Valene and Gelesia were cousins. Defendant installed a water filtration system at Valene's father's home that day. Defendant told Valene: "You are a beautiful young lady. Would you like to be in a commercial?" Valene responded affirmatively. Defendant later came to Valene's mother's home for an interview and "audition." Defendant demonstrated dance steps for Valene to use in the alleged commercial. After about 10 minutes, Valene's mother left to do laundry. However, Valene's 16-year-old sister, Vanessa, was present.

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

Valene's brother was also present for part of the time. At one point, defendant had Valene sit on his lap and say, "I love you, Daddy." Defendant instructed Valene to do a "cheerleading kind of routine." Thereafter, defendant danced with Valene. As they danced, defendant placed his leg between her legs. The top of defendant's knee touched Valene's vaginal area for approximately seven seconds. Valene believed defendant intentionally touched her. Valene became uncomfortable and scared because she knew she should not be touched there.

Shortly thereafter, Valene saw Gelesia arrive. Valene called Gelesia into the kitchen. Defendant told Valene and Gelesia to stand straight. Defendant told the two girls they were not standing up straight. Thereafter, defendant placed his open hands, palm up underneath Valene's breasts and pushed upwards for six or seven seconds. Defendant then did the same to Gelesia. Valene was very uncomfortable. Valene also believed defendant had intentionally touched her breasts. Valene also believed defendant intentionally touched Gelesia's breasts. Defendant also placed one hand on Valene's upper breast area and his other hand on her back shoulder blade to straighten her posture. Valene testified as to what happened next, "I told him that I wanted to go and tell my mother something." Valene then testified, "I went outside and told my mother." Valene's mother told defendant they had to go somewhere. Thereafter, Valene's mother telephoned the police.

Gelesia recalled being present from the beginning of Valene's audition. Valene's mother encouraged Gelesia to join in the "audition." Gelesia saw defendant touch Valene inappropriately with his leg. Gelesia also saw defendant place both of his hands underneath Valene's breasts and lift up. Defendant was smiling at the time. Gelesia thought Valene appeared uncomfortable. During the skit, defendant had Valene repeatedly say, "Oh, Daddy." Defendant simultaneously placed his leg between Valene's legs and touched her "private parts" or vaginal area with his knee. Valene looked very uncomfortable again. Defendant also told Gelesia to stand up straight and placed his hands underneath her breasts and lifted up. Gelesia felt "very weird" and

uncomfortable that someone unknown to her had touched her. Gelesia knew that what defendant was doing was wrong. Gelesia believed defendant's acts were intentional. Gelesia did not say anything because she was scared and nervous.

Vanessa L. is Valene's sister. Vanessa saw defendant place his hand underneath Valene's breast for approximately five seconds. Defendant looked happy at the time. Vanessa also saw defendant place his leg between Valene's legs. It appeared to Vanessa that defendant's knee area touched Valene's private area for five or six seconds. Valene looked very serious and uncomfortable. Vanessa was not present during the entire time defendant was auditioning her sister.

Jose Gonzalez was the president of Continental Water Softener Company in March 2000. Defendant was a subcontractor for Mr. Gonzalez's company at that time selling water purification systems. The company was not in the process of making any commercials or advertisements at that time. Defendant was not authorized to audition anyone for commercials or modeling advertisements.

B. The uncharged crimes

In July 1998, Cynthia T. was 23 years old. Defendant drove by Ms. T.'s home. Defendant told her he was a talent scout for the Ford Modeling Agency looking for models for commercials. Defendant gave Ms. T. his business card. Defendant later auditioned Ms. T. at her home. Defendant showed Ms. T. a portfolio of photos of different "girls" with whom he worked. Defendant had Ms. T. read a few lines and walk back and forth. Defendant got behind her. Defendant moved his hands up and down Ms. T.'s body and instructed her how to move. Defendant cupped Ms. T.'s breasts then moved his hands up and down her chest and waist area. Ms. T. was uncomfortable. Defendant also touched Ms. T.'s breast as he ostensibly tried to straighten her posture. Later, defendant had Ms. T. do a love scene where she was to kiss him. Defendant repeatedly told Ms. T. to kiss him. Defendant kissed Ms. T. and placed his tongue in her

mouth. Ms. T. backed off in surprise. Ms. T.'s mother entered the room. Ms. T.'s mother screamed at defendant and told him to leave.

In August 1998, Song L. was approached by defendant as he drove in her neighborhood. Defendant stopped Ms. L. as she was on the sidewalk. Defendant said he owned a water business and was looking for actresses for a commercial. Ms. L. was 21 years old. Defendant went to Ms. L.'s apartment to audition her. Defendant told her he was going to do a dance routine with her because that would be used in a commercial for a water company. After a few dance spins and dips, defendant stood behind Ms. L. and placed one hand over her chest and inside her bra. Defendant placed his other hand on her groin area. When Ms. L. asked what he was doing, defendant responded: "Oh, it's okay. It's okay." Ms. L. managed to free herself from that position. Ms. L. told defendant she no longer wanted to participate in the "audition." Ms. L. believed defendant grabbed her breast intentionally as he restrained her. Defendant had also asked her to rehearse kissing him. Ms. L. did not want to do so. Ms. L. also believed defendant intentionally pressed down hard on her pubic area. Defendant had also attempted to straighten Ms. L.'s posture.

Also during August 1998, defendant went to the home of Brenda C. for an audition for commercials. Ms. C. met defendant through her sister, whom he had initially approached. Ms. C.'s parents were present when defendant arrived at 9 p.m. Following introductions, defendant asked Ms. C.'s parents to leave the room so they would not influence the audition. Defendant had a photo portfolio with pictures of other young women. Defendant showed Ms. C. how to walk and stand up straight by using his hand behind her back. Defendant used his other hand to lift her breast. Defendant lifted her breast up several times. Initially, Ms. C. did not feel anything was "weird." Defendant also showed Ms. C. how to tango. As he held her back he placed his leg between her legs. At another time during the dancing, defendant's hand slipped into her shirt under her bra. Defendant's hand touched Ms. C.'s right breast. Ms. C. felt uncomfortable but thought it was "procedure." Ms. C. believed defendant intentionally

put his hand under her bra and grabbed her. Ms. C. pushed defendant away. Defendant then had Ms. C. to act excited about having won a car, run up to him, and then hug him. After repeating that several times, defendant told Ms. C. to tell him how much she loved him and hold his face next to hers. When Ms. C. did so, he grabbed her face and stuck his tongue in her mouth. Ms. C. was "disgusted" and pushed him away. When Ms. C. refused to repeat that "move," defendant told her she had passed the audition.

III. DISCUSSION

A. Substitution of Counsel

Defendant argues the trial court improperly denied his motion to substitute retained counsel.

1. Factual and procedural background

The preliminary hearing was conducted on August 12, 2002. Defendant was represented by retained counsel at the preliminary hearing. On August 26, 2002, defendant appeared in court and waived time for trial and arraignment. Defendant was represented by the public defender's office at that hearing. At the time of the September 4, 2002, arraignment, defendant was represented by Deputy Public Defender Kenneth Wenzyl. Defendant also appeared with Mr. Wenzyl on October 17, 2002. Defendant was a "miss-out" on November 15, 2002, when a readiness conference was held. On November 19, 26, and December 3, 2002, defendant was present "in lock up" when his jury trial was trailed. On December 4, 2002, defendant was present "in lock up" when the matter was transferred to Division 7 for jury trial. Later that day, the cause was called for trial. A panel of prospective jurors was given the perjury admonishment in defendant's presence. Immediately thereafter, defendant stated he

needed to speak to the court. The trial court advised defendant that would occur later and continued to address the jury. Defendant, again in the jurors' presence, interrupted stating: "Excuse me, Your Honor, I'm not— [¶] [¶] My family's bringing a private lawyer. I really do not wish to go to the trial." The trial court responded, "This case is going to be tried in this courtroom and tried today." Again, defendant spoke out: "Excuse me. It has—it has not been communicated— [¶] [¶] He has not seen me since yesterday. My public defender has not come to see me, Sir. I have been wanting to talk to him since yesterday that I don't want to go through to trial because last night—night—I talked [sic] my family. My mother of my daughter from Mexico called, and she's bringing—" The trial court responded: "Sir, we're going to try this lawsuit in this courtroom. Today. And I don't want you to say another word now while the jurors are in the courtroom. Not one more word." Defendant continued in the presence of the jurors to interrupt the trial court. The trial judge asked the prospective jurors to leave the courtroom.

Thereafter, the trial court again advised defendant that the trial would go forward. The trial court explained, "You happen to be represented by one of the best public defenders in our district who's been in my court for years numerous times, and I'm not going to accept any comments from you on the date of trial about the ineffective assistance of your lawyer." The trial court further explained: "[Y]ou're telling me today that on the day of trial, the last day of trial, that you've got somebody that's ostensibly bringing in another attorney to represent you. It's not accepted by me. This matter came from another department. It—it was answered ready. It's going to be tried." The trial court admonished defendant not to speak out when court was in session. The trial court also stated, "I'm not going to hear anything else about continuance of this trial on this." Defendant then explained to the trial court, "I had not seen Mr. Wenzl since about two months, or two months ago." Defendant then changed his story. Defendant said, "I have not seen him since yesterday." Defendant stated, "So what I did yesterday after I asked him in the afternoon, I said, you know, are you going

to bring the psychiatrist. he said, no, I'm not bringing the psychiatrist." Defendant continued on, "I did not know yesterday when I called and he said D.A. did not accept that." Defendant then indicated there was a conflict of interest with Mr. Wenzl. The trial court asked the prosecutor to leave the courtroom so that it could conduct a substitution of counsel hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, 122.

Thereafter, defendant explained: "But so I asked him that, you know, that I like to – I like to get him a – have interview with like four people and out that four people, only one interview was done. [¶] . . . [T]he other three interview was not done . . . ." Defendant further disagreed with Mr. Wenzl's decision not to call a psychiatrist as a witness. Defendant also expressed unhappiness with Mr. Wenzl's refusal to bring a "95" motion. Defendant requested that the trial court appoint another public defender. In the alternative, defendant requested permission to hire a private attorney. The trial court stated: "I will consider that a motion that you're making right now. You're making a motion to discharge your lawyer?" Defendant responded, "Yes." The trial court stated, "And get another attorney?" Defendant responded, "Please." The trial court responded, "That motion is made, and that motion is denied." Mr. Wenzl denied having not seen defendant in over a two-month period. Mr. Wenzl explained he had spoken with a deputy district attorney, a Ms. Cady, about an unidentified psychiatrist's recommendation for a one-year program. The prosecutor refused to enter into a disposition which only required defendant participate in a one-year program. Defendant indicated he would not accept the 10-year offer. Mr. Wenzl relayed Ms. Cady's offer to defendant—10 years in prison.

Defendant then asked if he could retain a private lawyer. Defendant explained that he spoke to the mother of his daughter in Mexico the previous evening. She indicated she would send money. Defendant also stated he spoke to his fiancée in Canada, who would also send money. The trial court responded, "Not timely." Defendant continued to explain about his family concerns and mental health. The trial court ultimately stated: "I'm going to instruct my reporter to not report anything else

that [defendant] says. He's attempting to obstruct these proceedings with—he's attempting to obstruct the proceeding. We're going to call the jury back inside. We're going to select the jury. . . . [T]he trial will begin, and the trial will end. And I'm not going to continue the case, and I'm not going to let you bring another lawyer in on the last day of ten days of ten."

Thereafter, the trial court again explained to defendant that he would be required to be quiet during the trial or would be removed from the courtroom. Defendant again stated he wanted another lawyer. The trial court responded: "You can't have another lawyer. You can't continue this case. [¶] . . . [¶] You haven't stated any grounds for discharging [defense counsel] from this lawsuit. You haven't stated any grounds." Defendant then said, "Yesterday I asked Mr. Wenzl . . . I said, can I . . . bring a private lawyer to work with you joint . . . ." The trial court indicated: "I don't care if somebody else come here, but [defense counsel] is your attorney; and he makes the decision. I don't care if somebody else comes in." Jury selection continued. On the following day, defendant stated: "Pardon me, Your Honor. Excuse me. I see the private counsel my family brought in has left. I'm putting my trust in God, and I am going to continue." The record does not make any other reference to the purported private counsel's alleged presence.

2. Substitution of retained counsel

The California Supreme Court has held: "The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing. [Citations.]' [Citation.]" (*People v. Courts* (1985) 37 Cal.3d 784, 789, quoting *People v. Holland* (1978) 23 Cal.3d 77, 86, overruled on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7.) However, the Supreme Court has held: "[T]he right [to retain counsel of choice] 'can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly

processes of justice unreasonable under the circumstances of the particular case.' [Citations.]" (*People v. Courts, supra,* 37 Cal.3d at p. 790, original italics, quoting *People v. Crovedi* (1966) 65 Cal.2d 199, 208; *People v. Jeffers* (1987) 188 Cal.App.3d 840, 849-850.) The Supreme Court has held: "The right to such counsel 'must be carefully weighed against other values of substantial importance, such as that seeking to ensure orderly and expeditious judicial administration, with a view toward an accommodation reasonable under the facts of the particular case.' [Citation.]" (*People v. Courts, supra,* 37 Cal.3d at p. 790, quoting *People v. Byoune* (1966) 65 Cal.2d 345, 346.) In *People v. Ortiz* (1990) 51 Cal.3d 975, 983-984, the Supreme Court held: "[T]he 'fair opportunity' to secure counsel of choice provided by the Sixth Amendment 'is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of "assembling the witnesses, lawyers, and jurors at the same place at the same time."'" (Accord, *People v. Lara* (2001) 86 Cal.App.4th 139, 153.)

The *Courts* decision concluded: "A continuance [for the purpose of retaining an attorney] may be denied if the defendant is 'unjustifiably dilatory' in obtaining counsel, or 'if he arbitrarily chooses to substitute counsel at the time of trial.' [Citation.]" (*People v. Courts, supra,* 37 Cal.3d at pp. 790-791; *People v. Byoune, supra,* 65 Cal.2d at pp. 346-347 *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.) On review, we look to the circumstances and reasons presented to the trial court at the time the request was denied to determine whether the denial was so arbitrary as to violate due process. (*People v. Frye* (1998) 18 Cal.4th 894, 1013; *People v. Courts, supra*, 37 Cal.3d at p. 791; *People v. Crovedi, supra,* 65 Cal.2d at p. 207; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850.) The defendant has the burden of demonstrating an abuse of discretion. (*People v. Courts, supra,* 37 Cal.3d at p. 791; *People v. Strozier* (1993) 20 Cal.App.4th 55, 60; *People v. Jeffers, supra,* 188 Cal.App.3d at p. 850; *People v. Blake* (1980) 105 Cal.App.3d 619, 624.)

In this case, defendant waited until the jury was present to request a continuance for purposes of retaining counsel. Defendant did not have the name of the lawyer or any way of verifying the attorney could go forward with the trial in a short period of time. Defendant did not demonstrate sufficient circumstances supporting his request to continue the trial. The record does not suggest defendant made a good faith, diligent effort to retain counsel before trial. As a result, defendant has not met his burden to show the trial court abused its discretion in denying his request for a continuance to secure new counsel. (*People v. Jeffers, supra,* 188 Cal.App.3d at p. 850; *People v. Rhines* (1982) 131 Cal.App.3d 498, 506.)

3. Substitution of appointed counsel

Moreover, the trial court could properly rule that defendant was not entitled to new appointed counsel. The California Supreme Court recently reiterated: "The governing legal principles are 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 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. Hart* (1999) 20 Cal.4th 546, 603, quoting *People v. Fierro* (1991) 1 Cal.4th 173, 204 and *People v. Crandell* (1988) 46 Cal.3d 833, 854; see also *People v. Nakahara* (2003) 30 Cal.4th 705, 718; *People v. Barnett* (1998) 17 Cal.4th 1044, 1085; *People v. Hines* (1997) 15 Cal.4th 997, 1025.)

We review the trial court's denial of the motion for substitution of counsel for abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 876; *People v. Hart, supra,* 20 Cal.4th at pp. 603-604; *People v. Horton* (1995) 11 Cal.4th 1068, 1102; *People v.*

Memro (1995) 11 Cal.4th 786, 857; *People v. Berryman* (1993) 6 Cal.4th 1048, 1070, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Although defendant had a right to an adequate and competent defense, he did not have the right to present a particular theory of exculpation of his choosing. (*People v. Welch* (1999) 20 Cal.4th 701, 728-729; see *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) Tactical disagreements between a defendant and counsel do not alone establish an "'irreconcilable conflict.'" (*People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729; *People v. Hines, supra,* 15 Cal.4th at pp. 1025-1026; *People v. Carpenter* (1997) 15 Cal.4th 312, 376 ["When a defendant chooses to be represented by professional counsel, that counsel is 'captain of the ship' and can make all but a few fundamental decisions for the defendant"].) Moreover, it is an abuse of discretion for the court to appoint new counsel absent a showing the appointed attorney does not or cannot adequately represent the accused. (*People v. Smith* (1993) 6 Cal.4th 684, 696; *Ng v. Superior Court* (1997) 52 Cal.App.4th 1010, 1022-1023, overruled on a different point in *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1069, fn. 6.)

At the time the *Marsden* hearing was conducted, defendant's reasons for requesting the appointment of new counsel related to Mr. Wenzl's: inability to convince a prosecutor, Ms. Cady, to accept a plea and psychiatric placement; refusal to call the psychiatrist as a witness; failure to interview all the witnesses defendant suggested; and refusal to make what appears to be a section 995 motion. Mr. Wenzl refuted the claim there had been no meeting for over two months with defendant. (This occurred after defendant contradicted his two-month story.) It was also apparent Mr. Wenzl had been involved in defendant's case and made tactical decisions regarding that representation. In this instance, the trial court provided defendant with the opportunity to set forth any complaints about Mr. Wenzl. The trial court further took comments from Mr. Wenzl, who explained what had occurred regarding the psychiatric report and plea discussions. The trial court could reasonably conclude that Mr. Wenzl's representation of defendant

was neither inadequate nor marked by irreconcilable conflict. The trial court did not abuse its discretion in denying defendant's substitution of counsel motion.

B. Evidence of Prior Sexual Misconduct

Defendant argues the trial court improperly admitted propensity evidence pursuant to section 1108. Defendant further argues that the admission of such evidence violated his federal constitutional rights to due process and equal protection.

1. Evidence Code section 402 hearing

Prior to trial in this case, the prosecutor sought to introduce evidence of three prior incidents involving defendant's touching of young women in the breast and vaginal areas while "auditioning" them for commercials pursuant to Evidence Code sections 1101, subdivision (b)[2], and 1108[3]. The prosecutor, Pak Kouch, explained she sought to introduce the evidence pursuant to Evidence Code section 1101, subdivision

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2 Evidence Code section 1101 provides in pertinent part: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

3 Evidence Code section 1108 provides in pertinent part: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

(b) to demonstrate motive, specific intent, plan, knowledge of wrongfulness, identity, and that the acts were not accidental. The prosecutor also argued that the evidence fell within the Evidence Code section 1108 exception because defendant committed almost identical acts on three previous occasions wherein he touched the breasts and vaginal areas of young women under the pretense of a demonstration during their audition for a commercial. In finding the evidence admissible, the trial court made specific findings: "And I'm going to make the finding, part of the argument against it underscores why it's relevant; and that is that [the prosecutor is] obligated to prove a sexual intent in this case. And under [Evidence Code section] 1101[, subdivision (b)], that would be admissible. [The prosecutor] made the motion under both [Evidence Code sections] 1101[, subdivision (b)] and 1108. [¶] [Evidence Code section] 1101[, subdivision (b)] never permitted propensity evidence. Section 1108 is a legislative enactment that propensity evidence is admissible unless the probative value is substantially outweighed by the prejudicial effect. And in this case, considering the great similarity in the offenses and the fact that there is a series of elements that [the prosecutor] referred to in her motion which have to be proved, that occurs to me it's relevant. [¶] And it is given with a limiting instruction at the time that the evidence is presented to the jury, and presumably the jury will follow the limiting instruction; but I do not believe that the prejudicial effect outweighs the probative value when we consider the present offenses and what [the prosecutor] has to prove, rather than accident or mistake, and that [the prosecutor] does have to prove intent." The jurors were instructed with CALJIC Nos. 2.50, 2.50.1, and 2.50.1, which explained the limits within which they could consider such prior sex offenses.

2. Waiver of constitutional claim

Preliminarily, defendant's constitutional contention was not the basis of an objection in the trial court and thus is the subject of waiver, forfeiture, and procedural

default. (*United States v. Olano* (1993) 507 U.S. 725, 731; *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Vera* (1997) 15 Cal.4th 269, 274; *People v. Padilla* (1995) 11 Cal.4th 891, 971, overruled on another point in *People v. Hill, supra,* 17 Cal.4th at p. 823, fn. 1; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20; *People v. Garceau* (1993) 6 Cal.4th 140, 173; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; *People v. McPeters* (1992) 2 Cal.4th 1148, 1174; *People v. Walker* (1991) 54 Cal.3d 1013, 1023; *People v. Ashmus* (1991) 54 Cal.3d 932, 972-973, fn. 10; *People v. Yarbrough* (1997) 57 Cal.App.4th 469, 477-478.)

3. Admissibility of evidence

Notwithstanding that waiver, we review the trial court's rulings concerning the admissibility of evidence for an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Rowland* (1992) 4 Cal.4th 238, 264.) In *People v. Falsetta* (1999) 21 Cal.4th 903, 911, the California Supreme Court held: "Available legislative history indicates [Evidence Code] section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and defendant's credibility. In this regard, [Evidence Code] section 1108 implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*Ibid.*; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 281; *People v. Frazier* (2001) 89 Cal.App.4th 30, 40.) The *Falsetta* court clarified: "Under [Evidence Code] section 1108, courts will retain broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offenses makes on the jury, outweighs its probative value. (See, e.g., [*People v.*] *Harris* [(1998)] 60 Cal.App.4th [727,] 740-741 [reversing conviction]; [*People v.*] *Fitch* [(1997)] 55 Cal.App.4th [172,] 183.) We have

no reason to assume [] that 'the prejudicial effect of a sex prior will rarely if ever outweigh its probative value to show disposition.'" (*People v. Falsetta, supra,* 21 Cal.4th at p. 919.)

Because the trial court found that the evidence was admissible under both Evidence Code sections 1101, subdivision (b) and 1108, we could find error only if the testimony was inadmissible under both sections. (See *People v. Branch, supra,* 91 Cal.App.4th at pp. 280-281.) In fact, without abusing discretion, the trial court could have concluded the testimony was admissible under both sections. The current offenses and the uncharged crimes were within those defined by Evidence Code section 1108, subdivision (d), as "qualifying 'sexual offenses.'" (*Id.* at p. 281.) The trial court found there was great similarity in the prior uncharged offenses and the current crimes. Moreover, as our colleagues in Division Seven of this appellate district held: "The . . . crimes need not be sufficiently similar that evidence of the [prior sex offenses] would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in [Evidence Code] section 1108." (*People v. Frazier, supra,* 89 Cal.App.4th at pp. 40-41.) In addition, the trial court could properly find that the evidence of prior sex offenses was admissible to establish intent pursuant to Evidence Code section 1101, subdivision (b). (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900.) Also, the trial court did not abuse its discretion in failing to exclude the evidence of prior sexual misconduct pursuant to Evidence Code section 352[4]. The trial court gave detailed reasons for admitting the prior sex offense evidence and indicated that it was weighing those matters pursuant to Evidence Code section 352.

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[4] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Defendant argues that the recent Ninth Circuit Court of Appeal decision in *Garceau v. Woodford* (9th Cir. 2001) 275 F.3d 769, 773-776, overruled on another point in *Woodford v. Garceau* (2003) 538 U.S. 202, 210, dictates reconsideration of the California Supreme Court holding in *Falsetta*. We disagree. We are bound by the California Supreme Court's holding in *Falsetta*. (*Musser v. Provencher* (2002) 28 Cal.4th 274, 287; *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, even if we had authority to revisit the *Falsetta* finding that Evidence Code section 1108 does not violate due process, a lower federal court's holdings are not binding on state courts even when they concern federal questions. (*People v. Camacho* (2000) 23 Cal.4th 824, 830; *In re Tyrell J.* (1994) 8 Cal.4th 68, 76.) In any event, the findings of *Garceau* are not instructive. The Ninth Circuit found, as did the California Supreme Court, that the instruction given related to evidence introduced pursuant to Evidence Code section 1101, subdivision (b) improperly allowed the jurors to consider the evidence for any purpose, including criminal disposition. The Ninth Circuit merely disagreed with the Supreme Court's harmless error finding.

4. Harmless error

Nonetheless, any error in admitting the evidence of defendant's prior sex offenses was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 36; *People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Watson* (1956) 46 Cal.2d 818, 836.) No witnesses testified for the defense. Both Valene and Gelesia gave convincing testimony regarding defendant's acts against them. Their testimony was corroborated by Vanessa, who was present part of the time when defendant inappropriately touched Valene. Moreover, the testimony could be properly admitted pursuant to Evidence Code section 1101, subdivision (b). Given the uncontroverted nature of the prosecution case, any error was harmless.

C. Presentence Credits

The Attorney General argues that defendant's presentence credits were inaccurately computed. We agree with the argument, but disagree with the calculations. The failure to award a proper amount of credits is a jurisdictional error, which may be raised at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11, 349, fn. 15; *People v. Serrato* (1973) 9 Cal.3d 753, 763-765, disapproved on other grounds in *People v. Fosselman* (1983) 33 Cal.3d 572, 583, fn. 1.) Defendant received an incorrect award of presentence credits. (§§ 2900.5, 2933.1.) He should have received 35 days of conduct credit as well as 243 days actual credit for a total of 278 days.

IV. DISPOSITION

The amount of presentence credits is to be changed to 278 days which includes 35 days of conduct credit. Upon issuance of the remittitur, the superior court clerk is directed to correct the abstract of judgment to reflect defendant's presentence credits of 278 days, including 243 actual days and 35 days of conduct credit. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.

DECLARATION OF STEPHEN I. BLANCHFILL

I, Stephen I. Blanchfill declare:

1. I was Payman Borhan's attorney in this matter. I remained his attorney throughout the preliminary hearing. At that time I had to drop out of the case due to Defendant's lack of funds in this matter. Prior to the preliminary hearing I was trying to negotiate a three year plea. This Defendant would not accept the plea due to his belief that he was innocent. At the time I had dropped out of the case I told Defendant that he had to obtain a psychiatrist and an investigator to interview witnesses. After I left the case, I was informed that Defendant's family was trying to obtain the funds to retain me a second time in this case. Prior to trial I was called by Defendant's mother . She told me that trial was about to start and that her son was upset that there seemed to be no trial preparation by the public defender. She told me that the public defender was showing conflicting attitudes toward Defendant and that Defendant had no trust in him. Defendant wanted me back in the case. The problem was that trial was to start the next day.

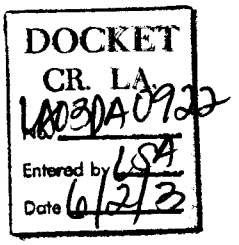
I went to court the next day to see if I could possibly obtain a continuance in the matter and get back into the case. The problem was that the jury was already impaneled. I was told by the court clerk. the public defender. and the District Attorney that if I attempted to do this I would have to start trial immediately. This I could not do. I therefore, did not try to enter the case.

I declare under the penalty of perjury that the foregoing is true and correct. Signed this 2[illegible] day of September 2003 in the City of Santa Fe Springs California.

Stephen I. Blanchfill. Declarant

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT



THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF-RESPONDENT, VS. PAYMAN BORHAM, DEFENDANT-APPELLANT.	SUPERIOR COURT NO. KA048417

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY

HONORABLE THEODORE D. PIATT, JUDGE PRESIDING

REPORTERS' TRANSCRIPT ON APPEAL

DECEMBER 4TH AND 5TH, 2002

APPEARANCES:

FOR PLAINTIFF-RESPONDENT: BILL LOCKYER
STATE ATTORNEY GENERAL
300 SOUTH SPRING STREET
NORTH TOWER, SUITE 5001
LOS ANGELES, CALIFORNIA 90013

FOR DEFENDANT-APPELLANT: IN PROPRIA PERSONA

VOLUME 2 OF 4
PAGES 1 THROUGH 314-600, INCLUSIVE

PAULA C. CHAVEZ, CSR #7943
OFFICIAL REPORTER

CASE NUMBER: KA048417
CASE NAME: PEOPLE VS. PAYMAN BORHAM
POMONA, CALIFORNIA WEDNESDAY, DECEMBER 4TH, 2002
DIVISION EAST 7 HON. THEODORE D. PIATT, JUDGE
REPORTER: PAULA C. CHAVEZ, CSR NO. 7943
TIME: 2:25 P.M.

-000-

APPEARANCES:

DEFENDANT, PAYMAN BORHAM, PRESENT IN COURT WITH COUNSEL KENNETH WENZL, DEPUTY PUBLIC DEFENDER; PAK KOUCH, DEPUTY DISTRICT ATTORNEY REPRESENTING THE PEOPLE OF THE STATE OF CALIFORNIA.

THE COURT: LADIES AND GENTLEMEN, THANK YOU FOR YOUR PATIENCE. WOULD YOU ALL PLEASE STAND TO BE SWORN AS JURORS.

THE CLERK: PLEASE LISTEN TO THE FOLLOWING STATEMENT. IF YOU AGREE WITH IT, PLEASE ANSWER BY SAYING, "I DO." DO YOU AND EACH OF YOU UNDERSTAND AND AGREE THAT YOU WILL ACCURATELY AND TRUTHFULLY ANSWER, UNDER PENALTY OF PERJURY, ALL QUESTIONS PROPOUNDED TO YOU CONCERNING YOUR QUALIFICATIONS AND COMPETENCY TO SERVE AS TRIAL JURORS IN THE MATTER PENDING BEFORE THIS COURT AND THAT FAILURE TO DO SO MAY SUBJECT YOU TO CRIMINAL PROSECUTION?

IF YOU AGREE, PLEASE ANSWER YES.

(WHEREUPON, THE JURY PANEL ANSWERED COLLECTIVELY IN THE AFFIRMATIVE.)

THE CLERK: THANK YOU.

THE DEFENDANT: EXCUSE ME, YOUR HONOR. I NEED TO TALK TO YOU FOR A FEW MINUTES.

THE COURT: WE'LL GET TO THAT, SIR.

WE'RE GOING TO CALL YOUR -- CALL YOU BY NUMBER. IT WILL BE THE LAST FOUR DIGITS OF THE BADGE THAT YOU WEAR. YOU WON'T HEAR YOUR NAMES SPOKEN IN THIS COURTROOM. I'LL TELL YOU WHY WHEN WE GET AROUND TO TALKING TO YOU ABOUT YOUR QUALIFICATIONS TO SIT AS JURORS.

FOR THE PRESENT, MY BAILIFF AND MY CLERK WILL PARTICIPATE IN DIRECTING YOU INTO THE JURY BOX; AND SHE WILL CALL --

THE DEFENDANT: EXCUSE ME, YOUR HONOR, I'M NOT -- MY --

THE COURT: I'M SORRY, SIR?

THE DEFENDANT: MY FAMILY'S BRINGING A PRIVATE LAWYER. I REALLY DO NOT WISH TO GO TO THE TRIAL.

THE COURT: THIS CASE IS GOING TO BE TRIED IN THIS COURTROOM AND TRIED TODAY.

THE DEFENDANT: EXCUSE ME. IT HAS -- IT HAS NOT BEEN COMMUNICATED --

THE COURT: SIR --

THE DEFENDANT: HE HAS NOT SEEN ME SINCE YESTERDAY. MY PUBLIC DEFENDER HAS NOT COME TO SEE ME, SIR. I HAVE BEEN WANTING TO TALK TO HIM SINCE YESTERDAY THAT I DON'T WANT TO GO THROUGH TO TRIAL BECAUSE LAST NIGHT -- NIGHT -- I TALKED MY FAMILY. MY MOTHER OF MY DAUGHTER FROM MEXICO CALLED, AND SHE'S BRINGING --

THE COURT: SIR, WE'RE GOING TO TRY THIS LAWSUIT IN

THIS COURTROOM. TODAY. AND I DON'T WANT YOU TO SAY ANOTHER WORD NOW WHILE THE JURORS ARE IN THE COURTROOM. NOT ONE MORE WORD.

THE DEFENDANT: YOUR HONOR?

THE COURT: NOTHING.

THE DEFENDANT: YOUR HONOR?

THE COURT: PLEASE SELECT 18.

THE DEFENDANT: PLEASE GIVE US FEW MINUTES, YOUR HONOR. PLEASE. THIS IS -- I CANNOT --

THE CLERK: NUMBER 3094.

THE DEFENDANT: THEY HAVE DONE THIS.

THE CLERK: PLEASE TAKE SEAT NUMBER ONE.

THE DEFENDANT: INSTEAD OF MISDEMEANOR --

THE COURT: I'M AFRAID WE'RE GOING TO HAVE TO ASK YOU TO STEP OUTSIDE FOR A SECOND. DON'T LEAVE THE COURTHOUSE. YOU'VE BEEN SWORN. WE NEED TO HAVE YOU REMAIN HERE. PLEASE STEP OUT IN THE HALLWAY.

(WHEREUPON, THE JURY PANEL EXITED THE COURTROOM.)

THE COURT: OKAY. ALL THE JURY HAS STEPPED OUT INTO THE HALLWAY.

THE DEFENDANT: YOUR HONOR?

THE COURT: SIR, YOU, HAVE TO UNDERSTAND SOMETHING. FIRST THING IS THAT YOU DON'T TALK WHEN I'M TALKING. THAT'S THE FIRST RULE. THE SECOND RULE IS THAT WE'RE GOING TO TRY THIS LAWSUIT. YOU HAPPEN TO BE REPRESENTED BY ONE OF THE BEST PUBLIC DEFENDERS IN OUR DISTRICT WHO'S BEEN IN MY COURT FOR YEARS NUMEROUS TIMES, AND I'M NOT GOING TO ACCEPT ANY COMMENTS FROM YOU ON THE DATE OF TRIAL ABOUT THE INEFFECTIVE

ASSISTANCE OF YOUR LAWYER.

THE DEFENDANT: YES, YOUR HONOR.

THE COURT: FURTHERMORE, YOU'RE TELLING ME TODAY THAT ON THE DAY OF TRIAL, THE LAST DAY OF TRIAL, THAT YOU'VE GOT SOMEBODY THAT'S OSTENSIBLY BRINGING IN ANOTHER ATTORNEY TO REPRESENT YOU. IT'S NOT ACCEPTED BY ME. THIS MATTER CAME FROM ANOTHER DEPARTMENT. IT -- IT WAS ANSWERED READY. IT'S GOING TO BE TRIED.

AND I WANT YOU TO UNDERSTAND THAT IF YOU -- IF YOU MISBEHAVE ANYMORE THAT -- I'M OBLIGATED NOW TO TELL YOU THIS -- YOU'RE NOT PERMITTED TO MISBEHAVE, AND YOU CAN'T SPEAK UP WHILE THE COURT IS IN SESSION BECAUSE BOTH LAWYERS NEED THE TIME AND THE OPPORTUNITY TO PICK A JURY AND SELECT JURORS AND CALL WITNESSES AND TRY THE LAWSUIT QUIETLY.

IF YOU CONTINUE TO MISBEHAVE, THEN WHAT I'LL HAVE TO DO IS ALTERNATIVE SUCH AS PUTTING YOU IN ANOTHER ROOM SOMEWHERE, HAVING A SOUND SYSTEM SET UP SO YOU CAN HEAR THE PROCEEDINGS. YOU ARE OBLIGATED TO SIT HERE QUIETLY WHILE WE TRY THIS LAWSUIT. PERIOD. I'M NOT GOING TO HEAR ANYTHING ELSE ABOUT CONTINUANCE OF THIS TRIAL ON THIS. THIS IS THE LAST DAY. THIS IS EITHER 60 OF 60 OR TEN OF TEN; AND I'M NOT SURE EXACTLY WHAT IT IS, BUT MY PRESUMPTION IS THAT IT'S TEN OF DAY TEN.

THE DEFENDANT: IT IS NOT, YOUR HONOR. WOULD YOU PLEASE GIVE ME FEW MINUTES TO TALK. PLEASE GIVE ME FEW MINUTES.

THE COURT: NOW THAT I SAID TO SAY WHAT I HAVE TO SAY, WHAT DO YOU HAVE TO SAY?

THE DEFENDANT: YOUR HONOR, FIRST OF ALL, I REALLY APPRECIATE GIVING ME THIS TIME TO TALK, AND I WANT YOU TO SEE THAT THIS IS TOTALLY MISCOMMUNICATION, AND TOTALLY MISCOMMUNICATION AND FAILURE TO -- I WAS DIAGNOSED LAST YEAR MANIC-DEPRESSIVE, AND 16 YEARS AGO I HAD AN EPISODE THAT HAPPENED TO ME. AND THEN THEREAFTER I WAS TOTALLY FINE TILL SIX YEARS AGO, THAT THIS -- I STARTED TO -- HAD FEW ATTACKS IN THE LAST SIX YEARS.

I HAD THEM ABOUT FIVE YEARS AGO WHEN I HAD SIMILAR SITUATION TO THIS CASE. WHAT HAPPENED TO ME THAT I HAD VERY SIMILAR SITUATION IN A ROOM FULL OF PEOPLE. I WAS -- I WAS CHARGED WHEN AFTER EIGHT MONTHS AFTER BEING IN JAIL, I WENT TO THE TRIAL; AND THEY OFFERED ME TWO MISDEMEANOR, TIME SERVED, AND SUMMARY PROBATION. AND I HAVE THE COURT REPORT ON THAT, ALSO.

I WAS SUCH A MANIC STATE, YOUR HONOR, I SAID NO TO THAT. IN THE AFTERNOON, I ACCEPTED TWO FELONY ON THE SAME CHARGE. THIS MRS. CADY, WHAT HAPPENED IS TO --

THE COURT: WHAT'S YOUR POINT, SIR? WHAT POINT ARE YOU TRYING TO MAKE? MISS CADY IS NOT HERE.

THE DEFENDANT: I WILL MAKE THAT RIGHT NOW. PLEASE ALLOW ME. YESTERDAY, OKAY, MR. WENZL CAME AND BROUGHT ME THE -- HE -- I HAD NOT SEEN MR. WENZL SINCE ABOUT TWO MONTHS, OR TWO MONTHS AGO. MR. WENZL KNOWS THAT I WAS VERY SUICIDAL, AND I WAS --

JUDGE APPOINTED ONE PSYCHIATRIST TO SEE ME. MEANWHILE I WAS -- I WAS ATTEMPTING SUICIDE. THEY STOPPED ME. THEY GOT THE RAZOR FROM ME, PUT ME ON LOCK DOWN,

CHANGED MY MEDICATION; AND SINCE THEN I HAVE REALLY BEEN FEELING GOOD THAT I HAVE NOT FELT THIS GOOD IN SUCH A MANY YEARS.

WHAT HAPPENED TO ME, YOUR HONOR, THEY -- THE DOCTOR THAT YOU SEND TO SEE ME, THIS DOCTOR EVALUATED ME, AND NOT ONLY MANIC-DEPRESSIVE BUT EMOTIONAL PROBLEM. RECOMMENDED INTO THE PROMISE. SO YESTERDAY I SEE MR. WENZL AFTER TWO MONTHS, AND HE COMES AND HE SAYS, OH, WE FINALLY GOT THE DOCTOR REPORT; AND DOCTOR SUGGESTS THAT YOU -- SEND YOU TO A PROGRAM. AND WHAT WE ARE GONNA DO IS TO SEND YOU TO -- WE CAN GET -- WE ARE GOING TO GET YOU A PROGRAM.

I SAID, HOW LONG DO YOU THINK IT'S GONNA BE? HE SAID, YOU KNOW, PERHAPS ONE YEAR, AND --

THE COURT: HE DIDN'T TELL YOU THAT. HE DIDN'T TELL YOU THAT.

THE DEFENDANT: PLEASE, HELP ME.

THE COURT: WAIT A MINUTE. HOLD ON JUST A MOMENT, PLEASE. MR. WENZL DIDN'T TELL YOU YOU COULD GET ONE YEAR OUT OF THIS CASE. HE DIDN'T TELL YOU THAT. HE COULDN'T HAVE TOLD YOU THAT BECAUSE THERE'S NO WAY YOU CAN GET ONE YEAR OUT OF THIS CASE IF YOU ARE CONVICTED.

THE DEFENDANT: OH, NO, NO. HE SAID THAT HE'S GONNA TALK TO D.A. -- TO MRS. CADY TO GET A PROGRAM FOR ME. AND WHAT HAPPENED IS TO -- HE WENT AND SPOKE TO MRS. CADY. AND OBVIOUSLY MRS. CADY LOOKED AT THOSE TWO FELONY, THAT THEY WERE SUPPOSED TO BE MISDEMEANOR FROM FIVE YEARS AGO. HE LOOKED AT THOSE TWO FELONY, AND HE SAID, NO, THIS PERSON IS A REPEAT SECOND TIME; AND WE ARE NOT GOING TO GIVE HIM THE

PROGRAM. SO THEY DECIDED TO TAKE ME TO TRIAL.

THE COURT: THAT'S WHERE WE ARE NOW.

THE DEFENDANT: BUT WHAT HAPPENED IS TO -- THERE ARE TOTALLY CONFLICT OF INTEREST BETWEEN ME AND THE PUBLIC DEFENDER.

THE COURT: OKAY. THAT'S -- AT THIS POINT, I HAVE TO ASK MISS -- COUNSEL TO PLEASE LEAVE THE COURTROOM BECAUSE THIS IS BEGINNING TO SOUND MORE AND MORE LIKE A MARSDEN MOTION.

MS. KOUCH: SO THE COURT IS CONDUCTING INFORMAL MARSDEN?

THE COURT: I BEG YOUR PARDON?

MS. KOUCH: IS THE COURT CONDUCTING A FORMAL MARSDEN MOTION AT THIS POINT?

THE COURT: I'M GOING TO, OUT OF AN ABUNDANCE OF CAUTION AT THIS TIME, BASED UPON WHAT HE JUST SAID, IT WILL BE A MATTER OF RECORD.

MS. KOUCH: OKAY. THANK YOU.

(WHEREUPON, THE D.A. EXITED THE COURTROOM.)

(AT THIS TIME, A MARSDEN HEARING WAS HELD, WHICH IS TRANSCRIBED AND SEALED, AT PAGES 8 THROUGH 16.)

(THE FOLLOWING PROCEEDINGS WERE HELD IN OPEN COURT:)

THE COURT: OKAY. MR. BORHAM, ARE YOU GOING TO BEHAVE? ARE YOU GOING TO DISRUPT THESE PROCEEDINGS FURTHER? ARE YOU GOING TO SIT THERE QUIETLY AND LET YOUR LAWYER TRY THIS CASE, OR ARE YOU GOING TO INTERRUPT THE PROCEEDINGS?

THE DEFENDANT: I DON'T MEAN TO INTERRUPT AT ALL. I JUST WANT A CHANCE TO DEFEND MYSELF FAIRLY, YOUR HONOR. I -- I WANT -- I'M MISDEMEANOR, THE SAME WAY THEY GAVE ME TWO FELONY AT THIS TIME WOULD -- I DON'T WANT TO GET 15 YEARS JUST BECAUSE IN A ROOM FULL OF PEOPLE, YOUR HONOR --

THE COURT: MR. BORHAM, I DON'T -- I'M NOT HEARTLESS BY ANY MEANS, BUT MY JOB IS NOT NOW TO BE CONCERNED ABOUT WHAT MISS CADY DID OR DIDN'T DO OR WHAT HAPPENED TEN YEARS AGO. MY JOB IS TO LET THIS LAWSUIT BE TRIED IN -- IN THIS COURTROOM AND LET THE LAWYERS HAVE THEIR DAY IN COURT. LET THE WITNESSES COME IN. LET YOU HAVE YOUR DAY IN COURT. BUT IF YOU CONTINUE TO INTERFERE LIKE THIS AND NOT LET THE CASE GO FORWARD, I HAVE TO LET YOU KNOW WHAT YOUR OPTIONS ARE.

THE OPTIONS ARE IF YOU CONTINUE TO INTERFERE, YOU CAN EITHER STAY IN THE COURTROOM AND BE GAGGED IN FRONT OF THE JURY PANEL, OR YOU'LL HAVE TO BE TAKEN BACK INTO THE LOCK-UP BECAUSE I CAN'T LET YOU INTERFERE WITH THE PROCESS OF THIS COURT.

NOW, I BROUGHT YOU BACK IN THIS TIME SO THAT I COULD TELL YOU THAT YOU HAVE TO SIT THERE, AND YOU HAVE TO SIT THERE QUIETLY LIKE EVERYBODY ELSE IN THE COURTROOM. I MEAN, YOU WANT TO KNOW SOMETHING? WHEN THIS TRIAL STARTS, EVERYBODY'S QUIET EXCEPT THE LAWYERS AND THE WITNESSES. AND

THEY'RE THE ONES THAT ARE TALKING, AND EVERYBODY ELSE IS QUIET. INCLUDING ME.

NOW, YOU HAVE TO DO THAT. AND YOU HAVE TO COMMIT TO ME THAT YOU WILL DO THAT. AND IF YOU DON'T DO THAT, I HAVE TO EXCLUDE YOU FROM THE PROCEEDINGS OR LET YOU REMAIN HERE BEING BOUND AND GAGGED. SO WE CAN PROCEED WITH THE PROCEEDING. I'M GOING TO GIVE YOU A CHANCE. I'M GOING TO GIVE YOU ANOTHER CHANCE NOW TO THINK ABOUT WHAT I JUST SAID. I'LL TAKE YOU BACK TO THE LOCK-UP FOR A FEW MINUTES.

I'VE BROUGHT YOU BACK IN TO TELL WHAT YOU YOUR ALTERNATIVES ARE; AND YOU HAVE TO SIT HERE, AND YOU HAVE TO SIT HERE QUIETLY, OR I HAVE TO -- OR I HAVE TO EXCLUDE YOU FROM THE PROCEEDINGS.

LET'S TAKE THE DEFENDANT BACK TO LOCK-UP FOR A FEW MINUTES. I'LL BRING HIM BACK IN IN FIVE OR TEN MINUTES.

THE DEFENDANT: YOUR HONOR, I CAN TRY TO STOP MY TEARS, BUT ONLY THING --

THE COURT: I DON'T WANT TO HEAR A THING FROM YOU.

THE DEFENDANT: ONLY THING'S TO HAVE ANOTHER LAWYER.

THE COURT: YOU CAN'T HAVE ANOTHER LAWYER. YOU CAN'T CONTINUE THIS CASE.

THE DEFENDANT: YOUR HONOR --

THE COURT: I'M NOT GOING TO EXCUSE YOUR LAWYER FROM TRYING THIS LAWSUIT. YOU HAVEN'T STATED ANY GROUNDS FOR DISCHARGING MR. WENZL FROM THIS LAWSUIT. YOU HAVEN'T STATED ANY GROUNDS.

THE DEFENDANT: YOUR HONOR, I WANT THE PSYCHOLOGIST TO COME TESTIFY. I WANT --

THE COURT: AND THAT'S MR. -- THOSE ARE ALL CHOICES THAT MR. WENZL MAKES, AND YOU CANNOT ADDRESS ANY OF THIS TO ME ANYMORE. I'M JUST THE TRIAL JUDGE. I'M GOING TO BRING YOU BACK IN TEN MINUTES. I'M GOING TO TALK TO YOU AGAIN.

THE DEFENDANT: ONE LAST THING. YESTERDAY I ASKED MR. WENZL YESTERDAY, I SAID, CAN I HAVE A -- A -- CAN I BRING A PRIVATE LAWYER TO WORK WITH YOU JOINT. HE SAID, DISMISS ME. BRING YOUR PRIVATE LAWYER.

THE COURT: I DON'T CARE IF SOMEBODY ELSE COMES HERE, BUT MR. WENZL IS YOUR ATTORNEY; AND HE MAKES THE DECISION. I DON'T CARE IF SOMEBODY ELSE COMES IN.

THE DEFENDANT: I CALLED LAST NIGHT TO BRING SOMEONE TO HELP HIM OR REPLACE HIM. I'M TRYING TO GET -- OKAY -- THE MONIES HERE FROM --

THE COURT: WE'VE HAD A LOT OF CASES IN OUR COURTS WHERE MULTIPLE LAWYERS HAVE DEFENDED PEOPLE. I DON'T CARE IF ANYBODY ELSE COMES IN.

(RECESS.)

THE COURT: OKAY. I THINK THE RECORD SHOULD REFLECT OUR PATIENCE BROUGHT MR. BORHAM BACK FOR THE THIRD TIME. MR. BORHAM, I'VE GIVEN YOU A CHANCE TO THINK ABOUT THIS IN THE LOCK UP. WHAT'S IT GONNA BE? ARE YOU GOING TO SIT HERE QUIETLY AND LET THIS TRIAL GO FORWARD, OR ARE YOU GOING TO DISRUPT THIS PROCEEDING?

IF I DON'T HEAR ANYTHING FROM YOU, I'LL ASSUME YOU'RE GOING TO SIT HERE QUIETLY AND NOT DISRUPT THE PROCEEDINGS AS YOU HAVE UP TO THIS POINT IN TIME. YOU HAVE DELAYED THESE PROCEEDINGS GOING FORWARD.

THE DEFENDANT: YOUR HONOR, ABSOLUTELY, I DIDN'T MEAN TO DISRUPT; AND I'M NOT MEANING TO DISRUPT AT ALL. I HAVE ALL MY RESPECT FOR THE COURT, YOUR HONOR.

THE COURT: THEN I'LL ASSUME WE'RE NOT GOING TO HEAR ANYTHING ELSE FROM MR. BORHAM, AND WE'LL PROCEED WITH JURY SELECTION.

MR. WENZL: JUDGE, IF IT'S POSSIBLE, CAN WE BREAK AT FOUR O'CLOCK TODAY?

THE COURT: YES.

MR. WENZL: THANK YOU.

(WHEREUPON, VOIR DIRE EXAMINATION COMMENCED.)

(AT THIS TIME, THE PROCEEDINGS WERE ADJOURNED UNTIL THURSDAY, DECEMBER 5, 2002, AT 9:30 A.M.)

-OOO-

(THE NEXT PAGE IS 301.)

ATTORNEY GENERAL

COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent vs BORHAM, PAYMAN-01 Defendant(s) and Appellant	No. KA048417-01 VOLUME 1 OF 1 VOLUME

CLERK'S TRANSCRIPT

Appearances:
Counsel for Plaintiff:
THE ATTORNEY GENERAL

Counsel for Defendant and Appellant

C/O C.A.P.

Appeal from the Superior Court,
County of Los Angeles

Honorable THEODORE D. PIATT, Judge

1-CT-195
4-RT-297
1-sealed env

Date Mailed to:
Defendant (in pro per)_____

Defendant's Trial Attorney_____

Defendant's Appellate Atty_____

District Attorney_____

Attorney General_____

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 08/26/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

NFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 08/26/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR ARRAIGNMENT

PARTIES: JACK P. HUNT (JUDGE) MARK NATOLI (CLERK)
DENISE NELSON (REP) PAK B KOUCH (DA)

PUBLIC DEFENDER APPOINTED. KENT THOMAS - P.D.

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY KENT THOMAS DEPUTY PUBLIC DEFENDER

NFORMATION FILED.

COURT ORDERS AND FINDINGS:

THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

DEFENDANT WAIVES TIME FOR TRIAL AND ARRAIGNMENT.

BAIL SET AT NO BAIL.

WAIVES STATUTORY TIME.

EXT SCHEDULED EVENT:

UPON MOTION OF DEFENDANT
9/04/02 830 AM ARRAIGNMENT DIST L.A. SUPERIOR EAST DEPT EAN

AY 00 OF 60

USTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

000084

DATE PRINTED: 09/04/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 09/04/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR ARRAIGNMENT

PARTIES: JACK P. HUNT (JUDGE) SHERRIE MARTINEZ (CLERK)
JACQUELINE HALL (REP) HABIB A. BALIAN (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

THE DEFENDANT IS ARRAIGNED.

DEFENDANT WAIVES ARRAIGNMENT, READING OF INFORMATION/INDICTMENT, AND STATEMENT OF CONSTITUTIONAL AND STATUTORY RIGHTS.

DEFENDANT PLEADS NOT GUILTY TO COUNT 01, 288(A) PC - LEWD ACTS WITH CHILD UNDER 14.
DEFENDANT PLEADS NOT GUILTY TO COUNT 02, 288(A) PC - LEWD ACTS WITH CHILD UNDER 14.

THE DEFENDANT DENIES ALL SPECIAL ALLEGATIONS.

BAIL SET AT NO BAIL.

NEXT SCHEDULED EVENT:
10/17/02 830 AM READINESS HEARING DIST L.A. SUPERIOR EAST DEPT EAN

NEXT SCHEDULED EVENT 2:
10/21/02 830 AM JURY TRIAL DIST L.A. SUPERIOR EAST DEPT EAN

DAY 47 OF 60

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 10/17/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 10/17/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR READINESS HEARING

PARTIES: JACK P. HUNT (JUDGE) SHERRIE MARTINEZ (CLERK)
JACQUELINE HALL (REP) HABIB A. BALIAN (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

READINESS CONFERENCE CONTINUED TO 11-15-02. JURY TRIAL CONTINUED TO 11-19-02. JURY TRIAL DATE OF 10-21-02 IS VACATED.

WAIVES STATUTORY TIME.

NEXT SCHEDULED EVENT:
11/15/02 830 AM READINESS HEARING DIST L.A. SUPERIOR EAST DEPT EAN

NEXT SCHEDULED EVENT 2:
11/19/02 830 AM JURY TRIAL DIST L.A. SUPERIOR EAST DEPT EAN

DAY 00 OF 15

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 11/15/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 11/15/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR READINESS HEARING

PARTIES: CHARLES HORAN (JUDGE) MARK NATOLI (CLERK)
JACQUELINE HALL (REP) PAK B KOUCH (DA)

THE DEFENDANT FAILS TO APPEAR, WITH SUFFICIENT EXCUSE. (MISS-OUT) AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

READINESS CONFERENCE IS HELD; TRIAL DATE REMAINS 11-19-02. THE DEFENDANT IS ORDERED TO APPEAR ON THAT DATE THROUGH WRITTEN SHERIFF'S REMOVAL ORDER.

NEXT SCHEDULED EVENT:

UPON MOTION OF COURT
11/19/02 830 AM JURY TRIAL DIST L.A. SUPERIOR EAST DEPT EAN

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 11/19/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 11/19/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR JURY TRIAL

PARTIES: JACK P. HUNT (JUDGE) SHERRIE MARTINEZ (CLERK)
JACQUELINE HALL (REP) PAK B KOUCH (DA)

THE DEFENDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

JURY TRIAL TRAILED TO 11-26-02.

NEXT SCHEDULED EVENT:

11/26/02 830 AM JURY TRIAL DIST L.A. SUPERIOR EAST DEPT EAN

DAY 07 OF 15

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 11/26/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 11/26/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR JURY TRIAL

PARTIES: JACK P. HUNT (JUDGE) MARK NATOLI (CLERK)
JACQUELINE HALL (REP) PAK B KOUCH (DA)

THE DEFENDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

NO MOTION PURSUANT TO PENAL CODE SECTION 1050 FILED.

COURT ORDERS AND FINDINGS:

-THE COURT ORDERS THE DEFENDANT TO APPEAR ON THE NEXT COURT DATE.

NEXT SCHEDULED EVENT:

UPON MOTION OF DEFENDANT
12/03/02 830 AM JURY TRIAL TRAILED DIST L.A. SUPERIOR EAST DEPT EAN

DAY 14 OF 15

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 12/03/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 12/03/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR JURY TRIAL TRAILED

PARTIES: JACK P. HUNT (JUDGE) SHERRIE MARTINEZ (CLERK)
JACQUELINE HALL (REP) PAK B KOUCH (DA)

THE DEFENDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

JURY TRIAL TRAILED TO 12-4-02.

NEXT SCHEDULED EVENT:

12/04/02 830 AM JURY TRIAL DIST L.A. SUPERIOR EAST DEPT EAN

DAY 15 OF 15

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 12/04/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 12/04/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT EAN

CASE CALLED FOR JURY TRIAL

PARTIES: JACK P. HUNT (JUDGE) SHERRIE MARTINEZ (CLERK)
JACQUELINE HALL (REP) PAK B KOUCH (DA)

THE DEFENDANT IS PRESENT(IN LOCK UP) AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

CASE TRANSFERRED TO DIVISION 7 FOR JURY TRIAL.

NEXT SCHEDULED EVENT:

12/04/02 830 AM JURY TRIAL DIST L.A. SUPERIOR EAST DEPT P07

CUSTODY STATUS: DEFENDANT REMANDED

MINUTE ORDER
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE PRINTED: 12/06/02

CASE NO. KA048417

THE PEOPLE OF THE STATE OF CALIFORNIA
VS.
DEFENDANT 01: PAYMAN BORHAM

INFORMATION FILED ON 08/26/02.

COUNT 01: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.
COUNT 02: 288(A) PC FEL - LEWD ACTS WITH CHILD UNDER 14.

ON 12/04/02 AT 830 AM IN L.A. SUPERIOR EAST DEPT P07

CASE CALLED FOR JURY TRIAL

PARTIES: THEODORE D. PIATT (JUDGE) GINA VALDEZ (CLERK)
P. CHRISTINE CHAVEZ (REP) PAK B KOUCH (DA)

DEFENDANT IS PRESENT IN COURT, AND REPRESENTED BY KENNETH WENZL DEPUTY PUBLIC DEFENDER

BAIL SET AT NO BAIL

CAUSE IS CALLED FOR TRIAL.
A PANEL OF 49 PROSPECTIVE JURORS ARE GIVEN THE PERJURY ADMONISHEMENT RE: QUALIFICATIONS.

.
OUT OF THE PRESENCE OF THE PROSPECTIVE JURORS:
COURT CONFERS WITH DEFENDANT RE HIS BEHAVIOR.
.
DEFENDANT'S MOTION TO DISCHARGE HIS COUNSEL IS HEARD AND DENIED.
DEFENDANT'S MARSDEN MOTION IS HEARD AND DENIED.
DEFENDANT'S MOTION FOR CONTINUANCE IS DENIED.
.
DEFENDANT IS TAKEN TO LOCK UP DUE TO HIS BEHAVIOR.
.
COURT AND COUNSEL CONFER IN CHAMBERS.
.
DEFENDANT IS RETURNED TO THE COURTROOM AND IS ADMONISHED RE HIS BEHAVIOR.
.

CASE NO. KA048417
DEF NO. 01 DATE PRINTED 12/06/02

DEFENDANT IS AGAIN TAKEN TO LOCK UP DUE TO HIS BEHAVIOR.
DEFENDANT IS RETURNED TO COURT.

IN THE PRESENCE OF THE PROSPECTIVE JURORS:
THE COURT READS THE CHARGES TO THE JURORS.
VOIR DIRE COMMENCES.
PROSPECTIVE JURORS ARE ADMONISHED, TRIAL IS RECESSED AND
CONTINUED TO 12/5/02 AT 9:30 A.M. IN DIVISION P07.

NEXT SCHEDULED EVENT:
12/05/02 930 AM JURY TRIAL IN PROGRESS DIST L.A. SUPERIOR EAST DEPT P07

CUSTODY STATUS: DEFENDANT REMANDED

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

B166670

DEPARTMENT EAST 7 HON. THEODORE D. PIATT, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. PAYMAN BORHAM, DEFENDANT.	SUPERIOR COURT NO. KA048417

COPY

REPORTER'S TRANSCRIPT OF MARSDEN PROCEEDINGS

CONFIDENTIAL - MAY NOT BE EXAMINED WITHOUT COURT ORDER

DECEMBER 4TH, 2002

VOLUME 2, PAGES 8 THROUGH 16, INCLUSIVE

ORIGINAL AND TWO COPIES

APPEARANCES:

FOR PLAINTIFF: STEVE COOLEY
DISTRICT ATTORNEY
BY: PAK KOUCH, DEPUTY
400 CIVIC CENTER PLAZA
SUITE 200
POMONA, CALIFORNIA 91766

FOR DEFENDANT: MICHAEL P. JUDGE
PUBLIC DEFENDER
BY: KENNETH WENZL, DEPUTY
100 WEST SECOND STREET
SECOND FLOOR
POMONA, CALIFORNIA 91766

PAULA C. CHAVEZ, CSR #7943
OFFICIAL REPORTER

THE DEFENDANT: TOTAL CONFLICT OF INTEREST, YOUR HONOR, FOR -- FOR REASON SINCE THE VERY FIRST DAY THAT WE STARTED, I -- I ASK MR. WENZL, I'M NOT -- IN PERSONAL, VERY NICE GENTLEMAN, MR. WENZL, MY ABSOLUTE RESPECT FOR THEM; BUT ABSOLUTELY. BUT SO I ASKED HIM THAT, YOU KNOW, THAT I LIKE TO -- I LIKE TO GET HIM A -- HAVE INTERVIEW WITH LIKE FOUR PEOPLE AND OUT OF THAT FOUR PEOPLE, ONLY ONE INTERVIEW WAS DONE.

AND THE OTHER -- THE OTHER ONE OF THEM -- THE OTHER THREE INTERVIEW WAS NOT DONE AND THE ONE THAT IS DONE, I DO NOT HAVE THE ANSWERS THAT WE WERE LOOKING FOR.

AND THAT WAS ALSO -- THERE ARE THREE THINGS. LET ME SEE IF, YOUR HONOR, I -- ABOUT THE PSYCHIATRIST. I TOLD THEM I LIKED THE PSYCHIATRIST TO COME AND TESTIFY AS TO WHAT HIS -- AND HE SAYS THAT, YOU KNOW, I'VE ABSOLUTELY DON'T FEEL THAT, YOU KNOW, THAT IS -- WILL HELP YOUR -- WILL -- HE SAYS I DON'T AGREE WITH THAT.

AND I ABSOLUTELY, I SAID, YOU KNOW WHAT? YOU WANT ME TO DO I WANT ABOUT THE CASE. I REMEMBER ABSOLUTELY NOTHING. I GO ON THE STAND SAY I DON'T REMEMBER ANYTHING, IF WHAT THE PSYCHIATRIST SAYS IS THE TRUTH. EVEN THOUGH IT HURTS ME, I WANT THE TRUTH TO BE OUT. THAT'S THE ONLY THING. I ASKED, YOU KNOW, SIR, THIS IS NOT A CASE THAT, YOU KNOW, THEY CAN GIVE ME.

FIRST THEY SAY IF YOU WIN, YOU GO HOME TODAY. IF YOU LOSE, YOU GET ONE YEAR PROGRAM. IT'S -- 15 YEARS IS MY LIFETIME, THEY ARE GOING TO GIVE ME; AND THIS IS WHY, WHEN I ASKED HIM, YOU KNOW, TO DO A 95 MOTION FOR DISMISSAL

OR REDUCTION. HE SAID, NO, I DON'T AGREE WITH THAT. I'M NOT GOING TO DO IT.

THE COURT: HE'S IN CHARGE.

THE DEFENDANT: YEAH, BUT -- BUT SO 95 MOTION WAS NOT DONE. THE INVESTIGATION WAS NOT DONE. AND -- AND I ABSOLUTELY WANT PSYCHIATRIST TO TESTIFY. HE DOES NOT AGREE. AND IT'S TOTALLY CONFLICT OF INTEREST AS TO WHAT I WANT AND WHAT HE WANTS. SO WHAT I DID YESTERDAY AFTER I ASKED HIM IN THE AFTERNOON, I SAID, YOU KNOW, ARE YOU GOING TO BRING THE PSYCHIATRIST? HE SAID, NO, I'M NOT BRINGING THE PSYCHIATRIST.

AND I HAVE NOT SEEN HIM SINCE YESTERDAY. SINCE YESTERDAY IN COURTROOM THAT WE TALKED TILL THIS MOMENT, I HAVE NOT SEEN HIM. I DID NOT KNOW YESTERDAY WHEN I CALLED AND HE SAID D.A. DID NOT ACCEPT THAT. I SAID I CALLED MY FAMILY. I SAID THAT, YOU KNOW, THIS IS TOTALLY CONFLICT OF INTEREST.

THE COURT: WHAT DO YOU WANT ME TO DO?

THE DEFENDANT: MY -- LAST NIGHT --

THE COURT: YOU JUST KEEP RAMBLING. WHAT IS IT YOU WANT ME TO DO?

THE DEFENDANT: YOUR HONOR, THE ONLY THING I WANT IS TO APPOINT ME ANOTHER PUBLIC DEFENDER OR GIVE ME A CHANCE TO -- FOR PRIVATE ATTORNEY TO --

THE COURT: I WILL CONSIDER THAT A MOTION THAT YOU'RE MAKING RIGHT NOW. YOU'RE MAKING A MOTION TO DISCHARGE YOUR LAWYER?

THE DEFENDANT: YES.

THE COURT: AND GET ANOTHER ATTORNEY?

THE DEFENDANT: PLEASE.

THE COURT: THAT MOTION IS MADE, AND THAT MOTION IS DENIED.

NOW, MR. WENZL, DO YOU HAVE ANY DESIRE TO RESPOND, SIR? I DON'T KNOW THAT YOU HAVE TO.

MR. WENZL: I DON'T. WELL, THE STATEMENT THAT HE HASN'T SEEN ME FOR TWO MONTHS IS INCORRECT. HE DID TALK TO ME YESTERDAY IN THE LOCK-UP IN THE MORNING. I WENT OVER PART OF WHAT THE PSYCHIATRIST REPORT SAID. AND THEY CALLED ME RIGHT ABOUT LUNCHTIME. WE SPOKE ABOUT IT AGAIN.

THE COURT: I'M ASSUMING THAT PSYCHIATRIST REPORT WAS A CONFIDENTIAL REPORT.

MR. WENZL: YES, IT WAS.

THE COURT: THAT'S WHY I ASKED THE DISTRICT ATTORNEY TO PLEASE LEAVE TO THE EXTENT THAT REPORT MIGHT COME TO THE ATTENTION OF THIS RECORD.

MR. WENZL: JUST FOR THE COURT'S INFORMATION --

THE DEFENDANT: YOUR HONOR --

THE COURT: BE QUIET.

MR. WENZL: JUST FOR THE COURT'S INFORMATION BECAUSE I -- THE REPORT DOES RECOMMEND THE GATE WAYS PROGRAM FOR MR. BORHAM. BECAUSE OF HIS PSYCHOLOGICAL ISSUES, IT ALSO RECOMMEND IF HE -- IF HE WAS NOT ON MOOD STABILIZERS -- BECAUSE THERE WAS AN ISSUE A COUPLE OF WEEKS AGO OR SO WHEN I WAS -- WHEN THE REPORT WAS WRITTEN, AS TO WHETHER HE'D BEEN GETTING MOOD STABILIZERS AS WELL AS THE PROZAC; AND IF HE HADN'T BEEN GETTING THOSE MOOD STABILIZERS, REQUEST A

CONTINUANCE.

SO ONE OF MY FIRST QUESTIONS WAS ARE YOU ON MOOD STABILIZERS NOW? ANSWER WAS, YES, I AM. AS HE TOLD THE COURT, HE'S FEELING MUCH BETTER NOW SO I DID NOT REQUEST A CONTINUANCE ON THAT. I DON'T KNOW WHETHER I WOULD HAVE BEEN GIVEN A CONTINUANCE BASED ON THAT BECAUSE IT'S NOT REALLY COMPETENCE ISSUE.

BUT ANYWAY -- BUT BECAUSE THE REPORT, IT'S A RATHER LENGTHY REPORT, ABOUT FIVE PAGES LONG, BECAUSE THE REPORT RECOMMENDED THE GATE WAYS PROGRAM, I DID GIVE THE REPORT TO MISS CADY, JUST SORT OF INFORMALLY ASKED HER TO REVIEW IT. EVEN THOUGH IT'S A CONFIDENTIAL REPORT, WE HAVE A GOOD WORKING RELATIONSHIP THAT I KNOW IF THERE WAS ANYTHING IN THERE, SHE'S NOT GOING TO CALL MY DOCTOR. SHE'S NOT GOING TO USE ANYTHING IN THAT REPORT BECAUSE I'M NOT USING IT.

BUT MY INTENT -- AND MY ATTEMPT WAS TO SEE IF THEY WOULD GO ALONG WITH GIVING MR. BORHAM A SUSPENDED SENTENCE OF SOME SORT AND THE GATE WAYS PROGRAM.

AFTER THE REVIEW OF THAT, INCLUDING ALL THE INFORMATION, I DIDN'T HIDE ANY OF THE INFORMATION FROM THEM -- THAT'S IN THAT REPORT -- INCLUDING ALL THAT, MR. BORHAM'S RECORD AND THE UNCHARGED OFFENSES WHICH THE COURT'S PROBABLY GOING TO HEAR, I GUESS, TODAY OR TOMORROW SOMETIME ON THE 402 MOTIONS, THERE ARE SOME UNCHARGED CRIMES, ALSO.

BECAUSE OF ALL THAT, MISS CADY FELT IT WAS NOT APPROPRIATE TO GIVE HIM A PROGRAM. SO I DISCUSSED THAT WITH

MR. BORHAM, AND I TOLD HIM HIS OPTIONS YESTERDAY WERE THE TEN-YEAR OFFER THAT WAS MADE YESTERDAY, OR GO TO TRIAL.

HE DIDN'T WANT THE TEN YEARS; THEREFORE, WE HAVE TO GO TO TRIAL.

THE COURT: THAT'S WHERE WE ARE?

THE DEFENDANT: YOUR HONOR --

THE COURT: MOTION TO APPOINT ANOTHER ATTORNEY IS DENIED. MOTION TO CONTINUE IS DENIED. I'M DENYING THOSE MOTIONS, AND I'M NOT GOING TO HEAR ANYMORE MOTIONS.

THE DEFENDANT: MAY I PLEASE ASK YOU, YESTERDAY, WHEN ANOTHER -- WHEN MISCOMMUNICATION, MAYBE LANGUAGE BARRIER FOR ME --

THE COURT: YOU DON'T SEEM TO UNDERSTAND. I DON'T CARE WHAT HAPPENED YESTERDAY. I DON'T KNOW ANYTHING ABOUT THIS CASE. I DON'T KNOW ANYTHING ABOUT THE WITNESSES. I DON'T KNOW ANYTHING ABOUT THE FACTS. IT WAS SENT TO ME FOR TRIAL. I'M GOING TO SELECT A JURY, AND WE'RE GOING TO TRY THE LAWSUIT, AND THERE ISN'T ANYTHING YOU CAN DO TO DELAY IT. NOTHING --

THE DEFENDANT: YOUR HONOR, YOUR HONOR, ALL THE JUROR WALKED IN. THEY SAW MY SHIRT THAT SAYS L.A. COUNTY JAIL.

THE COURT: THAT'S NOT MY PROBLEM.

MR. WENZL: ALSO, I DISAGREE WITH THAT. BECAUSE IF HE SITS WITH HIS BACK AGAINST THE CHAIR, THEY WON'T BE ABLE TO SEE IT. IF HE SETS STRAIGHT UP, SHIRT IS BOWED OUT ENOUGH THAT YOU CAN'T SEE IT. I DON'T SEE IT AS AN ISSUE TODAY.

THE DEFENDANT: WHAT HAPPENED YESTERDAY --

THE COURT: I DON'T WANT TO HEAR ABOUT YESTERDAY.

THE DEFENDANT: BUT, YOUR HONOR --

THE COURT: I DON'T WANT TO HEAR ABOUT YESTERDAY.

THE DEFENDANT: WOULD I GET A CHANCE TO BRING A PRIVATE LAWYER?

THE COURT: NO.

THE DEFENDANT: I TALKED TO MEXICO LAST NIGHT TO THE MOTHER OF MY DAUGHTER, AND SHE SOLD SOME MACHINES. SHE'S GOING TO BE SENDING THE MONEY. I SPOKE TO MY FIANCEE IN CANADA. SHE'S BORROWING SOME MONEY TO SEND SOME --

THE COURT: NOT TIMELY.

THE DEFENDANT: BUT, YOUR HONOR, TILL YESTERDAY, I DIDN'T KNOW THERE IS A TRIAL. WHEN WE CAME TO THE -- MR. -- WHEN WE GOT TO -- MR. HE SAID THAT, YOU KNOW, WOULD YOU LIKE TO ACCEPT? THAT WAS EXACTLY HIS QUESTION. HE SAID THAT, YOU KNOW, WHEN I CALLED HIM, HE DID NOT -- AFTER TALKING TO MR. -- MRS. CADY, HE DID NOT COME DOWN SO I DID NOT KNOW WHAT HAPPENED.

FORTUNATELY, I HAD A TELEPHONE FOR FEW MINUTES. I CALL HIS OFFICE. I SAID -- AND MRS. -- MR. WENZL, WHAT HAPPENED? DID THE THEY ACCEPT THE PROGRAM? HE SAID, NO, THEY DID NOT ACCEPT THE PROGRAM. AND I SAID OKAY. IF DID -- THEY DID NOT ACCEPT THE PROGRAM, AND YOU SAID YOU DON'T WANT TO -- YOU DON'T WANT TO POSTPONE TIME, I SAID NOT -- I DON'T WANT TO POSTPONE TIME.

I SAID I DON'T -- WHAT I DON'T -- I WANT TO START THE PROGRAM. GET HELP. GET THE RIGHT MEDICATION FOR ME AND GET ON WITH MY FAMILY. MY MOTHER HAD A HEART ATTACK

LAST MONTH. MY BROTHER PHILIP'S WENT TO THE MENTAL HOSPITAL.

MY FIANCEE AND DAUGHTER ARE SUFFERING EMOTIONALLY. I JUST WANT TO GO GET HELP, GO HELP THEM, YOUR HONOR. THEY REALLY NEED MY HELP. THAT'S ALL I WANT TO DO.

THE COURT: WELL, YOU KNOW WHAT, MR. BORHAM?

THE DEFENDANT: GETS MY TWO MONTHS --

THE COURT: WHAT WILL HAPPEN, WE'LL TRY THIS LAWSUIT. IF YOU'RE FOUND NOT GUILTY, YOU CAN GO OUT AND GET WHATEVER HELP YOU NEED. IF YOU'RE FOUND GUILTY, YOU'LL BE SENTENCED. IT'S JUST THAT SIMPLE.

THE DEFENDANT: YOUR HONOR, I WANT THE PSYCHOLOGIST TO TESTIFY. HE DOES NOT. THE INVESTIGATION IS NOT DONE.

THE COURT: HE RUNS THE CASE.

THE DEFENDANT: INVESTIGATION -- THIS CASE IS A HUNDRED PERCENT LOSE, YOUR HONOR.

THE COURT: OKAY.

THE DEFENDANT: THEY -- INVESTIGATION IS NOT DONE. PSYCHOLOGIST IS NOT GOING TO BE THERE. I DON'T REMEMBER ANYTHING AS TO WHAT HAPPENED. WHAT ARE WE -- WHAT AM I GOING TO SAY, YOUR HONOR?

THE COURT: I DON'T KNOW. MAYBE THAT'S AN ISSUE FOR APPEAL.

THE DEFENDANT: I HAD A MANIC ATTACK, YOUR HONOR, WHEN THAT HAPPENED. I WAS -- I WAS ON DEPRESSION. THEY WERE GIVING ME DRUGS THAT THEY WERE MAKING ME MANIC, AND I -- ONLY THING THAT I REMEMBER THAT I ENTERED WITH A SMILE AND CAME OUT WITH A SMILE; AND I DON'T KNOW, AFTER I --

AFTER I LEFT, WHAT HAPPENED.

THE COURT: I'M GOING TO INSTRUCT MY REPORTER TO NOT REPORT ANYTHING ELSE THAT MR. BORHAM SAYS. HE'S ATTEMPTING TO OBSTRUCT THESE PROCEEDINGS WITH -- HE'S ATTEMPTING TO OBSTRUCT THE PROCEEDING. WE'RE GOING TO CALL THE JURY BACK INSIDE. WE'RE GOING TO SELECT THE JURY.

IF YOU WANT TO MISBEHAVE, THAT'S YOUR PROBLEM. IF YOU DISRUPT THE PROCEEDING, I'M GOING TO HAVE TO TAKE YOU OUT AND SET UP A SYSTEM SO YOU CAN HEAR IT AND NOT BE IN THE COURTROOM WHERE YOU DISRUPT THE PROCEEDINGS.

THIS IS HERE IN MY COURT FOR TRIAL. WE'RE GOING TO TRY THIS LAWSUIT. WE'RE GOING TO SELECT A JURY AND CALL WITNESSES, AND THEN THE TRIAL WILL ENSUE; AND THE TRIAL WILL BEGIN, AND THE TRIAL WILL END. AND I'M NOT GOING TO CONTINUE THE CASE, AND I'M NOT GOING TO LET YOU BRING ANOTHER LAWYER IN ON THE LAST DAY OF TEN DAYS OF TEN.

AND I DON'T WANT TO HEAR ANYMORE FROM YOU ABOUT AND OF THESE THINGS.

THE DEFENDANT: ALL I WANT IS TWO MONTHS.

THE COURT: I DON'T CARE WHAT YOU WANT. IT'S DENIED. AND I DON'T WANT TO HEAR ANOTHER WORD FROM YOU.

THE DEFENDANT: YOUR HONOR, WAS NOT COMMUNICATED TO ME --

THE COURT: OKAY. BRING THE JURY BACK INSIDE.

THE DEFENDANT: YOUR HONOR, I CANNOT START THIS, YOUR HONOR.

THE COURT: WE'RE GOING TO START THIS TRIAL, AND IF --

THE DEFENDANT: YOUR HONOR, I CANNOT DO THIS. I HAVE BEEN FORCED ON TIME -- FORCED ONE TIME TO TAKE -- TO TAKE HIM FELONY ON SOMETHING THAT WAS MISDEMEANOR.

THE COURT: DO ME A FAVOR AND TELL THE JURY THAT I'LL GET -- I DON'T WANT THEM TO WAIT. TELL THEM I'LL GET TO THEM AS QUICKLY AS I CAN. I HAVE TO FIGURE OUT A PLACE TO PUT MR. BORHAM BECAUSE HE'S GOING TO OBSTRUCT THE PROCEEDINGS.

I'M NOT GOING TO LET YOU DO THAT. DON'T COME OVER HERE AND --

THE DEFENDANT: YOUR HONOR, I'M NOT.

THE COURT: I'M NOT THE GUY TO TALK TO.

THE DEFENDANT: YOU FEEL LIKE I AM. I'M NOT.

THE COURT: OFF THE RECORD.

(WHEREUPON, THE COURT TOOK A BRIEF RECESS.)

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